COLLECTIVE LABOUR LAW, CITIZENSHIP AND THE FUTURE*

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[This paper is a revised version of the Foenander Lecture which was delivered at The University of Melbourne on 9 October 1997 The thesis of this paper is that over the last 25 years, Australia's systems of compulsory conciliation and arbitration have been unable to deliver a mature system of collective labour law. This is because they fail both to recognise the individual rights and aspirations of workers, and to ground these collectivist mechanisms firmly in the Australian polity. The inability of the Industrial Relations Commission to make reinstatement orders until 1993 demonstrates that the High Court and Parliament were content to downplay individual rights Australia's labour tribunals have yet to be grounded within the national polity because insufficient attention has been paid to the concept of industrial citizenship. One badge of industrial citizenship is the right to have terms and conditions of labour determined on a collective basis by bodies which are independent of both the executive and Parliament.]

I INTRODUCTION

Chancellor Woodward, distinguished guests, family and friends. I am truly honoured to be standing before you this evening at The University of Melbourne. The Foenander Lecture is, without doubt, one of the premier industrial relations forums in Australia because for a decade these talks have played a prominent part in reshaping national industrial relations debates.

It is an enormous thrill to be here to play my part in this series of lectures — to be in my home city, to be among family and friends, and to have the opportunity to explain to this select audience my vision of the preferred future of our industrial relations laws is absolutely marvellous. Few disabled people are ever given such a platform, and I am privileged to be representing the disabled community on this occasion.

This lecture series is to honour the memory of the late Orwell de R Foenander, who taught industrial relations at this university for many years and who was the pioneer scholar of Australian industrial relations law. My eminent predecessors in this series of lectures have set a very high standard. For example, Professors John Niland,[1] Di Yerbury[2] and Keith Hancock[3] and Justice Michael Kirby[4] have used

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1 John Niland, 'The Light on the Horizon: Essentials of an Enterprise Focus' in Michael Easson and Jeff Shaw (eds), *Transforming Industrial Relations* (1990) 182

this Foenander platform to philosophise and to speculate upon the current and future changes in our industrial relations laws and practices. In my examination of the plight of collective labour law, I shall follow in their footsteps. I shall throw away some of the old industrial relations shibboleths and argue that what Australia really needs is a revitalised system of collective labour law.

Much has been written on changes to work practices, industry restructuring and the pressures of economic globalisation which led to the partial deregulation of our federal and state labour relations systems over the past decade.[5] However, my focus this evening will be on our labour laws, on their shortcomings and on the manner in which they have been interpreted by our courts. It is my contention that over the last quarter of a century, compulsory conciliation and arbitration has been slow to deliver to this country a mature labour law system because it has downplayed individual rights and has failed to ground itself within the Australian political system. While in my view this is true with respect to all our federal and state labour law mechanisms to varying degrees, my focus this evening will be upon federal industrial law. Although the post-Whitlam era in Australia could be characterised as the era of individual human rights, our conciliation and arbitration tribunals — especially at the federal level — have failed to break free from their collectivist moulds to encompass many of the individual aspirations of working women and men. In large part, these limitations have been the result of complacent trade unions and employer associations, of timorous Parliaments and of what I shall describe as linear thinking by some of our courts. Adherents of collective labour law have been unable to ground its system of public tribunals in the Australian political system. These adherents fail to recognise that the benefits which such tribunals bestow on working women and men, through test case decisions like parental leave[6] and family leave,[7] are a fundamental aspect of Australian citizenship. This is because the test case approach enables advances in social arrangements and productivity gains to be evenly bestowed upon Australian citizenry at work.

To make good this bold argument, I shall take 1971 as my base year, as this is the date of Foenander's last work.[8] Through an examination of collective labour law in the quarter of a century between then and now, I shall show how it failed

[2] Di Yerbury, 'Industrial Regulation after Hancock' (Address presented at the second Foenander Lecture, The University of Melbourne, 19 October 1987).

[3] Keith Hancock, 'Industrial Regulation in Australia' (Address presented at the first Foenander Lecture, The University of Melbourne, 21 October 1986).

[4] Justice Michael Kirby, 'Industrial Regulation in the "Frozen" Continent' (1989) 2 *Australian Journal of Labour Law* 1.

[5] For my own thoughts on these issues, see Ronald McCallum, 'The New Millennium and the Higgins Heritage: Australian Industrial Relations in the 21st Century' (1996) 38 *Journal of Industrial Relations* 294; Ronald McCallum, 'Crafting a New Collective Labour Law for Australia' (1997) 39 *Journal of Industrial Relations* 405.

[6] *Parental Leave Case* (1990) 36 IR 1.

[7] *Family Leave Test Case* (1994) 57 IR 121. See also *Personal/Carer's Leave Test Case-Stage 2* (1995) 62 IR 48.

[8] Orwell de R Foenander, *Industrial Conciliation and Arbitration in Australia* (first published 1959, 1971 ed)

to break out of its narrow paradigm and to embrace the changing aspirations of Australian citizens.

It is my view that these failures to broaden our processes of conciliation and arbitration left them in a weakened state, so that they became easy prey for the proponents of labour relations deregulation. As the world of work changed in the 1980s and beyond, all that stood between the deregulators and their goal were weakened and narrow systems of federal and state conciliation and arbitration.

II ORWELL DE R FOENANDER

When I began reading labour law at Melbourne's Monash University almost 30 years ago in March 1970,[9] Foenander's *Industrial Conciliation and Arbitration in Australia*[10] was one of the first books that I purchased as I began to build my labour law library. In my view, this little book and Foenander's other volumes[11] can be comprehended best as catalogues of the relevant Australian case law which he classified and sub-classified so that he could build and then explain a neat pyramidal structure of precedents. Orwell Foenander was, for very many years, the keeper of our collective labour law memory, and although his work may appear simple to later scholars, Foenander was a pioneer builder and he had to start from scratch. Once his matrix was in place, other writers were able to build upon this foundation.

