

THE REFORM OF LABOUR LAWS: AN INTERNATIONAL COMPARISON

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'Reform v. Make or become better by the removal of faults and errors

n. The removal of faults or abuses, esp. of a moral or political or social kind.'¹

'The most important piece of employment legislation introduced this year was the Employment Relations Law *Reform* Bill.'²

'John Howard has backed a single national industrial relations system and a dramatic simplification of the existing award structure as core elements of a second wave of *workplace reforms*.'³

'Of course, workplace relations is only one area in which *further reform* is needed at this time; others include infrastructure, tax and regulation.'⁴

In South Africa labour laws will be 'amended' in 2006 and various groups are mustering support but not 'the trade unions, which, for the most part, *oppose any reform*.'⁵

I INTRODUCTION

Drawing comparisons between the laws and legal systems of different countries or states has long been considered a valuable exercise. Certain laws of the various Greek city-states, for example, were compared by Plato, Aristotle and Theophrastus. Unfortunately, the records of these early efforts are incomplete.

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1 Della Thompson (ed), *The Concise Oxford Dictionary of Current English* (9th ed, 1995) 1154.

2 'Year Ends with Work on Important Bills', *The Dominion Post* (New Zealand), 20 December 2003, 7 (emphasis added).

3 Steve Lewis and Samantha Maiden, 'PM puts case for wide IR reforms', *The Australian* (Sydney), 7 February 2005, 1 (emphasis added).

4 Michael Chaney, 'Standing Still Not an Option', *The Australian* (Sydney), 1 April 2005, 15 (emphasis added).

5 Terry Bell, 'Labour Laws to be Changed This Year', *Business Report* (South Africa), 20 January 2006, 3 (emphasis added).

Nonetheless, their very undertaking reveals the impressive heritage of the study of comparative law.

Comparative law is an undertaking fraught with difficulty. On a theoretical level, the two objects of comparison may be so different that only the broadest observations concerning the different socio-political cultures are possible. Alternatively, the comparison may appear to provide instructive lessons but may overlook important matters of distinction in a broader sense.⁶ For instance, a comparison of the South African legal system with an alternate legal system, on any legal topic, must always commence with an appreciation of four interrelated matters. Firstly, that the sources of contemporary law in the South African Republic include legislation, judicial decisions, common law (both Roman-Dutch and English), customary law, indigenous law and, increasingly, international law.⁷ Secondly, given this diversity of sources, the substantive law will in all likelihood differ from that of the English common law, which is a strong source of law in all former British colonies.⁸ Thirdly, that the South African Constitution is the supreme law of the country and impacts every area of law. Fourthly, that all legislation since 1994 is based on the perceived need to correct the imbalances and structural faults inherited from the apartheid era. This is especially true of employment legislation.

With these difficulties in mind, it is possible to compare South African employment and industrial relations law with that of Australia and New Zealand, who share similar colonial histories and substantive and procedural law to the South African Republic.⁹

II A THREE NATION COMPARISON

The colonisation of Africa brought with it the imposition of English and other European legal systems. Africa was not alone in this experience, with European legal systems also being transplanted to colonies in the Americas, Asia, Australia, New Zealand and the Pacific. An important legal consequence of colonisation was the resulting similarity in many countries' legal systems. The Republic of South Africa provides an example. One source of contemporary South African law is Roman-Dutch law. This links South Africa to the

6 Paul von Nessen, 'Financial Services Reform: What can be learned from the Australian experience?' (Paper presented at the University of Johannesburg Annual Banking Law Update, Johannesburg, 20 April 2005). Professor Paul von Nessen was then Head of the Department of Business Law and Taxation, Monash University, Melbourne, Australia.

7 See Duard Kleyn and Frans Viljoen, *Beginner's Guide for Law Students* (3rd ed, 2002).

8 Examples can be found in contract law and delict (tort). In the former, the concept of 'consideration', central to English contract law, is totally missing from South African law. Intention replaces consideration. Consideration was not a concept in Roman Law. In delict (tort) the obligations arise from rights, not duties of care. What a lawyer trained in English common law sees as important, the Roman-Dutch lawyer sees quite differently. Space does not permit an exhaustive explanation but a debate between the two camps on the importance of *Donoghue v Stevenson* [1932] AC 562 has left both camps confused.

9 Procedurally each country has ended appeals to the Judicial Committee of the Privy Council. South Africa was first to do this and chose at the same time to abolish the jury system. That system is retained in Australia and New Zealand.

Netherlands and Western Europe. Another source of law is English common law, linking South Africa to the legal system of the United Kingdom.

Colonial administrators, particularly the English, imported European legal and administrative systems to the colonies. These systems were imposed on indigenous customary law, often resulting in dual legal systems: a European system governing relations among the colonisers and a subordinated and regulated version of indigenous law for the colonised.¹⁰ On achieving independence, former colonies were faced with creating a national legal system and ensuring economic growth while protecting human rights. The conflict inherent in achieving these sometimes competing objectives came together in the regulation of labour and employment. This conflict was complicated by the simultaneous process of transforming a subsistence economy into an industrialised economy and the tension lingering in exploitative colonial traditions and customs.¹¹

South Africa's experience was a far longer and significantly different experience to many other colonies, beginning with formal independence in the early 1900s and concluding with the transformation from limited suffrage to an inclusive democratic system. After decades of the policy of apartheid, South African society was split along racial and socio-economic lines when the first inclusive democratic elections were held in 1994.

The de-colonisation of New Zealand and Australia was different again. Australia, like the USA and Canada, struggled to balance the States' rights within a federal system. In contrast, New Zealand had abolished separate Provincial government in the middle of the nineteenth century. In contrast to South Africa and Australia, it never adopted a written constitution. Thus, unlike those two countries, the legal underpinnings for many legal questions are not the Constitution. The legal implications of this are significant in terms of industrial relations and industrial law.

These implications are demonstrated through an examination of the most recent 'reforms' to the labour and industrial laws of these three countries. There is a long history of industrial relations reform, which shall be a central focus of this essay. Moreover, these 'reforms' are on-going. New Zealand's *Employment*

10 Robert Seidman, 'The State, Law and Development' (1978), as cited in Iain Currie, 'The future of customary law: lessons from the lobolo debate' in Christina Murray (ed), *Gender and the New South African Legal Order* (1994) 146.

11 A clear expression of the tension is found in the Constitution of Samoa which, in art 8, prohibits forced or compulsory labour but those terms are not to be construed so as to include 'a work or service which is required by Samoan custom or which forms part of normal civil obligation.' This qualification reflects the desire to maintain the focus of customary law on the traditional authority of those who control village-based communities. The same is true in the Republic of South Africa, where the Constitution recognises the position of traditional leaders and the validity of indigenous laws. While traditional leaders may exercise their functions and indigenous law may be applied, they remain subject to the Constitution. That Constitution is affirmed by s 2 to be 'the supreme law of the Republic.' Within that Constitution is a Bill of Rights. It is unequivocal on the resolution of the tension found in the Constitution of Samoa. The Bill of Rights in South Africa art 13 provides that 'No one may be subjected to slavery, servitude or forced labour.' In addition, forced labour is prohibited under the *Basic Conditions of Employment Act 1997*. For a broad overview, see W J Hosten et al, *Introduction to South African Law and Legal Theory* (2nd ed, 1995).

Relations Act 2000 (NZ) was amended in 2004; the Australian Federal Government enacted the *Workplace Relations Act 1996* (Cth) in 1996 and introduced the WorkChoices Bill ten years later,¹² which came into effect on 27 March 2006. The new name of the legislation is merely symbolic of the changes to the traditional system of employment laws which have been underway for several decades. It is thus pertinent to consider four questions relating to industrial relations reforms:¹³ what is the meaning of 'reform'; do the 'reforms' in the three countries achieve the same objective; why is there this history of constant 'reforms' in each country'; and, finally, how can the success or failure of the 'reforms' be measured?

