Comment

The Internationalisation of Australian Industrial Law: The *Industrial Relations Reform Act* 1993[†]

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1. *Introduction*

Throughout this century, Australians and New Zealanders have been justly proud of their home-grown method of resolving industrial disputes by compulsory conciliation and arbitration. Under these countries' industrial laws, where industrial disputes could not be resolved through conciliation, a labour court or tribunal was given statutory powers to end these disputes through final and binding arbitration. The Australian/New Zealand systems have not been without problems. Until recently, most trade unions which initiated industrial disputes enrolled members on a craft or occupational basis. This meant that the results of arbitrations were embodied in awards which applied to large numbers of employers. Most awards prescribed minimum wage rates and terms and conditions of employment for the employees within their coverage. Furthermore, for much of this century, awards only provided a skeleton of work rules, leaving many matters which were specific to a particular enterprise to be governed by common law contracts of employment.

Over the last dozen years, there has been a growing dissatisfaction with compulsory arbitration by most groups on the left and right of Australian industrial relations and politics. Most reformers have argued that industrial relations would be better served through some form of enterprise bargaining.[1] The issues which have separated the Liberal and National parties reforms on the one hand, from those of the Australian Labor Party on the other, are the scope of the arbitration process, and the legal powers of trade unions. Speaking generally, Labor governments have opted for a controlled form of decentralisation where trade unions have the legal right to choose between enterprise bargaining and compulsory arbitration. By way of contrast, the approach of the conservatives is to give predominance to enterprise bargaining and individual contract-making, and accordingly to limit the powers of arbitral tribunals and trade unions.

In 1991, the New Zealand government abolished the remaining vestiges of

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† This paper is dedicated to Mrs Elizabeth Dodson who was my assistant at Monash University from 1976 to 1990. The development of my career as a blind academic owes much to her dedicated care and diligent hard work.

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1 See, for example, the moderate and well thought through proposals of Professor John Niland in *Transforming Industrial Relations In New South Wales: A Green Paper* (1989).

its conciliation and arbitration machinery.[2] Labour relations in that country are now governed by individual and/or collective employment contracts. Over the last four years, the federal government and all of the state governments have reformed their industrial laws. To varying degrees, they have sought to lessen resort to arbitral tribunals and to encourage enterprise bargaining.[3] What is significant in the Australian context is that no government — no matter how committed to the free market and contractual ideology — has yet sought to abolish its conciliation and arbitration machinery in toto.[4] In part, this is because the determination of terms and conditions of employment by arbitral tribunals is still deeply embedded in the consciousness of working Australian women and men.

The subject of this comment is the latest and most significant of these reform measures. In October 1993,[5] the Australian Parliament commenced debate on the *Industrial Relations Reform Act*[6] (the "Reform Act"), which was given assent at the close of 1993.[7] This Reform Act made many significant amendments to the *Industrial Relations Act* 1988[8] which is the principal federal industrial law statute.[9] Not since the establishment of compulsory conciliation and arbitration at the turn of this century[10] has any federal government enacted such far reaching reforms to its industrial laws.

It is not my purpose to summarise every alteration contained in this measure.[11] Rather, I shall focus upon the two matters which make up the centrepiece of the Reform Act. First, the Reform Act has broadened the scope of enterprise bargaining. Many employers with non-unionised work forces are now able to enter into enterprise agreements. Furthermore, the trade union movement has been given a limited and controlled right to take industrial action when engaging in the bargaining process. A new Bargaining Division of

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2 *Employment Contracts Act* 1991 (NZ).

3 *Industrial Relations Act* 1991 (NSW); *Industrial Relations (Legislation Amendment) Act* 1992 (Cth); *Industrial Relations Amendment (Enterprise Agreements and Workplace Freedom) Act* 1992 (Tas); *Industrial Relations (Miscellaneous Provisions) Amendment Act* 1992 (SA); *Industrial Relations (Amendment) Act* 1992 (Qld); *Employee Relations Act* 1992 (Vic); *Industrial Relations (Amendment) Act* 1993 (WA); *Minimum Conditions of Employment Act* 1993 (WA); and *Workplace Agreements Act* 1993 (WA).

4 The State of Victoria has come closest to this position. For comment on Victoria, see the articles collected in (1993) 6 AJLL No 2 which is devoted to the industrial law reforms in Victoria.

5 The Industrial Relations Reform Bill 1993 was given its second reading by Mr Brereton, Minister for Industrial Relations and Minister assisting the Prime Minister for Public Service Matters. See *Weekly Hansard*, House of Representatives, 28 October 1993, 2777.