Upon reading his work, however, two things stand out, especially to labour lawyers in the late 1990s. For Orwell Foenander, conciliation and arbitration was an unquestioned feature of Australian 20th century life. It was as home grown as Australian Rules football and as unchangeable as the stars in the Southern Cross. In the introduction to his revised 1971 edition of *Industrial Conciliation and Arbitration in Australia*, he expressed this rather static view of Australian conciliation and arbitration eloquently when he wrote:

> There are few signs of any real significance that compulsory conciliation and arbitration ... are losing their hold on the popular imagination in Australia, and that their inclusion as methods in the industrial codes of that country is in any material sense endangered. The trade unions — particularly the larger ones — are aware of the considerable advantages that have accrued to themselves, and their members, from the usage and practice of industrial arbitration, and the general body of Australians have come to regard the industrial tribunals as integral in the institutionalism of their country, and the activities of these tribunals as part and parcel of the course of their daily life.[12]

[9] I studied labour law in 1970 under Professor Harry Glasbeek. After two weeks of his classes I decided to dedicate my professional life to labour law scholarship. I owe Harry an enormous debt.

[10] Foenander, *Industrial Conciliation and Arbitration in Australia*, above n 8.

[11] See, eg, Orwell de R Foenander, *Towards Industrial Peace in Australia: A Series of Essays in the History of the Commonwealth Court of Conciliation and Arbitration* (1937); Orwell de R Foenander, *Solving Labour Problems in Australia: Being an Additional Series of Essays in the History of Industrial Relations in Australia* (1941), Orwell de R Foenander, *Trade Unionism in Australia: Some Aspects* (1962).

[12] Foenander, *Industrial Conciliation and Arbitration in Australia*, above n 8, vii.

The second striking feature of his work is that it concentrated almost exclusively upon collective labour law. In Foenander's world of trade unions, tribunals, courts and employers, there was little room for individual rights. Issues like discrimination, harassment and employment termination were not really part of his landscape. Even the problem of unfair dismissals was not perceived from the standpoint of the individual employee who had been improperly terminated. Rather, the fairness of a termination was but one of a number of matters which were best sorted out in the ebb and flow between the collective parties of labour and capital.

I mean no disrespect to his memory, but my thesis for this evening's lecture is that the seeds of the destruction of Australian conciliation and arbitration as we knew it can be found in the failure to place collective labour law squarely within the Australian political process, together with the inability of the arbitral functions to speedily come to grips with the individual aspirations of post-industrial employees who possess high levels of education. These workers in our postmodern and microchip-driven world are used to having their individual needs catered for in most aspects of public life. However, throughout the 1970s and 1980s they perceived the inability of the industrial relations mechanisms to adhere to post-1960s standards of human rights as proof that such mechanisms should be relegated to the manufacturing economy of the previous generation.

III THE GROWTH OF HUMAN RIGHTS LAW 1972–1997

The last quarter of a century has witnessed the remarkable growth of Australian human rights law. When this is coupled with the new forms of administrative review and our openness in politics, it is clear that we inhabit a different world from the rather 'comfortable' 1960s.

Less than three weeks after the federal Labor government was elected in December 1972, Australia ratified the *International Covenant on Civil and Political Rights*.[13] Australia took this step because of the international law outlook of Prime Minister Gough Whitlam. One of his goals was to place Australia at the forefront of world international law developments. He saw Australia as a nation which could join the small but highly developed powers like Canada and the Nordic countries as a significant player in the international legal realm.[14] Whitlam recognised this in a speech delivered at Monash University in 1989, where he reflected that during his time in government '[i]t had become more and more obvious to me that the best and perhaps the only hope of achieving comprehensive and contemporary standards of human rights in Australia was through international conventions'.[15] To this end, his government signed various interna-

[13] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976). Australia ratified this covenant on 18 December 1972.

[14] See, eg, E G Whitlam, 'The Eighteenth Wilfred Fullagar Memorial Lecture: International Law-Making' (1989) 15 *Monash University Law Review* 176

[15] Ibid 176.

tional treaties, together with a series of International Labour Organisation ('ILO') Conventions.[16]

The international convention which was to impact upon Australian human rights law more than any other instrument was the *International Convention on the Elimination of All Forms of Racial Discrimination*, ratified by Australia in 1975.[17] In reliance upon this convention, the Whitlam government immediately passed the *Racial Discrimination Act 1975* (Cth). Given that the United States Congress had enacted the *Civil Rights Act*[18] in 1964, and that in 1968 and 1975 the English Parliament passed laws prohibiting racial and sexual discrimination,[19] it was unsurprising that the Australian government also began to enact similar measures. The High Court upheld the validity of the *Racial Discrimination Act 1975* (Cth) by a four to three majority in the 1982 case *Koowarta v Bjelke-Petersen*.[20] By holding that the Australian Parliament could utilise the external affairs power[21] to enact into domestic law the subject-matter of international treaties, the High Court gave enormous impetus to human rights law.

While issues of racial discrimination do surface in employment situations from time to time, sex discrimination is a much larger problem in Australian workplaces. The Whitlam government did not take any immediate legislative steps in this area. South Australia became the first state to outlaw this form of discrimination in 1975.[22] Within three years New South Wales[23] and Victoria[24] followed suit. In 1984, the federal Parliament also proscribed discriminatory conduct on the grounds of sex, marital status and pregnancy.[25] By the mid-1980s, a network of federal and state anti-discrimination tribunals criss-crossed the nation. The majority of matters which have come and which still come before these bodies relate to discrimination in employment.[26] During the 1970s and 1980s, awards

16 *ILO Convention (No 87) Concerning Freedom of Association and Protection of the Right to Organise*, opened for signature 9 July 1948, 68 UNTS 17 (entered into force 4 July 1950); *ILO Convention (No 98) Concerning Application of the Principles of the Right to Organise and to Bargain Collectively*, opened for signature 1 July 1949, 96 UNTS 257 (entered into force 18 July 1951); *ILO Convention (No 131) Concerning Minimum Wage Fixing*, opened for signature 22 June 1970, 825 UNTS 77 (entered into force 29 April 1972); *ILO Convention (No 100) Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*, opened for signature 29 June 1951, 165 UNTS 303 (entered into force 23 May 1953), *ILO Convention (No 111) Concerning Discrimination in Respect of Employment and Occupation*, opened for signature 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960).