III THE MEANING OF 'REFORM'

If we start with the first question, we discover that the *Concise Oxford Dictionary* definition of the verb is to 'make or become better by the removal of faults and errors' and, used as a noun, the word means 'the removal of faults or abuses, esp. of a moral or political or social kind.'¹⁴ It is clear that the appropriately titled *Reform Act 1832* (UK) of the British parliament which, amongst other things, abolished the 'rotten boroughs', would fit that description. But can we see in the history of constant 'reform' of employment and labour laws the expression of a consistent philosophy aimed at the removal of faults and errors, especially of a moral or political or a social kind? The answer is yes and no, depending on your viewpoint. On the one side are groups such as the International Monetary Fund (IMF) and other institutions advocating a *laissez faire* economy; on the other side is the trade union movement, which for the most part, opposes reform. Both sides appear to have supporters in the government; this is true of both New Zealand and Australia. These conflicting philosophies as to how employment and industrial matters should best be handled run as a constant theme in South African, New Zealand and Australian labour law and exist as much between the political parties as within them.¹⁵

IV THE HISTORICAL BACKGROUND

A Australia

In Australia, there is a long history of division between competing political parties on their respective approaches to industrial relations. The political decision to federate in 1901 was accompanied by a deliberate decision to encourage and facilitate massive government intervention in industrial relations

12 That 'reform' is ongoing is acknowledged by the Australian Prime Minister who, in 2005, was reported as saying that Australia's economy 'needed further industrial relations reform': Matthew Franklin, 'Aussies, NZ Talk Change', *Herald-Sun* (Auckland), 21 February 2005, 23. That reform was effected on 27 March 2006 and the opposition immediately promised to reverse the legislation when in government.

13 Bell, above n 5.

14 Thompson, above n 1.

15 On 7 February 2005, *The Australian* carried a front page article which reported that '[d]ebate within the government on reforms is well under way' (emphasis added): Lewis and Maiden, above n 3.

by way of establishing permanent industrial tribunals. The context was the pastoral and maritime strikes of the 1880s. These events disclosed the inability of each separate colony to deal with strikes which ignored and cut across political boundaries. In 1894, New Zealand had responded to the maritime strike by enacting novel legislation. This provided for the compulsory conciliation and arbitration of industrial disputes through the establishment of permanent specialist tribunals. This was a departure from the traditional English approach to employment and industrial issues, which could broadly be defined as a 'hands-off' approach.

The complication for Australia arises from the distribution of legislative authority between a national parliament and the six states established by the *Commonwealth Constitution Act 1901* (Cth) ('*Constitution*'). Pursuant to s 51(xxxv) of the *Constitution*, the Federal Parliament has largely unfettered legislative powers in respect to *inter-state* industrial matters. Within each state border, however, the state's parliament has legislative power to regulate *intra-state* industrial matters. The result is a pattern of confusing and, at times, conflicting national and local legislation. This was foreseen by the framers of the *Australian Constitution*, who provided in s 109 that in the event of any inconsistency between state and federal laws, the federal law would prevail to the extent of the inconsistency. It is fair to say that the High Court of Australia's decisions have been largely in favour of the federal over the state systems when inconsistencies have arisen.¹⁶ There has also been a history of politically-driven legislative attempts to create a unified national system of handling employment and industrial matters, the most dramatic example being Victoria's ceding of its labour law and industrial relations system to the federal system. That attempt is carried further in the new federal legislation which, while not abolishing state industrial tribunals entirely, has so circumscribed their powers that it is possible that the state tribunals will wither away as their workloads diminish and move to the federal jurisdiction.¹⁷

At federation, not all the newly constituted Australian states adopted the system of arbitration tribunals.¹⁸ Put succinctly, the trend since 1901 has been to seek agreement amongst the states and, together with the national government, to find common ways of handling common problems.¹⁹ It is not an exaggeration to say that the trend has seen the adoption of the arbitration tribunal system federally and in each state. Where differences exist, they surface in the old battle between interventionists and 'hands-off' protagonists. The present Federal Government places itself firmly in the 'hands-off' camp. The very title of the new legislation reveals as much as the content of the legislation, whose

16 An excellent illustration is *Metal Trade Industry Association v Amalgamated Metal Workers and Shipwrights Union* (1983) 152 CLR 632.

17 Brad Norington, 'Winners Emerge in New IR Plan', *The Australian* (Sydney), 27 March 2006, 2.

18 For decades, Tasmania and Victoria conducted their industrial relations through a Wages Board system.

19 A former Federal Minister has argued that 'the opposition to a single national system of industrial relations is short-sighted and parochial. Having six separate sets of industrial relations laws and regulations makes no sense at all in a country whose economy is smaller than California's.' Chaney, above n 4.

provisions encourage workers to sign individual (rather than collective) contracts with employers. This is a long way from the compulsory conciliation and arbitration legislation introduced almost exactly one century earlier. That original federal Act has been amended many times, most often as a result of judicial decisions²⁰ and more recently as a result of political victories. In 1958, the *Industrial Relations Act 1958* (Cth) replaced the 1904 Act entirely. The 1958 Act was amended several times in 1993–1994 and then in 1996 the federal legislation was renamed the *Workplace Relations Act 1996* (Cth). Despite the political rhetoric which accompanied the new Act, the changes to the earlier legislation were slight. The *Workplace Relations Amendment (Work Choices) Act 2006* (Cth) ('*WorkChoices Act*') is simply the most recent attempt to effect a move to a unified industrial relations system in Australia and it was predictable that there would be politically-driven challenges to the constitutionality of the legislation. It should not be a surprise either to learn that the opposition party in the Australian Federal Parliament announced on the day that the new labour laws came into effect that it would reverse these laws when it became the government.

B New Zealand

In New Zealand, the high point for the interventionists was the enactment of the *Industrial Conciliation and Arbitration Act 1894* (NZ). The legislation was spurred by strikes which spread across the Tasman from the Australian colonies, a massive economic downturn and evidence of widespread exploitation of workers, especially in garment industry 'sweat shops'. The legislation gave expression to the view that the role of the State is to protect the public interest. This was to be achieved by maintaining a balance between capital and labour, as well as establishing a balance between the State on one side, and capital and labour on the other. The philosophy behind the legislation was a belief in the necessity for massive State intervention in the market place based on the accepted view at the time that employer and employee had opposing interests and therefore needed to be compelled to negotiate in a state established forum. That forum was a permanent industrial tribunal. The distinctive elements of compulsion were that, once notified of an 'industrial dispute', the tribunals were empowered to compel the disputing parties to appear at a conference. The parties had no choice as to the arbitrator. The obligations undertaken in the final agreement ('award') were enforced by the tribunal, not by the signatories – that is, the parties – to the award. There were numerous sanctions and penalties if industrial action occurred because direct industrial action was viewed as unnecessary given the forced arbitration. There was no distinction made between disputes of 'interests' and disputes of 'rights'. There were tight legal controls over two central issues: firstly, as to the kinds of matters which could be

20 In the mid-1950s, the Boilermakers Union challenged the validity of certain penalties imposed on it, arguing that the Court of Conciliation and Arbitration established under the 1904 Act was unconstitutional as it offended the doctrine of separation of powers inherent in the Constitution. Both the High Court of Australia and the Judicial Committee of the Privy Council agreed. The federal legislation was amended to reflect that separation, and a court and a commission were created.

negotiated and, secondly, as to the structure and function of the bargaining units. Yet, while compelled to negotiate, there was no duty to negotiate in good faith. A decade later, this interventionist model was adopted in Australia by the national parliament and all but two of the states. This experiment with a new way of handling employment matters lasted almost one hundred years.²¹ The system has been described as:

highly legalistic and interventionist with both the bargaining structures and the bargaining procedures being tightly regulated and with the employer-employee relationship being enfolded in a complex body of administrative, public law. The state accepted the responsibility for holding-the-ring between the parties and fostered the idea that collective contracts had an independent life beyond the willingness of employers to bargain them.²²

When translated into practical industrial relations, the picture was one of the 'big three' operating at arm's length to prescribe outcomes for the workplace; the 'big three' were employer, employee and political organisations working together to eliminate, or at least manage, industrial conflict. The 'big three' were the only parties legislatively empowered to appear before industrial tribunals. The view was that this was the best means through which to achieve the public interest.

The move away from the traditional system in New Zealand began eight decades after the original 1894 Act, commencing with the *Industrial Relations Act 1973* (NZ) and continuing with the *Industrial Relations Amendment Act 1984* (NZ) and the *Labour Relations Act 1987* (NZ). The apogee of deregulation was the *Employment Contracts Act 1991* (NZ), which allowed only minimal intervention into the employment contract. Later that decade, the political pendulum swung back and the new government repealed the 1991 Act and replaced it with the *Employment Relations Act 2000* (NZ). Their very names disclosed the different philosophies underlying the two Acts. The 1991 Act treated employment like any other contract, thus assuming equality of bargaining power between the respective parties and that market forces would determine wages and conditions.²³ The 2000 Act embodied a quite different philosophy.²⁴ For example, s 3 specifically mentioned the 'inherent inequality of bargaining power in the employment relationship' and the Act had much to say about acting and negotiating in good faith.