6 *Industrial Relations Reform Act* 1993 (Cth).

7 The Governor-General gave his Royal Assent on 22 December 1993.

8 *Industrial Relations Act* 1988 (Cth), hereafter "IRA". I gratefully acknowledge the assistance which I have received from my friend and colleague Associate Professor Greg McCarry and his paper entitled "*Industrial Relations Reform Act*, 1993 No 98 — Overview" *Federal Industrial Law* Bulletin 22 (January 1994).

9 The Reform Act amended a number of other statutes, the most significant alterations occurring to ss45D and 45E of the *Trade Practices Act* 1974 (Cth).

10 See *Commonwealth Conciliation and Arbitration Act* 1904 (Cth) which received Royal Assent on 15 December 1904.

11 Space will not permit me to comment upon new provisions proscribing trade union secondary boycotts. See IRA ss156-163Q. These sections place less onerous restrictions on trade union industrial action than did s45D of the *Trade Practices Act* 1974 (Cth). Note also the repeal of s45E of the *Trade Practices Act* 1974 (Cth).

the Australian Industrial Relations Commission (the "Commission") has been established with broad powers to both oversee and to control various aspects of the bargaining process.[12] The second matter is that the Reform Act has established mechanisms to ensure that most Australian workers are protected by a safety net of minimum employment rights. These minimum terms and conditions of employment cover minimum wage rates, equal pay for work of equal value, parental leave and family care leave, and most significantly of all, protection from unfair dismissals. No longer will the Industrial Division of the Federal Court of Australia have jurisdiction over federal industrial law matters.[13] Instead, the Industrial Relations Court of Australia has been created to exercise federal jurisdiction in this field.[14]

After writing about these matters in the two following sections, I shall then contend in Section 4 that the borrowing of concepts from European and North American labour law has led to an internationalisation of Australian industrial law. No longer have we a home-grown arbitral mechanism. Instead as our economy becomes more global, we have reached out and grasped foreign labour law ideas, in order to blend our industrial laws into the new industrial and economic world order.

2. *Enterprise Bargaining*

Australia's new industrial laws have established two enterprise bargaining systems; a unionised stream, and a non-unionised stream. The unionised stream is broadly similar to the mechanism which the Parliament established in 1992,[15] and accordingly it will not be necessary to give a detailed account of its familiar elements. There have, of course, been several additions and modifications; the most significant being the limited right to strike which has been bestowed upon trade unions when negotiating an enterprise agreement for a single business or single place of work. It is interesting to note that within the short life of its operation, the 1992 enterprise bargaining mechanism proved to have been rather successful. By October 1993, approximately twelve hundred enterprise agreements covering 37 per cent of the work force had been certified by the Commission.[16]

A. The Unionised Stream

The unionised stream which has now been established by the Reform Act relies for its constitutional validity on s51(xxxv) of the Australian Constitu-

12 IRA s170QA.

13 The Industrial Division of the Federal Court of Australia has exercised its industrial law jurisdiction in a competent manner. In my view, it would have been preferable for the federal Court to continue to exercise the industrial law jurisdiction under the IRA. See, McCallum, R C, "A Modern Renaissance: Industrial Law and Relations Under Federal Wigs 1977-1992" (1992) 14 *Syd LR* 401 at 429-431.

14 IRA s361.

15 See the *Industrial Relations (Legislation Amendment) Act* 1992 (Cth); and for comment, see McCallum, R C, "Enhancing Federal Enterprise Bargaining: the *Industrial Relations (Legislation Amendment) Act* 1992 (Cth)" (1993) 6 *AJLL* 63.

16 These figures were quoted by Mr Brereton in his second reading speech, *Weekly Hansard*, House of Representatives, 28 October 1993, 2777 at 2779.

tion,[17] which deals with the federal labour power. Where a trade union and one or more employers are parties to an interstate industrial dispute or to an industrial situation, that is, where they have satisfied the requirements of the federal labour power as embodied in the legislation,[18] they may engage in the bargaining process.[19] In the majority of cases these constitutional requirements will be satisfied because the disputants will be parties to a federal award already. Where the union and one or more employers reach an agreement resolving their differences, they may request the Commission to certify their enterprise agreement.[20] More often than not, such an enterprise agreement will relate to a single business or to a single place of work.