17 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969)

18 *Civil Rights Act*, 42 USCA s 21 (West 1994).

19 *Race Relations Act 1968* (UK) now repealed and replaced by *Race Relations Act 1976* (UK); *Sex Discrimination Act 1975* (UK).

20 (1982) 153 CLR 168.

21 *Australian Constitution* s 51(xxix)

22 *Sex Discrimination Act 1975* (SA).

23 *Anti-Discrimination Act 1977* (NSW)

24 *Equal Opportunity Act 1977* (Vic), now repealed and replaced by *Equal Opportunity Act 1995* (Vic).

25 *Sex Discrimination Act 1984* (Cth)

26 See the data collected in Human Rights and Equal Opportunity Commission, *1995–1996 Annual Report* (1996). For example, during the reporting period from 1 July 1995 to 30 June 1996, in the field of sex discrimination the Commission received 921 complaints concerning discrimination in employment out of a total of 1115 complaints (at 91). Similarly, for discrimi-

and agreements were exempted from the provisions of these anti-discrimination statutes,[27] and this meant that the industrial tribunals were not often called upon to directly confront discrimination matters. When issues of discrimination did surface, more often than not the tribunals focused upon the collectivist aspects of these issues.[28] With their individual complaint-based mechanisms and their capacities to award damages, the various anti-discrimination tribunals became the preferred venue for most complainants. For the first time, the labour tribunals found that a different form of adjudication was competing with them for business in the workplace.

In a very real sense, it was technical rulings by the courts which prevented the labour tribunals from breaking free from their collectivist paradigm. To show how the courts have impeded the growth of human rights labour law, I shall examine two phenomena: the crisis in our federal unfair dismissal laws and the inability of federal awards to be properly enforced. After these matters have been discussed, I will comment on awards, industrial tribunals and citizenship. Finally, I shall conclude by suggesting some strategies for the future which, if adopted, would lead to a strengthening of collective labour law.

IV THE FEDERAL UNFAIR DISMISSAL CRISIS

Why have the two most recent federal election campaigns been dominated by the unfair dismissal laws? Why in the March 1993 election campaign did Prime Minister Keating promise to establish federal termination laws, and why did Opposition Leader Howard use the failure of these laws as one of his key strategies for winning votes in the March 1996 election? The answer is that this crisis in federal unfair dismissal laws was brought about largely by the failure of labour lawyers and High Court judges to act with haste so as to enable the Australian Industrial Relations Commission ('the Commission') to use its dispute settlement powers to order the reinstatement of unfairly dismissed workers.[29]

You will recall that the labour power set out in s 51(xxxv) of the *Australian Constitution* enables the Parliament to make laws with respect to '[c]onciliation

nation on the grounds of race, it received 263 complaints concerning employment out of a total of 590 complaints (at 76). In the area of disability discrimination, the Commission received 335 complaints relating to employment out of a total of 726 complaints (at 104).

27 See especially Therese MacDermott, 'Amendments to the Sex Discrimination Act 1984 (Cth)' (1994) 7 *Australian Journal of Labour Law* 95, 98–9. See generally James Macken *et al*, *Macken, McCarry and Sappideen's The Law of Employment* (4th ed, 1997) 643–5.

28 See, eg, *Re Municipal Officers Association of Australia* (1978) 203 CAR 584 ('*Rockhampton City Council Case*') See generally Marilyn Pittard and Ronald McCallum, 'Industrial Law 1978' in Robert Baxt (ed), *An Annual Survey of Australian Law 1978* (1979) 164, 203–5.

29 In this section, I comment upon a series of High Court decisions concerning the powers of what is now the Australian Industrial Relations Commission. In these decisions, employers challenged the capacity of the Commission to promulgate award clauses which gave it the power to reinstate unfairly dismissed employees. Employers argued that these proposed clauses were either contrary to the *Australian Constitution* or that they went beyond the provisions in the federal industrial law statute. In this article it is not possible to discuss the arguments in these decisions at any length. Readers seeking further details should examine Ronald McCallum and Marilyn Pittard, *Australian Labour Law: Cases and Materials* (3rd ed, 1995) 502–53.

and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.'

In the 1970s and 1980s, it was argued that industrial disputes could concern employee–employer relations, but that as reinstatement affected the relationship between a *dismissed* employee and a *previous* employer, there was no longer a viable industrial dispute. In other words, as the employment relationship had ended, there was no industrial element to the dispute. A good example of the manner in which this argument was used to prevent the establishment of reinstatement powers is the 1973 *City of Perth Case*.[30] In this case, the High Court invalidated a proposed clause of an award which purported to give the Commission the power to reinstate unfairly dismissed employees. The court considered that once a dismissal had taken place the employment relationship was at an end. Stephen J opined that dismissal did not amount to an industrial dispute because it concerned 'the relations of a former employer and its ex-employee'.[31] It was not until the 1984 decision in *Slonim v Fellows*[32] that the High Court recognised that dismissal could be encompassed in an industrial dispute as termination clearly concerned the employee–employer relationship. Although *Slonim* was only concerned with the powers of the Victorian Industrial Relations Commission to grant unfair dismissal remedies,[33] its reasoning eventually flowed through to the federal system.[34]

It took the High Court more time and energy to overcome the 'interstateness' hurdle. It was argued in early cases[35] that the termination of a single employee, even if unfair, could not give rise to an interstate dispute and neither could it affect a previously settled dispute. This focus upon the individual termination deflected the attention of the High Court judges away from the collective interest that all workers have in ensuring that the terms and conditions of their employment mandate fairness upon termination. This attention to the interstate dispute in isolation meant that unnecessary concerns were raised over the ambit of each dispute. This approach was not really challenged until the 1989 decision in the *Wooldumpers Case*[36] and was not wholly laid to rest until the *Boyne Smelters*[37] decision in early 1993. Finally, it took the mid-1993 *Vista Paper Products Case*[38] for the High Court to definitively hold that the lack of an interstate element in an

30 *R v Portus; Ex parte City of Perth* (1973) 129 CLR 312 ('*City of Perth Case*').