It comes as no surprise to learn that the 2000 Act was amended to clarify the meaning of bargaining in 'good faith'. The Employment Relations Law Reform Bill was introduced in mid-2004. According to the New Zealand Law Society, the Bill demanded 'too much of the concept of good faith'.²⁵ Notwithstanding

21 Brian Brooks, '100 Years of Compulsory Conciliation and Arbitration in Australia and New Zealand' (1995) 11 *International Journal of Comparative Labour Law and Industrial Relations* 31.

22 Brian Brooks, 'De-Regulating the Labour Market: Reflections on the New Zealand Experience' in Chris Engels and Manfred Weiss (eds) *Labour Law and Industrial Relations at the Turn of the Century* (1998) 651.

23 Until 1979, this was also the assumption made about the relationship of employer and employee in South Africa: see André Van Niekerk, *Unfair Dismissal* (2nd ed, 2004) xv.

24 Gordon Anderson, 'Just a Jump to the Left: New Zealand's Employment Relations Act 2000' (2001) 14 *Australian Journal of Labour Law* 62-88.

25 New Zealand Law Society, 'NZLS Submissions on the Employment Relations Law Reform Bill' (2004) 627 *LawTalk* 14.

this and other objections, the Act was amended in 2004. In light of the history of legislative changes to employment laws in New Zealand, it is with perhaps a note of surprise that the Employment Law Committee of the New Zealand Law Society in its 2005 annual report observed that ‘there has been very little new or amended employment legislation in 2005.’²⁶ Therefore, at the time of writing,²⁷ the *Employment Relations Act 2000* (NZ) stands as the single most important piece of legislation amongst the more than 20 significant pieces of legislation regulating employment and industrial relations in New Zealand.²⁸

C South Africa

In South Africa, given the divisive effects of apartheid, it is not surprising that the political party elected to govern in 1994, and re-elected in every election since, has prioritised issues important to the previously marginalised minority – unemployment, housing, education and healthcare. The government actively intervenes in the economy to achieve some form of economic equality and does so through a wide range of Acts. The most important of these acts include the *Basic Conditions of Employment Act 1997* (South Africa), the *Employment Equity Act 1998* (South Africa) and the *Broad-Based Black Economic Empowerment Act 2003* (South Africa). The *Basic Conditions of Employment Act* deals with the regulation of matters such as working time, leave, minimum wages, meal breaks, termination of employment, prohibitions on certain types of employment and the establishment of an inspectorate to monitor and enforce the legislation. The *Employment Equity Act* is aimed at rectifying racial imbalances in the workplace by requiring companies to adopt and implement affirmative action policies.²⁹ The *Broad-Based Black Economic Empowerment Act* s 2(a) includes in its objectives the promotion of economic transformation to ‘enable

26 New Zealand Law Society, ‘Employment Law Committee – January’ (2006) 659 *Law Talk* 11.

27 On 15 February 2006, the government introduced the Employment Relations (Flexible Working Hours) Bill designed to protect employees affected by the transfer of a business or by contracting out. The Bill was referred to the Transport and Industrial Relations Committee and submissions are to close on 13 July.

28 In the leading textbook on labour law in New Zealand, the author identifies and lists over 20 significant pieces of legislation in the employment field and says of his list that ‘it is not exhaustive and would expand greatly if it were to include statutes which apply to particular industries or occupations’: Richard Rudman, *New Zealand Employment Law Guide* (2005) 5-8.

29 Section 15(2) requires designated employers to ‘ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce; and retain and develop people from designated groups. Designated employers include a person who employs 50 or more employees and a person employing less than 50 but whose annual turnover exceeds a predetermined amount. Designated groups include black people, women and people with disabilities.’ The measures required include preferential treatment and numerical goals. Designated employers are required to consult with employees, conduct an analysis, prepare an employment equity plan and report on progress made in implementing the plan.

meaningful participation of black people in the economy.³⁰ These Acts represent a significant intervention and reveal that the government lacks a belief in the efficacy of market forces in ensuring transformation.³¹ Much of the political rhetoric of the government and the justification for its policies is based upon the 'need to redress past wrongs' and correct the imbalances and structural faults inherited from South Africa's apartheid and colonial past.³²

V COMPETING PHILOSOPHIES

In the past two decades, the interventionist philosophy has increasingly come under attack in both Australia and New Zealand, resulting in the emergence of free-market values. Notably, however, this has not been the case in South Africa. The free-market philosophy argues the case for minimalising regulation or state intervention in the labour market. It has at its core the decentralisation of bargaining, a diminished role for industrial tribunals, a lesser role for trade unions (which are seen as bargaining agents rather than principal parties), a greater focus on workplace bargaining (with emphasis on non-union individual contracts) and, perhaps most importantly, individuals being granted access to industrial tribunals.³³ In the past, registered industrial organisations were the sole parties with the right to appear before industrial tribunals. Granting access to individuals has thus weakened the power of trade unions. It has also put the emphasis on workplace agreements, heightening the importance of grievance procedures.

30 This objective is achieved through establishing criteria for the granting of licenses and other concessions for preferential procurement policies for the public sector (including government), for the sale of state-owned enterprises and the establishment of public-private partnerships. The criteria include measures of direct empowerment (ownership and management), indirect empowerment (preferential procurement and enterprise development) and human resource development (employment equity and skills development). Industry-specific charters provide 'score-cards' for measuring progress. Newspapers regularly carry success stories. See, eg, 'Work junkie wants more than passive BEE partners', *Sunday Times* (South Africa), 24 July 2005, 8; 'Huge BEE deal for VW bus and truck,' *The Johannesburg Star* (Johannesburg), 17 January 2006, 1; 'Yes, BEE is costly, but it has dividends,' *Sunday Business Report* (South Africa), 22 January 2006, 2; 'Elephant blows BEE trumpet,' *Business Times* (South Africa), 29 January 2006, 1 (Elephant is a consortium which had controversially secured a 10 percent shareholding in Telecom in 2005); 'Black economic empowerment raises bar for entire economy,' *Business Report* (South Africa), 3 April 2006, 12.

31 There are many more Acts reflecting the government's concern to intervene into labour relations. See, eg, the *Labour Relations Act 1995* (South Africa); the *Skills Development Act 1998* (South Africa); the *Compensation for Occupational Injuries and Diseases Act 1993* (South Africa); the *Unemployment Insurance Act 2001* (South Africa).

32 An illustration of this commitment is the establishment in 1995 of the National Economic Development and Labour Council ('NEDLAC'), a central aim of which is to 'formulate a coordinated policy regarding social and economic matters and encourage and promote this policy.' As part of its function, the council must 'consider all proposed labour legislation before being placed before parliament.' Further, as part of its program of alleviating poverty and unemployment, the government has embarked on a number of strategies including the Expanded Public Works Programme ('EPWP'), which aims to create work opportunities and skills development.