The Commission may refuse to certify an enterprise agreement outright, or instead may delay its certification until all of the statutory requirements have been completed. In brief (and the provisions are technical and complex),[21] the Commission must be satisfied that the union has consulted with the employees, and that the workers are not disadvantaged by the agreement. In relation to consultation, the Commission is required to make sure that potentially vulnerable groups of employees — women, young persons and migrants — were not only consulted, but that they comprehended the agreement.[22] The "no disadvantage" test ensures that enterprise agreements will not, when read as a whole, undercut existing terms and conditions of employment.[23] Once certified the enterprise agreement becomes binding upon the parties and may be enforced in the courts.

In Australia, it is fair to say that almost all strikes are unlawful, as they usually violate the common law, industrial legislation, and occasionally even the criminal law.[24] The Reform Act changes this position by giving trade unions and employers a rather limited and highly circumscribed right to take industrial action. This right will only operate where a trade union is seeking to negotiate an enterprise agreement which will be applicable only to a single business or to a single place of work.[25] Where a trade union wishes to negotiate such an agreement, it must notify the employer and the Commission,[26] and provided all the formalities are met, a bargaining period between the parties will commence after 7 days. During this bargaining period, after giving

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17 Section 51(xxxv) of the Australian Constitution enables the Parliament to make laws with respect to: "Conciliation and Arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state". For commentaries upon the scope of the federal labour power, see McCallum, R C, Pittard, M J and Smith, G F, *Australian Labour Law: Cases and Materials*, (2nd edn, 1990) chs 5-8; and Creighton, W B, Ford, G W and Mitchell, R J, *Labour Law: Text and Materials*, (2nd edn, 1993) chs 15-19.

18 See the definition of "Industrial dispute" in s4(1) of the IRA. An industrial situation is a new term of art, which is now defined in s4(1) of the IRA to cover industrial situations which may develop into full blown disputes if no preventative action is taken. This is an attempt to utilise the prevention limb of the labour power.

19 IRA s170MA.

20 IRA s170MC.

21 IRA ss170MC-170MD.

22 IRA s170MG.

23 IRA s170MC(1)(b) and (2); and see also s88A and s170MC(1)(a).

24 For comment, see Ewing, K D, "The Right to Strike in Australia" (1989) 2 *AJLL* 18.

25 IRA s170PC.

26 IRA s170PD.

the other side at least 72 hours notice, either the trade union members who work at the employer's establishment may take industrial action, or the employer may lock-out the employees.[27] While industrial action on the employee side covers strikes, go slows and work to rule, employers are only given the option to lock-out. The industrial action or the lock-out will be lawful and will be immune from challenge in state or territory courts, provided that there have been no violations of the ordinary criminal law, or the laws relating to the protection of property.[28] While protected action covers trade unionists, employees who are not trade union members and who choose to join in a strike will not be protected. The legislation is silent on whether an employer may dismiss strikers outright and engage a replacement work force. The scope of an employer's response to protected industrial action is bound to be litigated in the courts. In enacting these laws, the Australian Parliament has not only relied on the federal labour power, but it has also sought to call in aid various international conventions, as well as international customary law.[29]

This limited right to strike or lock-out during bargaining is akin to the position in United States and Canadian collective bargaining. In those countries, once a trade union has been certified for an enterprise or workplace, it may lawfully strike when bargaining over terms and conditions of employment.[30] In American terminology, the union and the employer may "bargain to impasse" over these matters.

Another facet of the Reform Act which has been borrowed from North America and which goes hand in hand with bargaining to impasse, is the concept of bargaining in good faith. United States[31] and Canadian[32] labour boards have endeavoured for years to prevent unfair and sharp bargaining practices. The Commission has been given broadly similar powers which are applicable to both bargaining streams, but which are likely to be most frequently utilised when trade unions seek to bargain to impasse with employers. The Commission may compel the parties to negotiate and may endeavour to ensure that there is a reasonable exchange of information.[33] It will be interesting to see how the new Bargaining Division of the Commission exercises these new and untried powers within the rough and tumble of Australian enterprise bargaining.

B. The Non-Unionised Stream

As early as August 1992, Prime Minister Paul Keating made it clear that in order to speed up workplace reform, enterprise bargaining should be made

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27 IRA s170PG.

28 IRA s170PM.

29 IRA s170PA. The use of such international instruments to uphold federal legislation will be discussed below in Section 3.

30 For an analysis of strikes within the United States collective bargaining process, see Gould, W B, *Agenda for Reform: The Future of Employment Relationships and the Law*, (1993) ch 6; and see more generally, Gould, W B, *Strikes, Dispute Procedures and Arbitration: Essays on Labor Law*, (1985).

31 For comment on bargaining in good faith in the United States, see Gould, W B, *A Primer on American Labor Law*, (3rd edn, 1993) at 103-118.