31 Ibid 329.

32 (1984) 154 CLR 505 ('*Slonim*').

33 It related to the definition of 'industrial dispute' in s 3(1) of the *Industrial Relations Act 1979* (Vic) (now repealed).

34 See, eg, *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656 ('*Ranger Uranium Case*'); *Re Boyne Smelters Ltd; Ex parte Federation of Industrial Manufacturing & Engineering Employees of Australia* (1993) 112 ALR 359, 366 (Brennan, Deane, Toohey and Gaudron JJ) ('*Boyne Smelters*').

35 See, eg, *R v Gough; Ex parte Cairns Meat Export Co Pty Ltd* (1962) 108 CLR 343; *City of Perth Case* (1973) 129 CLR 312.

36 *Re Federated Storemen & Packers Union of Australia; Ex parte Wooldumpers (Victoria) Ltd* (1989) 166 CLR 311 ('*Wooldumpers Case*').

37 (1993) 112 ALR 359.

38 *Re Printing & Kindred Industries Union; Ex parte Vista Paper Products Pty Ltd* (1993) 113 ALR 421 ('*Vista Paper Products Case*').

industrial dispute was not a barrier to the exercise of the Commission's reinstatement powers.

However, the major stumbling block for the High Court was its *Boilermakers*[39] doctrine. In the *Boilermakers Case*, it was argued that the Commonwealth Court of Conciliation and Arbitration could not exercise both judicial and administrative powers. In 1956, both the High Court[40] and the Privy Council[41] accepted this argument because, in the view of the judges, federal courts could not have their judicial powers tainted by simultaneously undertaking administrative functions. Even at the time these judgments were handed down, many prominent lawyers were critical of the rigid separation of administrative and judicial powers which would henceforth be imposed on federal courts.[42] In my judgment, the *Boilermakers* doctrine has little to recommend it. The rigid divide between administrative and judicial functions has weakened federal administrative adjudication and enforcement, especially in the field of federal anti-discrimination law.[43]

From the 1960s to the mid-1980s, the High Court was unswerving in its view that the power to adjudge a termination to be unfair and to grant the remedies of reinstatement and/or compensation was judicial power par excellence.[44] In my view, the judges seemed to regard the rigid divide between arbitration and adjudication as weighing so heavily against the Commission having power in this area, that not until a form of arbitration was created to overcome this classification issue did they really turn their minds to the problems of 'interstateness' and industrial disputation.

The breakthrough came in the High Court's December 1987 holding in the *Ranger Uranium Case*,[45] which dealt with a dispute in the Northern Territory over the dismissal of several workers. As this case concerned a dispute in a territory, there was no need for the Commission to find an interstate dispute[46] and this focused the minds of the judges on the issue of judicial power. In a brilliant dissenting opinion in the Commission, Boulton J showed the High Court a path around this crevasse.[47] By classifying arbitration as encompassing the creation of future rights and obligations to reinstate, judicial power could be circumvented. Where a dispute occurred over a dismissal, it was open to the Commission — if

[39] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 ('*Boilermakers Case*').

[40] Ibid.

[41] *Attorney-General (Cth) v The Queen* [1957] AC 288.

[42] See G Sawer, 'The Separation of Powers in Australian Federalism' (1961) 35 *Australian Law Journal* 177 and following commentary. For a more recent comment, see Justice Mary Gaudron, 'Some Reflections on the *Boilermakers Case*' (1995) 37 *Journal of Industrial Relations* 306.

[43] See, eg, *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245. For comment see Therese MacDermott, 'The Implications for Employment Law. *Brandy v Human Rights and Equal Opportunity Commission*' (1995) 8 *Australian Journal of Labour Law* 276.

[44] See, eg, *R v Gough; Ex parte Cairns Meat Export Co Pty Ltd* (1962) 108 CLR 343; *R v Gough; Ex parte Meat & Allied Trades Federation of Australia* (1969) 122 CLR 237; *City of Perth Case* (1973) 129 CLR 312; *R v Ludeke; Ex parte Queensland Electricity Commission* (1985) 159 CLR 178, 191.

[45] (1987) 163 CLR 656.

[46] *Northern Territory (Self-Government) Act 1978* (Cth) s 53(1)

[47] *Federated Miscellaneous Workers Union of Australia v Ranger Uranium Mines Pty Ltd* (1987) 19 IR 157, 172–7 (Boulton J).

in all the circumstances it was appropriate to do so — to create new rights by making an order for the employee to be reinstated and/or compensated. Once the High Court judges had crossed this Rubicon, their attitude to the arbitral powers of the Commission became much more relaxed. In the 1995 *Dingjan Case*,[48] for example, the High Court held that the Commission's power to vary and to set aside unfair contracts was clearly arbitral.[49]

In its 1985 report on Australia's industrial relations laws, the Hancock Committee of Review examined the inability of the Commission to make reinstatement orders.[50] The Committee recommended that where the Commission could not resolve termination disputes through conciliation, a federal court should be empowered to determine whether a dismissal was unfair, and if so, whether the employee should be reinstated and/or compensated.[51] In May 1987,[52] the Hawke government presented its Industrial Relations Bill to Parliament.[53] The Bill contained an unfair dismissal regime[54] under which the Commission had the power to conciliate allegations of unfair dismissal when the relevant award or agreement contained an unfair termination clause. If conciliation failed, the employee would be entitled to seek curial adjudication. Determination of whether a dismissal was unfair was to be given to a new federal court to be called the Australian Labour Court.[55] After employer opposition to the Bill (and more especially to its new approach on sanctions for industrial action), it was hurriedly withdrawn to clear the decks for the July 1987 federal election. When a new Bill was introduced into Parliament the following April (which became the *Industrial Relations Act 1988* (Cth)),[56] the unfair dismissal provisions had been deleted. Instead of creating an Australian Labour Court, the new statute retained the status quo whereby judicial issues were reposed in the Industrial Division of the Federal Court of Australia.