33 Each of these themes is clearly seen in the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

The free-market approach allows the participants to choose both what is to be negotiated as well as the conduct of those negotiations. A South African practitioner captures the free-market philosophy in this passage:

Increasingly we are seeing a move towards employers opting for the services of temporary or contract employees. The reasons for this include the introduction of the Labour Relations Act, which made it difficult and often costly to get rid of non-performing staff members. Employers often feel that a hole is being dug for them by the trade unions.³⁴

The passage goes on to extol the benefits of free choice in employment contracts. An earlier and very clear political expression of this approach is found in the Manifesto of the New Zealand National Party, which won the biggest landslide in New Zealand's electoral history in November 1990. In its Manifesto, the party described the key points of its industrial relations policy as being to:

re-introduce voluntary unionism; encourage more flexible bargaining arrangements between employers and employees; allow employees to choose their own bargaining agents; give industrial agreements the status of binding contracts; give workers greater flexibility to decide who will represent them in dispute procedures, and the introduction of a minimum code of wages and conditions.³⁵

That Manifesto was swiftly put into legislation in the form of the *Employment Contracts Act 1991* (NZ) and the six points of the Manifesto make interesting reading in the light of the most recent 'reforms' to Australian industrial laws. Amongst those changes, hailed by one Australian newspaper as a 'workplace revolution',³⁶ are:

a reduction in the number of minimum conditions contained in arbitrated agreements; new rules allowing third parties affected by a strike to apply for the strike to be declared illegal; severe restrictions on the activities of trade unions and their officials; a list of matters concerning trade union activities which are prohibited from being included in agreements; a reduced role for the federal industrial tribunal; the exemption of small businesses (those with fewer than 100 staff) from unfair dismissal laws and from the obligation to pay redundancy; and restrictions on the grounds for unfair dismissal claims by employees.³⁷

It is clear, therefore, that the employment relationship lies at the heart of labour law and the recent changes in South Africa, Australia and New Zealand. Any account of labour and industrial law in each of the three countries must start with the individual relationship of employer and employee. Indeed a New Zealand observer asserted that:

we have inherited a conventional picture of working relationships which puts the employment contract in centre stage. The employment contract shapes class concepts. It provides the major source of income for most people. It establishes a nexus without which unions could not exist. Statistically it serves as a barometer of economic health. To businessmen, industrialists and economists it is one of the building blocks for organisations...³⁸

34 T Hackney, 'Contract employees are the future', *Johannesburg Star* (Johannesburg), 8 May 2002, 8.

35 Doug Kidd, 'National's Industrial Relations Policy' (1996) 1 *Employment Law Bulletin* 3.

36 Norington, above n 17.

37 Ibid.

38 M D Malloy, 'Wealth without Conflict: Reconsideration of the Employment Contract' (1984) *New Zealand Law Journal* 285-286.

Specialist employment and industrial tribunals exist in each of the three countries to settle disputes between employers and employees. An employer answers vicariously for harm done to a third party by an employee who causes that harm in the course of their employment. For other workers, most obviously the independent contractor, there is no vicarious liability principle applicable. Protective legislation mostly extends to only those who are parties to an employment contract. The employment contract has attached to it a range of common law and statutory rights and duties.

'Reform' at the level of the individual relationship of employer and employee is also driven by the opposed philosophies of intervention and non-intervention, between the 'free market' and the need for regulation. A clear expression of the former view is found in a New Zealand editorial which commenced with the assertion that '[e]mployment is no longer very different in law from any other service a business can buy. Labour arrangements are made by voluntary contract between buyers and sellers much as any other commodity is traded.'³⁹ Furthermore, 'the logic of applying the general principles of contract to labour relations argues for an end to the specialised courts which have functioned under various statutes and guises for about as long as the labour market has been regulated.'⁴⁰ This classic neo-conservative view argues for very little intervention in the employer-employee relationship and points to such distortions in the labour market as personal grievance provisions in legislation and/or collective agreements, minimal wage legislation, redundancy payments and, of course, the activities of trade unions. Consistent with this view are several provisions in the new Australian federal legislation including, for example, that small businesses be exempted from unfair dismissal laws and from paying redundancy when the termination is for 'genuine operational reasons'.⁴¹

Against this backdrop of deregulation and non-intervention, an Australian academic draws the conclusion that:

the history of labour in the 19th and 20th centuries is the history of efforts to modify the world of work, to change the bargaining positions of workers and employers – in short, to bite into the 'rights' of management and increasingly to bring all the terms and conditions of work into the sphere of joint determination.⁴²

What that suggests is that there is massive intervention into the employer-employee relationship and that the labour market has long been regulated despite political rhetoric to the contrary. We can identify laws which prohibit discriminatory practices at the point of hiring and firing and laws which promote equal opportunity. There is legislation governing employment relationships from the act of advertising a position, through the interview and selection process to

39 Editorial, 'Court is Redundant', *The New Zealand Herald* (Wellington), 7 March 1997.

40 Ibid. Interestingly, the most recently proposed amendment to the South African Constitution envisages abolishing the existing Labour Courts.

41 The problem of retrenchment based on operational requirements has also been faced in South Africa. See *Labour Relations Act* (1995) ss 189 and 197; see also Van Niekerk, above n 23. There are heavy obligations on an employer who takes over the business or part thereof of another employer as 'a going concern'. The Act does not define 'a going concern' and predictably this causes confusion and creates many industrial disputes, most recently a Transnet strike in March 2006.

42 Geoffrey Sorrell, *Law in Labour Relations* (1979) 30.

the formation of the contract and then to regulate the terms and conditions of employment and how the contract is terminated. Such laws have been enacted in Australia, at both a State and Federal level, and in South Africa and New Zealand.

Likewise, each country has enacted occupational health and safety laws,⁴³ consumer protection legislation, environmental laws and has written into their labour laws provisions which allow the processing of personal grievances.⁴⁴ Provisions also cover what happens to employees when a business is sold or restructured,⁴⁵ matters such as human rights, privacy,⁴⁶ social welfare, taxation regimes, affirmative action and equal opportunity legislation, anti-harassment laws, legislation on retirement fund regulation and on various types of leave,⁴⁷ working time and the protection of whistleblowers.⁴⁸ When taken as a total package, this legislation represents massive government intervention into the individual employer-employee relationship in each of the three countries.⁴⁹

43 In enacting such legislation, the three countries are observing certain ILO Conventions such as 155 (Health and Safety), 148 (Working Environment), 139 (Occupational Cancer) and 162 (Asbestos). Further, each country faces the same issues in the legislation: who should bear the risk; what employee input into the management of health and safety should there be; should there be a protected right to strike over health and safety; what new forms of injury to recognise; should there be the same level of penalties for employer and employee; should manufacturers be liable? Countries answer these questions in different ways.

44 An unintended consequence of this was that industrial tribunals in Australia and New Zealand became clogged with grievances lodged not by lower level employees but by very senior managers who found the employment tribunal less expensive and much faster than a civil court.

45 At the federal level in Australia, the terms and conditions for serving employees remain for 12 months after the sale of the business and are then up for re-negotiation. In South Africa, the transferee must continue to provide terms and conditions that are 'on the whole not less favourable' than those which applied before the transfer. In New Zealand, a Bill was introduced in February 2006 that aimed to clarify the rights of employees when restructuring occurs. Restructuring will include the sale or transfer of a business and the contracting-out of work.

46 At the end of September 2005, the new *Regulation of Interception of Communications and Provision of Communication-related Information Act No. 70 of 2002* (South Africa) came into effect. This replaces the former Act and makes it even more difficult for employers to monitor telephonic, email and other communications of employees at the workplace. This is a dramatic illustration of intervention at the level of the workplace. Similar legislation is found in the *Privacy Amendment (Private Sector) Act 2000* (Cth).

47 The most recent New Zealand legislation is the amendments made to the *Holidays Act 2003* (NZ).

48 *Protected Disclosures Act 2000* (NZ); *Protection of Disclosures Act No 26 of 2000* (South Africa).

49 This intervention hides a paradox - the law is complex and detailed but those normally charged with observing the law are not trained lawyers, but rather practical people trying to solve practical problems. Despite often prolonged and bitter disputes, they have to live together on a daily basis. The clearest expression of this is found in a weekly publication in South Africa, *Workplace*, which is produced as an insert each Wednesday in *The Star*. It comprises practical advice to employers and employees on a range of issues. Over the past two years, the most attention has been given to advice on preparing for and appearing in tribunals and this advice has been slanted towards employers. The second most popular issue was the question of misconduct and how to dismiss employees, followed by advice on taking care with job applicants (fraudulent curriculum vitae seem common). Very little attention was given to health and safety, workers with disabilities, BEE, affirmative action, domestic workers or strikes and stoppages.

VI THE INDIVIDUAL EMPLOYMENT CONTRACT

Clearly, the breadth of these provisions ensures that workplace law extends well beyond the workplace. Various forms of pension and retirement schemes are an example. Conversely, there is a great deal of external influence on the workplace that affects, directly or indirectly, the conduct of relationships between employer and employee. That relationship starts with a contract. Is there a 'consensus of opinion' on what constitutes an employment contract? The answer is no. It is indeed surprising that in the first decade of the 21st century there is still no agreed test to isolate an employment relationship from the many other ways we perform that social activity we call 'work'. The three countries have in common the search for the distinction between two major modes of 'working': a contract *for services* and a contract *of service*. The former commonly has as its exemplar the 'independent contractor' and the latter the employment contract. Legislation does not assist to make the distinction between a contract for services and a contract of service. One South African authority observes that '[w]hether a person is an employee or an independent contractor is often a difficult question to answer and regrettably little guidance is given by either the *LRA* [*Labour Relations Act*] or the Code of Practice.'⁵⁰ To the same effect, another South African text notes that 'it should be kept in mind that the *Labour Relations Act 1995* is applicable to both the individual as well as the collective labour relationship ... [but] the *Labour Relations Act* does not state, as the previous Act, to whom the law applies.'⁵¹

In New Zealand, the *Employment Relations Act 2000* (NZ) s 6(a) provides us with a definition. There we learn that an 'employee' 'means any person of any age employed by an employer to do any work for hire or reward under a contract of service.' The phrase 'for hire or reward' is not defined in the legislation. Nor is the central notion of 'contract of service'.