32 For comment on bargaining in good faith in Canada, see Arthurs, H W, Carter, D D and Glasbeek, H J, *Labour Law and Industrial Relations in Canada*, (2nd edn, 1985) at 219-228.

33 IRA s170QK.

available to non-unionised enterprises.[34] The trade union movement was not keen to lose its monopoly on enterprise bargaining. After much toing and froing between the Australian Council of Trade Unions ("ACTU") and the government, and after a protracted parliamentary debate, the new non-unionised stream came into existence.

Under this stream, enterprise agreements, which will be known as enterprise flexibility agreements, may be entered into by a defined class of employer and its non-unionised work force. This stream relies for its constitutional validity on the corporations power.[35] In brief, this power enables the federal government to make laws relating to foreign, trading or financial corporations.[36] This means that only employers which are constitutional corporations[37] may enter into such agreements. Furthermore, in order to confine this stream to employer corporations which are already governed by federal industrial law, such constitutional corporations must be bound by federal awards.[38]

As there is no trade union directly bargaining for the employees before certifying an enterprise flexibility agreement, the Commission must ensure that a majority of the workers approved of the proposed agreement.[39] Furthermore, any trade union which is a party to a federal award that is binding upon the corporate employer may intervene before the Commission during the certification stage.[40] The Commission's powers to refuse certification are broadly similar to the powers which it possesses in respect of unionised bargaining.[41]

Many employers, especially in the small business sector, will be unable to take advantage of the non-unionised stream even where they are already bound by federal awards. This is because they will not be incorporated. These non-unionised employers could have been included in this stream, had the government chosen to rely on other constitutional powers. While the Australian Parliament's ability to utilise international conventions to enact valid industrial laws will be examined below,[42] such an approach could have roped in these employers. The Parliament could have relied upon the International Labour Organization's ("ILO") convention on collective bargaining[43] to enable unincorporated employers to conclude enterprise agreements with their workers. If the Parliament had enacted such a mechanism, it would have had far reaching consequences. It would have been difficult to confine its operation to employers who were already governed by federal industrial law; and employ-

34 See his speech to the 12th World Congress of the International Industrial Relations Association Sydney mimeo, which was held at Sydney on 31 August 1992. See also his speech on 21 April 1993 to the Institute of Directors, Sydney mimeo.

35 Section 51(xx) of the Australian Constitution enables the Parliament to enact laws with respect to "Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth".

36 For comment on the scope of the corporations power, see Zines, L, *The High Court and the Constitution*, (3rd edn, 1992) ch 5.

37 IRA s4(1) definition of "Constitutional corporation".

38 IRA s170NC(1)(b).

39 IRA s170NC(1)(h).

40 IRA s170NB.

41 IRA ss170NC-170ND.

42 See Section 3.

43 Right to Organise and Collective Bargain, ILO Convention 98, 1949.

ers under state industrial machinery would no doubt have sought coverage by these new bargaining laws. If the non-unionised stream proves to be popular, a future government may be persuaded to extend its benefits to unincorporated employers, even if this increases the coverage of federal industrial laws as against those of the states.

3. *The Safety Net*

The approach of the Australian labor government to enterprise bargaining has been both cautious and controlled. In its view, enterprise agreements must not be used to undercut existing employment terms and conditions, nor to diminish trade union power. Several conservative state governments (and all states have Liberal and National Party coalition governments save Queensland), have established industrial law regimes which give primacy to free market forces over both arbitral tribunals and trade unions. Victoria, and to a lesser extent Western Australia, have enacted mechanisms which enable employers to conclude individual contracts with their employees without any form of trade union or tribunal scrutiny. In an endeavour to prevent the undercutting of current employee terms and conditions, the Reform Act contains a safety net of rights which is applicable to most Australian employees.

This safety net was enacted in reliance upon the external affairs power.[44] Under this constitutional head of power, the Australian Parliament may enact laws relating to the subject matter of any international treaty that Australia has signed and ratified. Over the last dozen years, the use by the Australian Parliament of this head of power has created a great deal of controversy. The High Court (albeit by majority) has upheld the reach of this power. Laws prohibiting racial discrimination, and protecting the environment have been sustained as measures properly enacted in accordance with international treaties to which Australia is a signatory.[45]

In order to legislate its safety net, the federal government has sought to rely upon a number of International Labour Organisation conventions and recommendations. These conventions are international instruments which prescribe minimum employment conditions with which ratifying countries are required to comply. The ILO was founded in 1919 as an international organisation designed to foster and protect the lives of workers.[46] Australia is a founding member of this body.