In his second reading speech for the 1988 Bill, the Minister for Industrial Relations explained that the unfair dismissal provisions had been deleted because in late 1987 the High Court's *Ranger Uranium Case* had held that the Commission could grant arbitral remedies to unfairly dismissed workers.[57] As the *Wooldumpers Case* showed in February 1989, however, the jurisprudence on the

48 *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 ('*Dingjan Case*').

49 See, eg, Kate O'Rourke, 'The Federal Unfair Contracts Provisions: Tested and Found Wanting: *Re Dingjan; Ex parte Wagner*' (1995) 8 *Australian Journal of Labour Law* 263.

50 Committee of Review into Australian Industrial Relations Law and Systems, *Australian Industrial Relations Law and Systems: Report of the Committee of Review* (1985) vol 2, 347–9

51 Ibid 353–9.

52 Commonwealth, *Parliamentary Debates*, House of Representatives, 14 May 1987, 3164 (Ralph Willis, Minister for Employment and Industrial Relations).

53 Industrial Relations Bill 1987 (Cth) For comment on the Bill, see Marilyn Pittard, 'Industrial Relations Bill 1987 and Federal Industrial Law: Whither Reforms?' (1987) 15 *Australian Business Law Review* 293.

54 Industrial Relations Bill 1987 (Cth) cll 188–92, which must be read together with the definition of 'dismissal term' in cl 4(1).

55 Industrial Relations Bill 1987 (Cth) cll 47–93.

56 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 April 1988, 2333 (Ralph Willis, Minister for Industrial Relations).

57 Ibid 2334.

powers of the Commission with respect to unfair terminations remained unsettled. Had the 1988 Act contained unfair dismissal provisions giving the Commission the power to grant arbitral remedies, the Commission would have had the opportunity to develop a jurisdiction in this field and the country would have been spared the anguish which surrounded the Keating government's 1993 termination laws. The failure of the Hawke government to come to grips with this issue in 1988 shows, in my opinion, that the government was content to downplay the role of federal collective labour law in securing individual rights.

It is clear that the breakthroughs in the High Court's case law on federal unfair dismissals were so fragmented that by early 1993 the power of the federal Commission to reinstate had not solidified into hard and fast law. The solidification of this jurisprudence only occurred with the handing down of the *Vista Paper Products Case* by the High Court on the 3rd of June of that year. As part of its election strategy for the March 1993 election, the Keating government ratified the ILO's *Termination of Employment Convention*[58] on 26 February 1993 without fully consulting the States. By signing this convention, the government was able to promise the electorate that, if returned to office, it would establish an Australia-wide regime of termination protection laws. This promise was kept later in that year with the passage into law of the *Industrial Relations Reform Act 1993* (Cth). The problem was that neither the Convention nor the Act established a regime whereby a court or tribunal could test the fairness of a dismissal. On the contrary, both the Convention and the Act prohibited all terminations unless they could be justified as concerning employee conduct, capacity or the operational requirements of the business.[59] It was only after an employer had proved that a termination was because of employee conduct or capacity, that an employee was required to prove that the lawful termination was harsh, unjust or unreasonable.[60] As Gray J aptly put it when sitting on the Full Bench of the Industrial Relations Court of Australia, these laws 'constitute a charter of rights for employees. They are directed towards the protection of the existing jobs of employees.'[61] In order to circumvent the *Boilermakers* doctrine, determination of the validity of terminations was reposed in a specialist Industrial Relations Court of Australia, which had to adhere to the rules of evidence[62] when determining issues of proof. Looking at this matter with hindsight, it is not surprising that these laws were strongly opposed by employers. Their true nature as job retention laws was never fully explained by the government, and for many the court was an expensive forum for the resolution of these matters. While the jurisprudence of the Industrial Relations Court of Australia did explain the requirements for valid dismiss-

[58] *ILO Convention (No 158) Concerning Termination of Employment at the Initiative of the Employer*, opened for signature 22 June 1982, ATS 1994 No 4 (entered into force 23 November 1985) ('*Termination of Employment Convention*').

[59] Ibid art 4; *Industrial Relations Act 1988* (Cth) s 170DE(1).

[60] *Industrial Relations Act 1988* (Cth) s 170DC(9); *Termination of Employment Convention*, above n 58, art 7. As the Convention does not use the words 'harsh, unjust or unreasonable', in *Victoria v Commonwealth* (1996) 138 ALR 129, the High Court held s 170DE(2) to be invalid as unsupported by the Convention.

[61] *Fryar v Systems Services Pty Ltd* (1995) 130 ALR 168, 189.

[62] These rules were codified in the *Evidence Act 1995* (Cth)

als,[63] many employers preferred to pay compensation rather than to litigate. Although by early 1996 these laws were made more flexible[64] and although the option of consent arbitration by the Commission was introduced as a means of bypassing the court,[65] employer disillusionment with these laws increased.