In Queensland, the *Industrial Relations Act 1999* (Qld) s 5 defines 'employee' as being a person 'employed in a calling on wages or piece work rates' or 'a person whose usual occupation is that of an employee in a calling'. While 'calling' is defined in s 5 of the Act, there is no definition of 'employed' or 'employee'.

What this means is that in each of the three countries the judiciary must determine the criteria to enable us to distinguish the 'employer-employee' arrangement from all the other ways in which 'work' is performed. As a consequence, there is difficulty in being consistent. Space does not allow a detailed analysis of why this is so; the following four observations will have to suffice.

The first observation is that the problem endemic in isolating an employment contract from other modes of performing 'work' is shared by the three countries.⁵²

50 van Niekerk, above n 23, 6.

51 Fanie van Jaarsveld and Stefan van Eck, *Principles of Labour Law* (1998), 34 [46].

52 See Brian Brooks, *Labour Law in Australia* (2003); Rudman, above n 28; van Jaarsveld and van Eck, above n 51; van Niekerk, above n 23.

The second observation is that the judicial approach in each country starts from the same point: the old law of ‘master and servant’ that has as its touchstone the central notion of ‘control’. An early indication of the judicial approach is found in the famous observation by Lord Denning that ‘it is often easy to recognise a contract of service when you see it, but difficult to say wherein the difference (from that of an independent contractor) lies.’⁵³ This utterly pragmatic approach persists. In the New Zealand case *Inspector of Awards v Newlandia Industries Ltd*, the judge suggested that we should ask ‘whether an ordinary, intelligent and informed person would consider a worker in a particular situation to be an employee or an independent contractor.’⁵⁴ Clearly this is not conducive to consistency, but it does allow the courts to expand or contract the definition of employee so as to extend or limit the reach of protective labour legislation. In other words, the vagueness inherent in this area of law allows significant scope for judicial social engineering. This is accomplished on a case-by-case basis and frequently has the effect of producing results which the legislature neither expects nor approves,⁵⁵ engendering criticism of judicial activism and the enactment of further ‘reforms’.⁵⁶

The third observation is an extension of the second – legislation is increasingly narrowing the judicial room for social engineering by expanding the definition of ‘employee’ to cover those who, by the application of the common law, would not be held to be ‘employed’ and would thus be excluded from protective legislation which, as noted earlier, applies only to employees. There is a concern in each of the countries that questionable ‘independent contractor’ arrangements might be entered into and that this will conceal reduced wages and conditions and also restrict the reach of protective legislation. Thus, in Queensland, s 5 of the *Industrial Relations Act 1999* (Qld) has an extended definition of employee which covers any person who is an ‘outworker’ or employed ‘even though working under a contract for labour only, or substantially for labour only; or the person is a lessee of tools or other implements of production, or of a vehicle used to deliver goods; or the person owns, wholly or partly, a vehicle used to transport goods or passengers.’

In New Zealand, s 5 of the *Employment Relations Act 2000* (NZ) includes a ‘homeworker’ in its definition of ‘employee’. ‘Homeworker’ is defined as being ‘a person who is engaged to do work for [another person] in a dwellinghouse’ and this ‘includes a person who is in substance so engaged, employed or contracted even though the form of the contract between the parties is technically that of vendor and purchaser’. This policy of extending the definition of

53 *Stevenson Jordan and Harrison Ltd v Macdonald and Evans* [1952] TLR 101.

54 As cited in Rudman, above n 28, 23.

55 For instance, in New Zealand an Employment Court decision was seen as not giving effect to the policy intended by the *Employment Relations Act 2000* (NZ) Pt 6A and the government introduced an amendment to overturn the decision. See, eg, New Zealand Law Society, ‘Employment Relations Act Amendment Introduced’ (2006) 662 *LawTalk* 10.

56 For a clear demonstration of this interplay between the judiciary and the legislature, see *Brighouse Ltd v Bilderbeck* [1994] 2 ERNZ 243; *Aoraki Corp Ltd v McGavin* [1998] 1 ERNZ 601; *Coutts Cars Ltd v Baguley* [2001] ERNZ 660. Interestingly, the new Australian legislation allows for common law contracts as a form of employment contract alternative to Australian Workplace Agreements.

‘employee’ to include those not included in the common law tests has been taken even further in New Zealand in the *Protected Disclosures Act 2000* (NZ). In s 3 of that Act, the definition of ‘employee’ includes former employees, contractors, homeworkers, managers and people seconded to the organisation. In South Africa, s 213 of the *Labour Relations Act* defines an ‘employee’ so as to specifically exclude an independent contractor but, confusingly, to include ‘any other person who in any manner assists in carrying on or conducting the business of an employer’. That latter definition, if read literally, would include persons not at common law considered employees. In contrast to the courts in Australia and New Zealand, the judges in South Africa have read the definition down.⁵⁷ Perhaps in response to this narrowing down, the South African government amended the *Labour Relations Act* by inserting s 200A to provide for the operation of a rebuttable presumption that a person working for another is an employee should certain criteria be met. These criteria are a codification of the various ‘tests’ long evolved in the English common law and applied in Australia and New Zealand.⁵⁸

Fourth, pursuant to point three, the reasons for the definitional problems and the reason for legislative intervention must be seen in a social and economic context. Labour law does not exist in a vacuum.⁵⁹ The context is one of deep changes affecting contemporary industrial societies. These changes have been widely documented elsewhere and a prominent feature has been the steady erosion of the traditional distinction between the terms and conditions of public and private employment.⁶⁰ One common trend indicative of those deeper changes is the observable move away from the traditional model of full-time, ‘nine-to-five’ employment. This model served to explain the ‘master-servant’ relationship, justifying the eight hour day and all the legislation which established and maintained the welfare state, as well as the traditional system of compulsory conciliation and arbitration in Australia and New Zealand. The move to casual, part-time employment or full-time contracting is well-documented.⁶¹ But why the shift? Supply-side commentators would argue that this is because people are increasingly choosing this way of life. People perceive advantages in being self-employed. Self-employment is considered able to grant the individual greater control of their lives, greater financial rewards, providing the opportunity to become more technically competent and to avoid the drudgery of ‘management’ work. It is possible to point to the reality of permanent high-levels of unemployment as creating the casualisation of work, or to argue that there is a new generation which is not attracted to full-time employment and who seek other models to allow accommodation of changing family and life-style patterns. Central to this view is the demographic aging of the population in Australia and

57 van Niekerk, above n 23, 5.

58 The presumption will be made that a worker is an employee if there is: the presence of control by another; the worker forms part of the organisation; the worker is economically dependent on the other; the other provides tools and equipment; and the worker works for or supplies one other only.

59 An obvious comparison is family law.

60 See Engels and Weiss, above n 22.

61 For a practical analysis see Hackney, above n 34.

New Zealand. This raises questions about the age of retirement, the provision of retirement income and associated problems.⁶²

VII THE COLLECTIVE EMPLOYMENT RELATIONSHIP

Despite differing socio-political contexts, South Africa, New Zealand and Australia all share the same central question regarding labour market regulation: how far, if at all, should the state intervene in the relationship of employer and employee? At the level of employer and employee we have seen the answer. In each of the countries the state does already intervene. Australia and New Zealand have done so for a century or more and South Africa has done so with increased intensity in recent years.⁶³ The same is true for the collective relationship. Here there are four related core questions: Should collective bargaining be encouraged and if so, how should the process be regulated; what dispute settling processes should be used; what is to be the place of trade unions; and is there a place for penalties in the collective relationship?