On 2 December 1992, Prime Minister Keating announced that the government would use several of the ILO conventions to enact a safety net of employee rights. This policy was subsequently adopted by the government and ACTU Prices and Incomes Accord Mark VII.[47] Given the state of the present

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44 Section 51(xxix) of the Australian Constitution enables the Parliament to make laws with respect to, "External affairs".

45 See *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 (The Racial Discrimination Case); *Tasmania and Ors v Commonwealth and Anor* (1983) 158 CLR 1 (the Tasmanian Dams Case); and *Richardson v Forestry Commission* (1988) 164 CLR 261.

46 For background on the ILO, see Valticos, N, "International Labour Law", in Blanpain, R (ed), *Comparative Labour Law and Industrial Relations*, (3rd edn, 1987) at 77.

47 Accord Agreement 1993-1996 cl 4.4.

High Court's thinking on the scope of the external affairs power,[48] it is my view that laws based on these conventions will be upheld. It is less clear that provisions based on ILO recommendations, which are not international treaties, will be held valid. The extent to which the Australian Parliament may legislate in reliance upon customary law is a rather vexed question[49] which is within the realm of international law scholars and beyond the scope of this comment. Suffice to write that as most of the safety net measures (as well as the provisions bestowing a limited right to strike during bargaining) are based on ILO conventions and on the International Covenant on Economic, Social and Cultural Rights, their substance is likely to be immune from challenge in the High Court.

A. Minimum Conditions of Employment

The Reform Act has established a safety net of minimum employment conditions. The Commission has been empowered to set minimum wage rates and to make orders providing for equal pay between the sexes for work of equal value. The statute also gives Australian workers the right to take parental leave, as well as providing a mechanism for the future implementation of a family care leave scheme.

The government relied on the external affairs power in conjunction with the ILO Minimum Wage Convention,[50] to empower the Commission to make orders setting the minimum wage for any group of eligible employees.[51] Orders may be sought by the dissatisfied employees or a trade union which has coverage over them.[52] Eligible employees are workers who are neither covered by a federal award, nor come within the realm of a state system where there is access to compulsory arbitration. In other words, the orders will assist employees who are currently award free, as well as workers in states such as Victoria who do not have direct access to a compulsory arbitration tribunal.

Australia appears to have made greater progress in narrowing the wages gap between men and women, than have comparable countries like the United Kingdom, Canada and the United States. In large part, this progress appears to be due to the operation of arbitral tribunals, and to the employment of women in our large public sector.[53] Nevertheless present wage structures are still very unequal. For example, in August 1989, women earned only 83 per cent of the average ordinary time earnings of their male counterparts. When earnings of

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48 For discussions of the external affairs power, see Zines, above n36 ch 13; Crock, M E, "Federalism and the External Affairs Power", (1985) 14 *MULR* 238; Lee, H P, "The High Court and the External Affairs Power", in Lee, H P and Winterton G (eds), *Australian Constitutional Perspectives*, (1992) 60; and Ludeke, J T, "The External Affairs Power; Another Province for Law and Order?" (1993) 35 *JIR* 453 .

49 For a brief comment, see Zines, above n36 at 245 and the references there cited.

50 Minimum Wage Fixing, ILO Convention 131, 1970.

51 IRA s170AC.

52 IR s170AD.

53 For discussions on women's struggle for equal pay for work of equal value, see Burton, C, *The Promise and the Price: The Struggle for Equal Opportunity in Women's Employment* (1991) esp chs 8-11; Hunter, R, "Women Workers and Federal Industrial Law From Harvester to Comparable Worth" (1988) 1 *AJLL* 147; and Bennett, L, "Equal Pay and Comparable Worth and the Australian Conciliation and Arbitration Commission" (1988) 30 *JIR* 533.

all workers are included, including part-time employees and overtime pay, women only earn 65 per cent of the earnings of men.[54]

The Reform Act has given the Commission power to make orders providing for equal pay as between the sexes for work of equal value.[55] These orders may be made in favour of any employees who do not have an adequate alternative remedy under federal or state law to secure pay equity.[56] In order to uphold these provisions, the Parliament has relied upon a raft of international instruments.[57] In my view, the powers of the Commission do not relate merely to making equal pay orders simpliciter, but enable it to make orders over pay equity between various occupational categories of employment.