When the Howard government enacted its workplace relations legislation in late 1996,[66] it did away with these termination laws. Relying principally on the corporations power[67] for constitutional validity,[68] it enacted new provisions establishing an unfair dismissal regime[69] whereby terminations were tested against 'proscribed reasons'. At long last, the Commission was given statutory powers to arbitrate upon unfair dismissals.[70] However, as the government chose — in the main — to rely upon the corporations power and not the labour power, this new federal termination regime fails to cover all workers who come under federal labour law. As part of the government's policy to downsize awards and to clip the wings of the Commission, the Commission's award-making and dispute-settling powers to order the reinstatement of unfairly dismissed workers were abolished.[71]

In my considered judgment, academic and practising labour lawyers and the High Court must accept some responsibility for this debacle. Rather than seeking to settle termination issues in conciliation proceedings before the Commission, some practising lawyers preferred to resist settlements and instead play the 'jurisdiction game' by taking constitutional points to the High Court. In turn, if the High Court had solidified the Commission's reinstatement jurisdiction by the late 1980s, the political need to enact the Keating termination protection laws would have been largely unnecessary. Had the High Court not engaged in rather linear thinking on unfair dismissal by the Commission (taking each portion of the labour power in turn) and had it adopted a global approach to cutting through this constitutional labyrinth in order to give unfairly dismissed workers a remedy, we all would have been saved some anguish. We would not have had the Keating laws, nor the Howard measures which fail to cover all employees who are under

[63] See, eg, *Nicolson v Heaven & Earth Gallery Pty Ltd* (1994) 126 ALR 233; *Liddell v Lembke* (1994) 127 ALR 342.

[64] Schedule 2, item 9 of the *Industrial Relations and Other Legislation Amendment Act 1995* (Cth) inserted a broad discretion into s 170EE(1) of the *Industrial Relations Act 1988* (Cth).

[65] Consent arbitration commenced on 15 January 1996. The *Industrial Relations and Other Legislation Amendment Act 1995* (Cth) inserted s 170EC into the *Industrial Relations Act 1988* (Cth) (now repealed).

[66] *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) ('*Workplace Relations Act 1996*').

[67] Under s 51(xx) of the *Australian Constitution*, Parliament may make laws with respect to trading and financial corporations formed within the limits of the Commonwealth.

[68] *Workplace Relations Act 1996* (Cth) s 170CB(1)(c), which must be read together with the definition of 'constitutional corporation' set out in s 4(1).

[69] Ibid s 170CQ.

[70] For a full discussion of these new unfair dismissal laws, see Anna Chapman, 'Termination of Employment Under the Workplace Relations Act 1996 (Cth)' (1997) 10 *Australian Journal of Labour Law* 89.

[71] *Workplace Relations Act 1996* (Cth) s 89A(2) does not include the power to reinstate and/or to compensate for unfair dismissals as an allowable award matter, which means that these issues cannot be the subject of arbitration by the Commission.

federal jurisdiction. Instead of having exemptions from these unfair dismissal laws being argued out in the political arena (a pertinent example are the proposed exemptions for small businesses employing fifteen or fewer persons),[72] the Commission could have decided on exemptions on an industry or occupational basis. However, as the High Court had failed labour law by not bestowing this power on the Commission soon enough, the opportunity for establishing an industry approach to unfair terminations has passed us by.

V THE UNENFORCEABLE FEDERAL AWARD

In current parlance, awards represent the safety net of minimum employment conditions for Australian workers. Yet the federal award is a rather primitive instrument which is difficult to enforce. Where an employer fails to abide by award terms, the only recourse for an employee is to seek a monetary penalty in the courts,[73] together with the payment of any lost monies.[74] As the law currently stands, injunctive relief to prevent award breaches appears to be unavailable.[75] While Parliament must share some of the blame for this state of affairs, the courts cannot escape some criticism. By turning their backs on the use of contract law to enforce awards, the courts have ensured that our federal safety net will continue to reside in the land of the dinosaurs.

To understand this phenomenon, it is necessary to travel back in time to 1984. One innovative process undertaken by the Commission in that year was its *Termination, Change and Redundancy Case*.[76] In this matter (which was brought as a test case by the Australian Council of Trade Unions), the Commission placed clauses in awards dealing with technological change, redundancy and periods of notice upon termination of employment. For present purposes, however, the Commission decided to insert into awards clauses prohibiting dismissals which were 'harsh, unjust or unreasonable'.[77] Having regard to federal and state laws proscribing racial and sexual discrimination and also to the *Termination of Employment Convention* of the ILO, the Commission stated that award clauses would provide that terminations would be impermissible if they were made on the grounds of 'race, colour, sex, sexual preference, marital status, family responsibilities, pregnancy, handicap, religion, political opinion, national extraction or social origin'.[78] In effect, the Commission was trying to catch up with the anti-discrimination tribunals and break free from its collectivist shackles.

[72] Schedule 1, items 1 and 2 of the Workplace Relations Amendment Bill 1997 (Cth) (which was introduced into the House of Representatives for the first time on 26 June 1997 and for the second time on 26 November 1997) propose to amend ss 170CE(1) and (5) of the *Workplace Relations Act 1996* (Cth).

[73] *Workplace Relations Act 1996* (Cth) s 178(1).

[74] Ibid ss 179–9B.

[75] See, eg, *Australasian Meat Industry Employees' Union v Frugalis Pty Ltd* (1987) 14 FCR 535; *Victoria v Australian Teachers Union [No 2]* (1993) 48 IR 109; *Wattyl Ltd v Australian Liquor, Hospitality & Miscellaneous Workers' Union* (1995) 134 ALR 203.

[76] *Termination, Change and Redundancy Case* (1984) 8 IR 34. See also (1984) 9 IR 115 for the supplementary decision.

[77] *Termination, Change and Redundancy Case* (1984) 8 IR 34, 43.

[78] Ibid 44.

Although it was both sensible and innovative to insert this type of termination clause into awards, how could they be enforced? As the law then stood,[79] and as it still is,[80] the only remedy for breach is the imposition of a penalty.