A The Role of Government

The starting point is an examination of the role of governments in establishing an industrial relations system. Here there is a clear choice. Governments can be interventionist or they can have a *laissez faire* approach. The choice they make is dictated by a range of economic, political and social concerns, as we have seen.

In South Africa, intervention into almost every aspect of life is found in the *Republic of South Africa Constitution Act 108 of 1996*. A written Constitution marked the emergence of South Africa from British rule. In May 1961, South Africa became a Republic independent from Great Britain. South Africa made its independence clear with a new Constitution in that year. In 1983, another Constitution was adopted. The 1980s and early 1990s saw the slow dismantling of a system of limited suffrage and legislative discrimination, known widely as apartheid, and the eventual enactment of the *Republic of South Africa Constitution Act 108 of 1996* ('*Constitution of South Africa*').

The main feature of the *Constitution of South Africa* as outlined in s 2, is that it is 'the supreme law of the Republic.' It is important to appreciate that this supremacy applies to the entire *Constitution of South Africa*. The *Constitution of South Africa* is written, inflexible (in the sense that it is very difficult to alter) and sets out a federal system and the division of legislative functions at national, provincial and local levels.

62 This was a major theme at the World Conference of the International Society for Labour Law and Social Security held in Jerusalem in September 2000.

63 Also underpinning the common problems in the three countries is the need to attract foreign investment. Regulation of the labour market can be interpreted as a disincentive to foreign investors or it can be seen as an advantage. Each view is expressed in an interview with the President of South Africa: Alide Dasnois, 'Invest in SA, says Mbeki', *Business Report* (South Africa), 27 February 2006. In the same Report the President was quoted as being critical of the unemployment figures. He said that despite the unsatisfactory nature of the statistics, moves to implement labour market reform would continue.

The *South African Constitution* is comprised of 243 sections grouped into 14 chapters. For our present purposes the most important is Chapter Two. This contains 27 sections which are known compendiously as the 'Bill of Rights'. Primarily, first generation rights – civil and political rights – are protected by these sections. There is also a protection for socio-economic rights – second generation rights. Section 9 states that '(1) Everyone is equal before the law and has the right to equal protection and benefit of law,' and '(4) National legislation must be enacted to prevent or prohibit unfair discrimination.' Section 17 states that 'Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.'

Even more relevant are the following provisions of s 23:

- (1) Everyone has the right to fair labour practices.
- (2) Every worker has the right –
 - (a) to form and join a trade union;
 - (b) to participate in the activities and programmes of a trade union; and
 - (c) to strike.'

Section 23(3) recognises the right of employers to form employers' organisations and s 23(5) gives trade unions, organisations of employers and individual employers the right to engage in collective bargaining. The subsection adds that 'national legislation may be enacted to regulate collective bargaining.'

In South Africa, collective bargaining has long been encouraged as a means of achieving industrial peace.⁶⁴ In the first decade of the 20th century, when Australia was enacting its conciliation and arbitration legislation, laws were passed in the Transvaal to establish processes to settle industrial disputes.⁶⁵ In the early 1920s, massive strikes and other industrial turmoil erupted in the gold fields of the Rand. The 1909 Act failed to provide the machinery to help resolve the turmoil. A new Act, with a title resonant of legislation in Australia and New Zealand, was enacted in 1924. This was the *Industrial Conciliation Act 1924* (South Africa). It was replaced just over a decade later by the *Industrial Conciliation Act 1937* (South Africa) which was itself replaced by the *Industrial Conciliation Act 1956* (South Africa). That Act was renamed the *Labour Relations Act 1956* (South Africa) and, under that title, has undergone major amendments in the past fifty years.⁶⁶ Much of those new laws, including the *Basic Conditions of Employment Act 1997* (South Africa), came into force in a piecemeal fashion, in some cases merely replicating sections from the *Labour Relations Act 1956* (South Africa).⁶⁷ And, as noted above, the South African

64 See *Labour Relations Act No 28 of 1956* (South Africa), *Act 146 of 1993* (South Africa); *Act 195 of 1994* (South Africa).

65 *Transvaal Industrial Disputes Prevention Act 20 of 1909* (Transvaal).

66 One commentary describes the first set of amendments as 'drastic' and points to one of the significant aspects of the amendments being found in the fact that 'distinctions on the basis of race were done away with': Hosten et al, above n 11, 925 fn 77.

67 Bell, above n 5.

Government indicated earlier this year that there will be 'labour law reform' in 2006.⁶⁸

Pausing here, we can identify several constitutional matters of relevance to a comparative study. First, the several references to the power to enact legislation pursuant to the 'Bill of Rights'. The legislation regulating collective bargaining is one example. Second, the right to demonstrate and picket is a constitutional right, as is the right to form trade unions and to engage in collective bargaining. This takes these matters far beyond the narrow confines of employment law and makes the point that workplace arrangements are not dependent solely on an employment contract, either individual or collective. Third, there is the constitutional right of everyone 'to fair labour practices'. These rights are not defined in the *Constitution of South Africa* and we must therefore look to specific labour legislation for operative definitions. This opens up the possibility that the constitutional reach of the right to fair labour practices might collide with legislated concepts.⁶⁹ Could, for instance, an employer rely on the constitutional right to fair labour practices when protesting an alleged unfair practice perpetrated by an employee?⁷⁰ Or imagine that there is a contractually agreed disciplinary code in the workplace which is not followed by the employer. When challenged, the employer says that what he does in practice nonetheless protects the constitutional right of the employee to fair labour practices.⁷¹ Do affirmative action programs infringe the constitutional right to equality?⁷² Is there a constitutional right to legal representation in disciplinary proceedings?⁷³ What happens where the employee's right to fair labour practices collides with the employer's right to freedom of association and to engage freely in economic activity?⁷⁴ The short answer appears to be that it is possible that the constitutional rights to fair labour practices may be construed as being wider than those legislated for outside the *Constitution of South Africa* and that the various rights cannot be seen in isolation.

The *Constitution of South Africa* also establishes a hierarchy of courts.⁷⁵ The enactment of its constitution created serious jurisdictional issues in South Africa. There had not been any tribunal with industrial jurisdiction until 1979. In that year, less than three decades ago, the Industrial Court was established whose determinations were subject only to review by the Supreme Court. Despite its name, however, the body was not considered a court. In a leading decision, the Administrative Division of the Supreme Court ('AD') held that the Industrial Court was not a superior Court. Indeed it was not a court of law at all. Rather, it

68 Ibid.

69 *Mans v Mondi Kraft Ltd* (2000) ILJ 213; *NEHAWU v University of Cape Town* (2003) 3 A 1.

70 *NEWU v CCMA and others* (2004) BLLR 165.

71 *Denel (Pty) Ltd v Vorster* (2004) ILJ 659.

72 *Minister of Finance and others v Van Heerden* (2004) 6 SA 121.

73 *Hamata and another v Chairperson, Peninsula Technikon Internal Disciplinary Committee* (2002) ILJ 1531; *MEC, Department of Finance, Economic Affairs and Tourism: Northern Province v Mahumani* [2005] 2 BLLR 173.

74 *Concorde Plastics (Pty) Ltd v NUMSA* (1997) BCLR 1624.

75 Constitutional Court; Supreme Courts of Appeal; High Courts; Lower Courts; Specialist courts and tribunals.

was held to be an administrative tribunal. Amongst other things, the reasons for this decision were that, despite its description as a court and despite the fact that it could perform judicial functions, the body was located and operated within the administrative arm of government, the members were appointed by the Minister of Labour, the appointed persons were neither judges, former judges nor legal practitioners, and the Minister could appoint 'ad hoc' members and members had a limited tenure.⁷⁶ In 1988, the Labour Relations Amendment Bill introduced the Labour Appeal Court ('LAC'). As its name indicates, this was the body which heard appeals against determinations of the Industrial Court ('IC'). A judge of the Supreme Court chaired the LAC with two assessors.⁷⁷ There was a right of appeal on matters of law from the LAC to the Appellate Division.

There is clear evidence that the statutory dispute resolution processes did not function effectively in South Africa.⁷⁸ As far as the court system was concerned there were identifiable problems. The IC was outside the judicial hierarchy, it lacked status and provided no security of tenure or career paths for either its members or its administrative staff. Long delays were caused by the ability to appeal from the IC to the LAC and then to the AD. Furthermore, some labour laws including the minimum conditions of employment legislation were enforced through the Criminal Courts. This added to the difficulties occasioned by overlapping jurisdictions.