Although the right to take twelve months unpaid parental leave on the birth of a child[58] has been granted to many employees by industrial tribunals[59] and by statute,[60] the Reform Act enables all Australian employees to have the opportunity to take time off work to care for a child.[61] The significance of enacting a law on parental leave is that it gives the leave taking parent the right to return to her or his job once the leave has ended. To enable true equality in this area, however, the government should give some thought to enabling those who are undertaking full-time care of their children some further tax breaks and appropriate social security payments. Recent enactments on parental leave have been made in comparable countries. In 1993, United States President Clinton signed into law the the *Family and Medical Leave Act*.[62] In the same year, the United Kingdom Parliament passed the *Trade Union Reform and Employment Rights Act*[63] which broadened English maternity leave law, in order to bring that country into line with the *Pregnant Workers Directive*[64] of the European Union (formerly the European Community).

In the Senate, the Reform Act was altered in order to give power to the Commission to conduct a test case into family care leave. The Commission is required to hold a hearing in 1994, in order to make recommendations when, and under what circumstances, an employee shall be entitled to take unpaid leave to care for a close family member who is ill.[65] The Commission is required to furnish these recommendations to the Minister for Industrial Relations, in order that they may act as a basis for future family care leave

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54 See National Women's Consultative Council, *Pay Equity for Women in Australia*, AGPS (1990) chs 3-5.

55 IRA ss170BB and 170BC.

56 IRA s170BE.

57 The major instruments are: Equal Remuneration, ILO Convention 100, 1951; Discrimination (Employment and Occupation), ILO Convention 111, 1958; and the United Nations Convention on the Elimination of all Forms of Discrimination Against Women.

58 There are also provisions for unpaid adoption leave.

59 See, for example, *Parental Leave Case* (Australian Industrial Relations Commission) (1990) 36 IR 1.

60 See, for example, *Industrial Relations Act* 1991 (NSW) ss25-69.

61 IRA s170KA; and see also schedule 14.

62 Gould, above n30 at 58.

63 *Trade Union Reform and Employment Rights Act* 1993 (UK). For comment, see Ewing, K D, "Swimming With the Tide: Employment Protection and the Implementation of European Labour Law" (1993) 22 *ILJ* 165.

64 Council Directive, 92/85.

65 IRA s170KAA.

legislation. The government has relied primarily upon the Workers with Family Responsibilities Convention when enacting these parental leave and family care leave provisions.[66]

B. Unfair Dismissals

Most foreign observers of Australian industrial law and relations are surprised to learn that throughout almost all of this century, the federal industrial tribunals have not had the power to order the reinstatement of workers who have been dismissed harshly, unjustly or unreasonably. In 1984, the Federal Commission did place clauses in awards prohibiting unfair dismissals.[67] However, it was not until the High Court handed down two favourable decisions in 1993,[68] that the power of the Commission to reinstate unfairly dismissed employees was confirmed. The Reform Act has at long last enacted a legislative code to protect most Australian employees from arbitrary and unfair terminations. Of all the measures contained in this safety net, this code will have the greatest effect upon the daily lives of most Australian workers because it will strengthen their security of employment.

The code has substantive, procedural and remedial elements. As a matter of substantive law, an employer may only lawfully dismiss an employee, with or without notice, for reasons relating to capacity, conduct or because of the operational requirements of the business.[69] In these circumstances a termination will be harsh, unjust or unreasonable where the incapacity, misconduct or operational requirements cannot justify a dismissal.[70] Discriminatory terminations are also prohibited.[71]

There are also three procedural elements which must be complied with, when employers seek to terminate. The code lays down minimum periods of notice which must be given to employees before termination,[72] unless summary termination is warranted owing to employee misconduct. The required period of notice is on a sliding scale and is similar to the notice provisions which were inserted into federal awards after the 1984 *Termination Change and Redundancy Case*.[73] Under this scale, an employee with not more than one year's service must receive one week's notice, while an employee with more than five years service must receive four weeks notice.[74]

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66 Workers with Family Responsibilities, ILO Convention 156, 1981.

67 *Termination Change and Redundancy Case* (Australian Conciliation and Arbitration Commission) (1984) 8 IR 34.

68 *Re Boyne Smelters Ltd; Ex parte Federation of Industrial Manufacturing and Engineering Employees of Australia* (1993) 112 ALR 359; and *Re Printing and Kindred Industries Union; Ex parte Vista Paper Products Pty Ltd* (1993) 113 ALR 421.

69 IRA s170DE(1).

70 IRA s170DE(2).

71 An employer may not terminate an employee by reason of, inter alia, temporary illness or injury; trade union membership or non-membership; or on grounds of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin. IRA s170DF.

72 An employer may dispense with the notice period if the employee is given pay in lieu of notice.

73 (1984) 8 IR 34.