This situation is the reason why the 1988 holding in *Gregory v Philip Morris Ltd*[81] was of such enormous importance. In this case, Mr Gregory (who had been dismissed by his employer), argued that the clause in his award which prohibited 'harsh, unjust and unreasonable dismissals' had become an implied term of his contract of employment. On this basis, he asserted that his termination was unfair, and that this unfairness was a breach of contract because his employer was in breach of this 'harsh, unjust and unreasonable dismissals' implied term. In *Gregory*, the Federal Court held that unfair dismissal award clauses could become implied terms in individual employment contracts. Accordingly, Gregory received damages for breach of contract. The Federal Court was able to use its jurisdiction to grant unfairly dismissed employees damages for breach of implied contractual terms. In other words, if an employee was unfairly dismissed she or he could obtain damages in accordance with the law of contract. This novel method of enforcement gave rise to much academic comment,[82] and *Gregory* was followed in a series of cases which gave unfairly dismissed employees damages for breach of contract.[83] In *Byrne v Australian Airlines Ltd*, however, a majority in the Federal Court[84] and a unanimous High Court[85] held that award clauses could not become implied terms of employment contracts. In so holding, the judges adhered to the traditional rules governing the implication of terms into contracts.[86] In my view, however, the approach of the dissentients in the Federal Court is to be preferred. As Gray J said in his judgment:

> This Full Court is faced with a clear policy choice. It can follow *Gregory*, thereby prising employment law in Australia from the grip of 19th century

[79] *Commonwealth Conciliation and Arbitration Act 1988* (Cth) s 119(1) (now repealed) See, eg, *Thompson v WFM Motors Pty Ltd* (1983) 5 IR 312, 314 (St John J).

[80] *Workplace Relations Act 1996* (Cth) s 178

[81] (1988) 80 ALR 455 ('*Gregory*').

[82] See, eg, Richard Naughton and Andrew Stewart, 'Breach of Contract through Unfair Termination. The New Law of Wrongful Dismissal' (1988) 1 *Australian Journal of Labour Law* 247; Richard Mitchell and Richard Naughton, 'Collective Agreements, Industrial Awards and the Contract of Employment' (1989) 2 *Australian Journal of Labour Law* 252; Ronald McCallum, 'A Modern Renaissance: Industrial Relations Law under Federal Whigs 1977–1992' (1992) 14 *Sydney Law Review* 401, 420; Gregory Tolhurst, 'Contractual Confusion and Industrial Illusion: A Contract Law Perspective on Awards, Collective Agreements and the Contract of Employment' (1992) 66 *Australian Law Journal* 705; Anthony Forsyth, 'Contractual Incorporation of Award Terms: *Byrne and Frew v Australian Airlines Limited*' (1994) 36 *Journal of Industrial Relations* 417.

[83] See, eg, *Wheeler v Philip Morris Ltd* (1989) 97 ALR 282, *Lane v Arrows Crest Group Pty Ltd* (1990) 99 ALR 45; *Bostik (Australia) Pty Ltd v Gorgevski [No 1]* (1992) 36 FCR 20. See also *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots* [1991] 1 VR 637, 679 (Brooking J); *Gooley v Westpac Banking Corporation* (1995) 129 ALR 628, 648–58 (Wilcox CJ).

[84] *Byrne v Australian Airlines Ltd* (1994) 120 ALR 274.

[85] *Byrne v Australian Airlines Ltd* (1995) 131 ALR 422 ('*Byrne*')

[86] For a full discussion of the case, see Amanda Coulthard, 'Damages for Unfair Dismissal: The High Court's Judgment in *Byrne and Frew v Australian Airlines*' (1996) 9 *Australian Journal of Labour Law* 38.

> judges and correcting some of the imbalance inherent in employer–employee relationships, while at the same time paralleling developments in other common law countries and adhering to internationally recognised standards. Alternatively, it can overrule *Gregory*, on the basis of a technical view as to its correctness as a matter of authority. In my view, the choice is clear.[87]

By divorcing awards from employment contracts, the *Byrne* holding has relegated award clauses to empty shells. As they can be enforced only by proceedings for a penalty, their role in a modern labour law system has been diminished.

It is interesting to contrast the narrow approach of the High Court with that of the House of Lords, which is not known for its radicalism. Perhaps because the English judges have had more experience of deregulated employment law than have their Australian cousins, they have taken a firm hold upon employment contracts and on protective legislation. In the 1997 *BCCI Case*,[88] for example, the House of Lords implied into employment contracts a term to the effect that employees could receive damages for lost opportunities of future employment owing to the fraudulent conduct of their current employer.[89] In the *Equal Opportunities Commission Case*[90] which was handed down in 1994, the House of Lords held that an aspect of English labour legislation[91] was incompatible with the *Treaty Establishing the European Economic Community* ('the *Treaty*').[92] At that time, the qualifying period of employment for entitlement to unfair dismissal and redundancy payments was two years for employees working 16 or more hours per week. However, where employees worked for at least eight but for less than 16 hours a week, the qualifying period was five years employment. As many more women than men were employed in this latter category, the House of Lords held that the five year qualifying period discriminated against women, contrary to article 119 of the *Treaty*. These cases and other House of Lords decisions show that the English judiciary have a keen appreciation of labour law deregulation which the High Court still lacks.[93] Had the *Byrne* case confirmed the *Gregory* reasoning — even if on narrower grounds — employees who are solely reliant upon award clauses for their protection would have been given a useful remedy.

87 (1994) 120 ALR 274, 336.

88 *Malik v Bank of Credit & Commerce International SA* [1997] 3 WLR 95 ('*BCCI Case*').

89 See generally Richard Naughton, 'The Implied Obligation of Mutual Trust and Confidence: A New Cause of Action for Employees?' (1997) 10 *Australian Journal of Labour Law* 287

90 *R v Secretary of State for Employment; Ex parte Equal Opportunities Commission* [1995] 1 AC 1 ('*Equal Opportunities Commission Case*').

91 *Employment Protection (Consolidation) Act 1978* (UK) now repealed and replaced by the *Employment Rights Act 1996* (UK).

92 *Treaty Establishing the European Economic Community*, opened for signature 25 March 1957, UKTS 1979 No 15, art 119 (entered into force 1 January 1958).