Shortly after the first democratic elections in South Africa, a Labour Relations Bill was produced to act as a negotiating document. This Bill was the basis of the *Labour Relations Act 1995* (South Africa). The Bill proposed the establishment of the Commission for Conciliation, Mediation and Arbitration with mediation as the first step in the dispute resolution process and with arbitration as the next step. This has also long been the model for dispute resolution in Australia and New Zealand; it is increasingly being adopted worldwide⁷⁹ and continues to be a central role for the federal tribunal in Australia under the new legislation. Also proposed in South Africa was a Labour Court with national jurisdiction staffed by judges who had to be legally qualified. A Labour Appeal Court was proposed, with the authority to hear appeals from the Labour Court from which there would be no further right of appeal. The Bill also proposed the decriminalisation of labour disputes.

South Africa now has several layers of tribunals and courts with power to deal with employment matters. Australia and New Zealand also have tribunals and courts. In each of the three countries, those bodies have the same broad problems. Space precludes careful attention and elaboration but the following matters can

76 A A Landman, 'The Status of the Industrial Court' (1985) 6 *Industrial Law Journal* 278.

77 In New Zealand, for many years the Labour Court comprised a judge and two lay assessors, one an employer association nominee and one from employee trade unions. In each instance the three members had one vote each, and although it was rarely done, the assessors could outvote the chair.

78 The negotiating document in the form of a Labour Relations Bill that formed the basis of the 1995 *Labour Relations Act* recorded that the existing statutory dispute resolution processes did not function effectively. Less than 30 per cent of disputes referred to Industrial Councils were settled and some 20 per cent of disputes sent to conciliation boards were settled.

79 Brian Brooks, 'Some Recent International Developments in Employment Dispute Settlement' (2001) 17 *IJCLAIR* 199-209.

be identified as common issues facing employment tribunals and courts: how to identify an employment contract; how to identify and apply the terms and conditions of the employment contract; the composition of the tribunal or court and who makes appointments; who may appear before the tribunal or court; what are arbitral or justiciable matters; how is evidence adduced; who has the onus of proof and what is the standard of proof; what discretions exist; what remedies are available; and what is the system for appeal?

Even more important is the fact that employment tribunals and courts are dominated by one central issue: how to best ensure 'good' employment relations. Put another way, legislatures, tribunals and courts are concerned to promote fairness in the dealings between employer and employee at both the individual and collective level. In South Africa, the right to fair labour practices is enshrined in s 23(1) of the *Constitution* and this right has been interpreted by the Constitutional Court to mean that the right protects both employers and employees.⁸⁰ This interpretation is an echo of the famously robust observation of an Australian industrial judge over thirty years ago who said that the desired outcome for employers and employees was 'a fair go all round.'⁸¹ The language used to encapsulate this notion of fairness varies but the concept runs through every 'reform' of labour and employment law starting with the compulsory conciliation and arbitration statutes in New Zealand and Australia. An authoritative commentary on the most recent reform to New Zealand's *Employment Relations Act 2000* (NZ) observes that 'the principle of good faith is a central theme of the Act.'⁸² Encouraging 'good faith' is also a professed aim of the most recent 'reforms' in Australia.

The South African process of 'transformation' from inequality to equality is also characterised by the search for fairness. As noted earlier, the Constitution enshrines a right to fair labour practices. That right is also expressed in the *Labour Relations Act* ('LRA'). That Act identifies and prohibits 'unfair labour practice'.

Section 186(2) of the *LRA* defines 'unfair labour practice' as

- (a) any unfair act or omission that arises between an employer and an employee involving;
- (b) unfair conduct by the employer relating to the promotion, demotion, probation (excluding dismissals of probationers) or training of an employee or relating to the provision of benefits;
- (c) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of any employee;
- (d) a failure of refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and
- (e) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act 2000 on account of the employee having made a

80 *NEHAWU v University of Cape Town* (2003) 3 SA 1.

81 *Re Loty and Australian Workers' Union* [1971] ART (NSW) 95, 99; repeated by a West Australian tribunal in *Magyar v Ursula Frayne Catholic College* (1977) 77 WAIG 2175.

82 See Rudman, above n 28, 68.

protected disclosure defined in that Act.

In New Zealand and Australia, similar language is used in the relevant industrial legislation. In each country, vague employment laws are enacted with vague concepts which allow change to be accommodated. Labour law statutes abound with wide and loose notions such as 'unfair dismissal', 'harsh, unjust and unreasonable', 'as far as reasonably practicable', 'in accordance with equity and the substantial merits of the case', 'substantial hazards', 'dangerous machinery', 'no disadvantage', 'good faith bargaining' and 'harsh and unconscionable contracts'. In the South African *LRA*, the word 'unfair' is mentioned several times but there is no definition provided. The New Zealand Parliament has seen the need to amend the provisions governing good faith bargaining enacted in the *Employment Relations Act 2000* (NZ). The amendments, enacted in 2004 and located in s 33, makes it mandatory for parties who engage in collective bargaining to then conclude a collective agreement unless there is 'a genuine reason' not to do so. The legislation gives no guidance to those seeking the meaning of 'a genuine reason'. This absence of legislative guidance creates problems for courts and tribunals.⁸³ The use of vague and loose language in legislation has the further consequence of producing conflicting decisions from courts and tribunals as to what constitutes the proscribed or prohibited behaviour.

B The Role of the Judiciary

Once legislation is enacted and comes into force, it is the task of the judge to interpret and apply the law. As industrial relations legislation is often drafted with deliberately vague language and frequently amended, interpretation of this legislation has swung between one of more and less intervention, depending on the times. At the retirement of the Chief Judge of the Employment Court, the New Zealand Law Society Vice-President remarked of the Chief Judge:

Your judicial career has been notable for many things, but it is worth pausing to observe the huge amount of change which has occurred since 1989. The court then was the Labour Court and its statute the Labour Relations Act 1987. In 1991 you had a completely new statute and court to come to grips with, and again in 1999. *In no other jurisdiction can judges have had to master so many changes in such a short time.*⁸⁴

Such a statement could well be applied to the employment and industrial tribunals in both Australia and South Africa.

C The Role of Trade Unions

The third players in the traditional system of industrial regulation in both Australia and New Zealand were the bargaining units, better known as registered industrial organisations or trade unions. The names varied in accordance with legislative changes, and so did the role of these bodies which comprised both

83 In March 2004, the judges of New Zealand's Employment Court took the highly unusual step of appearing before a select committee of Parliament to protest that the meaning of proposed amendments to the *Employment Relations Act 2000* (NZ) was not clear to them.

84 New Zealand Law Society, 'Towering figure in employment law retires,' (2005) 647 *LawTalk* 15 (emphasis added).

employers and employees. Every industrial or industrialising society is faced with the question of where to place trade unions in the political, social, economic and legal framework of that society. In South Africa, as we have seen, every worker has the constitutional right to form and join a trade union, to participate in the activities of a union, to engage in collective bargaining, to assemble, to demonstrate, to picket and to strike. Within the traditional system of conciliation and arbitration in Australia and New Zealand, the answer was simple – all governments actively encouraged the industrial organisation of employers and employees. A registration process was legislated. There were tight legal controls at the point of registration. Once registered, the organisation achieved corporate status and, as such, many of the good governance requirements imposed on trading corporations were imposed on registered industrial organisations. Democratic control of registered organisations was positively encouraged by legislation. The registered organisations were granted exclusive industry coverage which meant, among other things, that only a registered industrial organisation could create an ‘industrial’ dispute and appear before an industrial tribunal (so that individuals had no access), that registered organisations were principal parties in registered industrial awards and agreements and that organisational protection was legislated in the form of rights of entry to the workplace and preference in employment to members of employee organisations was protected. This, as noted earlier, has now been almost entirely changed in Australia and New Zealand. Those changes are reflected in the *WorkChoices Act* as well as in New Zealand legislation which allows individuals access to industrial tribunals and reduces trade unions to the position of bargaining agents and not party principals.