74 The notice period will be increased by one week where an employee has more than two years service and is over 45 years of age.

The second procedural matter relates to terminations on grounds of capacity or conduct. An employer must inform the employee of the reason for a proposed dismissal and give the employee a reasonable opportunity to make a defence, unless in all the circumstances it would not be reasonable for the employer to delay the termination.[75] Consultation with trade unions prior to terminating 15 or more employees on economic grounds is the final procedural element.[76] Where the employer fails to engage in meaningful consultations, the Commission may exercise broad ranging powers to reverse any prior terminations, and require negotiations and the exchange of information.[77] The Commission may also prescribe general rules relating to severance allowances.[78]

A terminated employee or the relevant trade union, may seek a remedy within 14 days, from the Industrial Relations Court of Australia.[79] Before further dealing with the matter, the Court must unless special circumstances exist, refer it to the Commission for conciliation.[80] Where conciliation fails, the Court may hear the claim. If it finds that the dismissal contravened the code, it may order the employer to reinstate and/or to compensate the employee.[81]

An employee will not have a remedy under the code where there is an adequate alternative remedy.[82] While there is much room for legal argument over the scope of this exempting provision, no current state unfair dismissal regime is as broad in its scope as the federal dismissal code. All employees under state industrial laws who do not have access to re-instatement remedies for unfair dismissal will most certainly come within the code.

The Reform Act also permits the government to make regulations excluding certain classes of employees from the scope of the unfair dismissal code.[83] It will be possible to exclude workers on probation, employees on fixed term contracts, and persons who are employed as casuals on a short-term basis. It is to be hoped that when exercising this power, the government ensures that some protection is given to these groups, and in particular to the growing army of casual employees.

When enacting these unfair dismissal laws, the Parliament has utilised the ILO Convention and Recommendation on Termination of Employment.[84] It is interesting to note that by September 1993 only 18 countries had ratified this Convention.[85] Apart from Australia, the industrialised nations in this group

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75 IRA s170DC.

76 Employers are also required to inform the Commonwealth Employment Service when dismissing 15 or more employees.

77 IRA s170GA.

78 IRA s170FA.

79 IRA s170EA.

80 IRA s170EC.

81 IRA s170EE.

82 The alternative remedy must meet the standards set by the Termination of Employment, ILO Convention 158, 1982. IRA s170EB.

83 Such regulations are tied to art 2(2) of the Termination of Employment, ILO Convention 158, 1982. IRA s170CC.

84 *Termination of Employment*, ILO Convention 158, 1982; and Termination of Employment, ILO Recommendation 166, 1982.

85 These figures were given by Brereton, the Minister for Industrial Relations, in answer to a question on notice, *Weekly Hansard*, House of Representatives, 29 September 1993, 1240 at 1243.

are Finland, France, Spain and Sweden. Australia did not ratify this Convention until 26 February 1993, which was less than three weeks before the 13 March 1993 federal election which returned the labor government to power for another term. In my view, the small number of ratifications does not lessen the international nature of the Convention, nor should it tell against the validity of these measures in any constitutional challenge in the High Court. What it does show, however, is that the parliament has enacted standards in this area which are at the forefront of international thought on employment termination.

C. *The Safety Net and the Setting of Standards*

The new federal laws on minimum wage rates, equal pay for work of equal value, parental leave and the unfair dismissal code, have the potential to cover most Australian employees. The extent of their operation will depend upon the adequacy or otherwise of state industrial laws. This is because all of the safety net measures only operate on employees covered by state industrial laws, where those laws fall below the standards of the safety net. By bringing its laws into line with the safety net, a state parliament can maintain full coverage of workers who come within its realm. If a parliament refuses to match the federal laws, its control of workers will be diminished. In this sense, the provisions of the Reform Act can be viewed as standard setting legislation.

In view of the cooperation between the current government and the ACTU since 1983, it is fair to describe the Reform Act as social contract legislation. It is somewhat akin to the minimum rights legislation which operates in some western European countries.[86] There are also parallels between the federal government's method of regulation, and the work of the European Commission which ensures that member countries comply with its directives on workers' rights.[87]

4. *The Process of Internationalisation*

During the first decade after Federation, Australian governments established compulsory conciliation and arbitration machinery, primarily to bring about industrial peace, by attempting to substitute the rule of law for industrial conflict.[88] For the next 80 years, this machinery remained largely unchanged. Indeed, if H B Higgins had viewed federal industrial law in 1985, he would have perceived few divergences from his blueprint. The stability was due to the success of these systems in providing employees with fair wage rates and reasonable terms and conditions of employment. Over the present decade, however, Australia has been moving into the mainstream of the world economy. The deregulation of our financial markets in the mid-1980s, coupled with the lowering of our tariffs, have forced most of our industries to either become more competitive or to go out of business. Whether or not these

86 For an overview of European industrial relations, see Ferner, A and Hyman, R (eds), *Industrial Relations in a New Europe* (1992).

87 See Davies, P L, "The Emergence of European Labour Law", in McCarthy, W (ed), *Legal Interventions in Industrial Relations: Gains and Losses* (1992) at 313.

88 See Macintyre S and Mitchell, R J (eds), *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration: 1890 to 1914* (1989).

changes were brought about by free marketeers or were inevitable is beside the point. In the current economic climate, enterprises are seeking to increase efficiency and productivity. This in turn has caused our centralised industrial relations system to become more flexible, with the federal Commission encouraging workplace bargaining.[89] Over the last half dozen years, we have seen an avalanche of federal and state legislation facilitating enterprise bargaining.

The framers of the Reform Act sought to build a consensus from conflicting demands. Business wished for the availability of federal enterprise bargaining to the non-unionised sector. The trade unions did not wish to lose their bargaining monopoly. They also demanded the right to engage in industrial action when participating in the bargaining process. Workers under free market oriented state industrial laws urged the federal government to protect their current and future terms and conditions of employment.

In order to satisfy these demands, the federal government has drawn upon North American, European and international laws as supplements to its compulsory conciliation and arbitration mechanism. Under this new legislation, trade unions may take industrial action and employers may lock-out their workers during the bargaining process. The Commission has powers to ensure that such bargaining is in good faith. In writing the new strike and good faith bargaining laws, the policy advisers and drafters have drawn upon similar laws which exist in the United States and Canada. The non-unionised bargaining stream has been engrafted upon the unionised bargaining mechanism. Now, non-unionised employers who are incorporated and are covered by federal industrial law, have been given the right to engage in enterprise bargaining. Trade unions may appear at certification hearings in the non-unionised bargaining stream.

The safety net of terms and conditions of employment is based upon ILO Conventions which reflect international thinking in these areas. While the parallels are less exact here, much of the safety net is similar to European social contract legislation. Furthermore, the standard setting by the federal government has similarities to the work of the European Commission in the European Union.

In these respects, the Reform Act marks the commencement of the internationalisation of Australian industrial law. As the world shrinks and as our nation becomes integrated more closely into the world economy, it is both natural and inevitable that policy-makers turn to the laws of other comparable countries to ensure the viability of laws governing the workplace. As Sir Otto Kahn-Freund pointed out 20 years ago, the transplantation of foreign laws will be a failure if they are not tailored to the political, economic and cultural norms of the recipient nation.[90] Rather than engaging in wholesale transplantation, the Reform Act has drawn guidance from the laws of foreign nations. It is true that the legislation does parallel a number of international conventions, but they are minimalist in nature and have been adopted by international bod-

89 See *National Wage Case 10 March 1987* (Australian Conciliation and Arbitration Commission) (1987) 17 IR 65, where the Commission through its Restructuring and Efficiency Principle enabled workplace bargaining to take place over a second tier wage increase in return for improvements in work practices and productivity.

90 Kahn-Freund, O, "On Uses and Misuses of Comparative Law" (1974) 37 *Mod LR* 1.

ies. In my opinion, this form of careful and considered international transplantation is likely to be a success.

5. *Conclusion*

I am confident that history will be kind to the Reform Act. It is the latest measure in a group of federal and state laws which have sought to decentralise our compulsory conciliation and arbitration mechanisms. The Reform Act has opened up enterprise bargaining to some non-unionised employers, but has sought to safeguard their work forces from exploitation. Trade unions and employers have been given a limited right to use economic weapons in the bargaining process, while the Commission has power to prevent unfair bargaining practices. In an endeavour to protect workers' minimal terms and conditions of employment, a safety net of measures has been enacted covering minimum wage rates, equal pay for work of equal value, parental leave, and unfair termination. In engaging in this standard setting exercise, the Australian Parliament has placed less reliance upon the federal labor power, and more upon the corporations power and the external affairs power. At long last, the Australian Parliament has accepted responsibility for establishing uniform employment standards, which are well thought through and which will enhance the lives of most working women and men.

When framing these laws, the Parliament has borrowed from Europe, from North America and from the international community. Home grown laws on compulsory conciliation and arbitration now belong to a past era. The future is squarely in the hands of an internationalised Australian industrial law.