D The Role of Penalties

Finally the question must be asked: if a process to channel collective bargaining is in place, and the party principals have a defined and demarked role, what then happens if the processes fail and the parties elect to go outside their legislated territory? From this question, two further questions arise. First, what are the lawful limits to negotiating pressure, particularly where there is a legal obligation to bargain in good faith? Second, is there recognised lawful direct action? A supplementary question to this is whether there is a role for penalties and sanctions in collective employment law. Again, the response is determined by which side of the battle line you stand with, the historic evidence clearly demonstrating that anti-strike laws do not prevent strikes. In South Africa, as noted earlier, every worker has a constitutional right to strike⁸⁵ and this again takes the right far beyond employment relationships and would, it can be

85 *Constitution of South Africa* s 23(2). This constitutional right to strike is also recognised in many European countries. In other words, it is seen as the right of a citizen rather than an employee and is therefore not dependent on the existence of an employment contract. Yet even with this protected right, there is no certainty that the exercise of the right will be enjoyed peacefully. In March 2006, France (and Paris in particular) saw violent riots in protest against new labour laws. On 24 March 2006, the Johannesburg daily, *The Star*, carried a front-page headline – ‘Police Shoot Strikers’.

reasonably assumed, offend the promoters of Australia's *WorkChoices Act* as being an unacceptable intervention.

For those non-interventionists in Australia and elsewhere, however, the response is often conflicting and confused. Free-market advocates argue for non-intervention and yet those same advocates cry foul when trade unions take direct action in support of unsatisfied claims. When this happens, the non-interventionists call for intervention, by which they mean legislated penalties upon workers and their collective organisations. This explains the complicated legislative history in Australia of the response to secondary boycotts.⁸⁶ This is the situation when a third party is affected by direct industrial action. Interestingly, the *WorkChoices Act* contains provisions to allow third parties affected by a strike to apply for the strike to be declared illegal. That alerts us to the fact that, over time in both New Zealand and Australia, there has been a move to differentiate between legal and illegal strikes. In the traditional conciliation and arbitration system, as we have seen, all industrial action was illegal. There was no perceived need to resort to direct action as both sides could compel the other to sit down and negotiate under the eye of a permanent tribunal which could, and did, penalise obstructive behaviour. With the relaxation of the compulsory aspects of the traditional system, and a revised role for worker unions, came a recognition that the limits to lawful negotiating pressure was reached at the bargaining stage. Here 'interests' were at stake. Once a binding agreement was sealed, disputes would be over the 'rights' embodied in the agreement. Direct industrial action over 'rights' would be illegal; such a dispute should go before a properly constituted court. A dispute over 'rights' is a dispute over the interpretation of a legal document.⁸⁷ 'Interest' disputes, however, were exactly that, and lawful pressure could be exerted to 'persuade' the other side to sign. Unfortunately, third parties are frequently affected by the pressure of 'strikes' and 'lockouts' and various forms of boycotts. Can a government wedded to non-intervention intervene in such circumstances? And, if there is intervention in the form of legislated penalties, are such penalties effective? And, what is the ultimate point to the establishment of collective bargaining processes? Is it to achieve 'good' industrial relations? If so, how do you know when you have 'good' industrial relations?

VIII HOW DO YOU MEASURE THE EFFECTIVENESS OF 'REFORMS'?

How do we know when we have reached that happy condition at either the individual or the collective level? The answer depends on what outcome you desire from the 'reforms'. And here again we encounter the battle lines. On one

86 Prohibitions on secondary boycotts were variously housed in industrial legislation and the *Trade Practices Act 1974* (Cth), and were contested in each instance on the grounds that they lacked constitutional authority.

87 The most recent Australian federal legislation takes this distinction further by denying the right to protected strike action when employees are re-negotiating non-union individual employment contracts known as Australian Workplace Agreements.

side is the camp which says that 'industrial relations' means what does or does not happen inside the factory gates and this camp believes that penalties will ensure 'good' relations. Hence, the significantly named Masters and Servants legislation which, amongst other things, made it a criminal offence for a servant to leave the employ of the master. This view of employment relations is that, just as with the machinery, so the employer and employee should be kept quiet, kept busy and kept within the factory gates. Such an approach presupposes equality of bargaining power and freedom of choice and equates the employment contract with a commercial contract for the sale and purchase of inanimate goods.⁸⁸

The other camp looks at industrial relations and employment law as taking account of the entire condition of living in an industrial society and that rights and duties in the employment relationship do not start and finish in the workplace. Choices made at the workplace affect life outside the workplace – hence the attention devoted to retirement funds, legislative attempts to ensure that there is a balance between work and life and the recognition of new types of compensation such as for work-induced stress.⁸⁹ 'Good' labour relations is seen as an automatic byproduct of a sound economy, low unemployment, an equitable tax regime, low interest rates, a sensible immigration policy, a well-planned education system and an appropriate mix of skills in the labour market.⁹⁰ This broad view of industrial relations invites us to see the measurement of the success of labour law 'reforms' through a variety of lenses including those of the economist,⁹¹ the lawyer, the historian, the sociologist, the trade unionist,⁹² the capitalist, the employer,⁹³ the employee, the lawyer, the academic⁹⁴ and the politician.⁹⁵ Each viewpoint is valid and each will measure the efficacy of any

88 Above n 39.

89 The keynote address at the NZLS Employment Law Conference 2004 was entitled 'Whose life is it anyway?' and its theme was the enormous changes to working life and the composition of the workforce in the past 20 years: Professor Ron McCallum, 'Whose Life is it Anyway? Work, Technology, Family and the Challenge to 21st Century Labour Law' (Speech delivered at the New Zealand Law Society Employment Law Conference, New Zealand, 11-12 October 2004).

90 The South African government recognises this and in late March 2006 launched the Joint Initiative on Priority Skills Acquisition (JIPSA). Speaking at the launch, the Deputy President of the Republic commented that a shortage of skills is hampering attempts to grow the economy faster and was a potentially fatal constraint. 'That fact should be admitted with emphasis,' she said: Thabang Mokopanele, 'Skills Revolution Needed, says Mlambo-Ngcuka', *Business Report* (South Africa) 28 March 2006, 3.

91 If, as is frequently claimed, the outcome of labour law 'reforms' is increased productivity and economic growth, then how is the cause and effect demonstrated? Could there be causes other than, and more significant than, legislation?

92 Neva Makgetla, 'Labour legislation protects the weakest', *The Sunday Times* (South Africa), 24 July 2005, 9.

93 See Chaney, above n 4.

94 The suggestion of this paper, that the more things change the more they remain the same, is nowhere better illustrated than in the topics chosen for conferences by academic labour lawyers. This applies to national, regional and international conferences.

95 The President of the Republic of South Africa has been reported as insisting that skills and training are essential to ensure that economic growth is shared. This is part of the accelerated and shared growth initiative (ASGiSA) recently launched in South Africa. See Alide Dasnois, 'Development of Skills 'Essential' for Shared Growth', *Business Report* (South Africa), 27 February 2006, 15.

‘reform’ against the outcome which those making the judgment expect of the ‘reform’.⁹⁶

IX CONCLUSION

The common theme in the ‘reforms’ outlined in these three countries is the tug-of-war between proponents of a labour market that is totally flexible and unregulated, and which allows both employers and employees to make their own choices to do what they wish, and, at the other end, those who advocate intervention into almost every activity of employer and employee in the workplace. Clearly if pushed to the extreme, neither position is sustainable over time on its own. What the history of constant ‘reforms’ teaches us is that achieving a balance between the two extremes is no easy task. What should also be learnt is that the assumption behind the efforts of the ‘reformers’ that a legal solution is available to remedy all social ills is simply not the case, as the history of ineffective anti-strike legislation demonstrates. This makes the further point that law reform does not occur in a vacuum.

The context for labour law ‘reform’ is the social activity called ‘work’. This activity is subject to constant change, which in turn carries with it constant conflict. An indication of these endless changes is found in the reality that tribunals and courts around the English-speaking world continue to have difficulty separating an ‘employment’ contract from other contractual arrangements to perform work. The fact that the notion of ‘employment’ remains elusive despite legislative guidance and two centuries of judicial deliberation makes a mockery of the continual attempts to ‘reform’ labour law and achieve ‘good’ industrial relations. The fact that *constant* ‘reform’ is undertaken points to the unintended consequences inherent in industrial relations legislation. Had the ‘reforms’ ever been sufficient, there would have been no further need for ‘reform’. The problem is that there is no agreed way to measure whether or not the ‘reforms’ have been successful. Ultimately, for this reason alone, all ‘reforms’ will be contentious.

96 Thus, the Australian Prime Minister insists that economic prosperity depends on his government’s most recent industrial relations legislation: see Norington, above n 17.