93 See, eg, *Scally v Southern Health & Social Services Board* [1992] 1 AC 294, *Spring v Guardian Assurance Plc* [1995] 2 AC 296 For comment, see Barbara Hocking and Graeme Orr, 'Employers' Liability for a Negative Reference; *Spring v Guardian Assurance*' (1995) 8 *Australian Journal of Labour Law* 85. See also the interesting holding in *R v Secretary of State for Employment; Ex parte Seymour-Smith* [1997] 1 WLR 473.

VI AWARDS, TRIBUNALS AND CITIZENSHIP

When the Workplace Relations Bill 1996 (Cth) was introduced into federal Parliament in May 1996,[94] it proposed that certified agreements[95] and Australian workplace agreements[96] would be tested against a list of minimum terms and conditions of employment which were set out in the Bill.[97] Although awards would determine comparative rates of pay,[98] it was to be these statutory minima which would form the benchmark against which the fairness of agreements would be tested. By the time this measure had become law,[99] however, the statutory minima had been dropped from the Act and the global no-disadvantage test had been reinstated,[100] so that certified agreements and Australian workplace agreements are now tested for fairness against existing federal or state awards.

In my judgment, the Howard government attempted to diminish the role of awards in the agreement vetting process in order to further its strategy of weakening the Commission, at least with respect to employees who choose to enter into certified agreements and Australian workplace agreements. If, for these classes of employees, award minima could be jettisoned in favour of minimum terms and conditions of employment largely determined by statute, the power of the Commission would be diminished. As more and more employees move from award to agreement governance, the coverage of awards will fall. The use of a core set of statutory standards against which agreements can be vetted will not only ensure that agreement-making is more flexible, but it will greatly curtail the role of the Commission as the primary determiner of national employment standards.

After all, a similar strategy was successful in Western Australia. In 1993, the Western Australian Parliament altered its industrial relations laws by taking away the right of the Western Australian Industrial Relations Commission to set an annual minimum wage. The discretion to fix the minimum wage is now reposed in the relevant minister, and the powers of the Commission are confined to recommending to the minister the level of the minimum wage.[101]

The fact that the Howard government's plan for the establishment of statutory minima did not succeed in 1996, showed in part that at that time the people still retained their faith in terms and conditions of employment being set by an independent tribunal which is separate from the executive and Parliament. Yet,

[94] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 May 1996, 1295 (Peter Reith, Minister for Industrial Relations).

[95] Workplace Relations and Other Legislation Amendment Bill 1996 (Cth) sch 9, Part 1, item 19, cl 170LT(2).

[96] Ibid sch 11, item 3, cl 170VG(1)–(3).

[97] Ibid sch 13, item 1, cll 170X–XZ.

[98] Ibid sch 13, item 1, cl 170XF.

[99] The Bill was forwarded to the Senate Economics References Committee which received over 1000 submissions. See Commonwealth, *Report on Consideration of the Workplace Relations and Other Legislation Amendment Bill 1996*, Parl Paper No 105 (1996)

[100] *Workplace Relations Act 1996* (Cth) s 170LT(2) (certified agreements); s 170VPB(1)(a) (Australian workplace agreements).

[101] *Minimum Conditions of Employment Act 1993* (WA) ss 14–15.

the *Workplace Relations Act 1996* (Cth) did substantially weaken the Commission. Under this statute, in most circumstances, the Commission can utilise its powers of compulsory arbitration to determine only those minimum terms and conditions of employment which are specified as allowable award matters.[102] While the Commission still retains the power to register certified agreements,[103] Australian workplace agreements are primarily vetted by a separate agency known as the Office of the Employment Advocate.[104] Certified agreements are examined in the full light of day, but Australian workplace agreements are scrutinised behind closed doors and the identity of the parties to these agreements must not be disclosed unless they consent to this disclosure.[105]

I believe that conservative governments have been successful in weakening our network of arbitral tribunals because they are perceived of as little more than creatures of statute. On the contrary, without independent labour relations machinery there can be no viable system of collective labour law in this country. Collectively secured terms and conditions of employment must be guaranteed as an indispensable right of the democratic citizenry. The downgrading of our industrial tribunals is, in my opinion, an attack on citizenship itself.

The failure of the adherents of collective labour law to perceive the linkage between independent labour relations machinery and democratic citizenship occurs because insufficient attention has been paid to the worker as citizen and to the place of independent labour relations tribunals in the Australian political structure.

Over the last 20 years, English political scientists and lawyers have built upon the writings of Thomas Marshall[106] and have written about the concept of citizenship.[107] By citizenship, these writers mean the bundle of rights and obligations which democratic polities should bestow on citizens. In particular, it is argued that women and various minority groups have not been granted full citizenship. Marshall wrote from the 1940s onwards, in that optimistic time after World War II when the British government was building its welfare state and when it was assumed that poverty and insecurity could be eliminated. Over the last decade, these ideas on citizenship have been taken up in Australian legal and political science circles.[108] However, this Australian debate has focused almost exclusively upon issues like immigration, social welfare rights and the needs and aspirations of women and Aborigines. Scarcely any attention has been paid to the role of the citizenry at work. In my view, insufficient attention has been paid to

[102] *Workplace Relations Act 1996* (Cth) s 89A(1)–(3) The Commission may also make short-term arbitral orders on exceptional matters: ss 89A(7), 120A(5); and it may make arbitral orders in defined circumstances if it ends a bargaining period, ss 170MX(1)–(3); 170MY

[103] Ibid s 170LT(1).

[104] For comment on Australian workplace agreements, see Ronald McCallum, 'Australian Workplace Agreements: An Analysis' (1997) 10 *Australian Journal of Labour Law* 50.

[105] *Workplace Relations Act 1996* (Cth) s 170VG(2).

[106] For an introduction to his work, see Thomas Marshall, *Sociology at the Cross-Roads and Other Essays* (1963).

[107] See, eg, the essays collected in Robert Blackburn (ed), *Rights of Citizenship* (1993).

[108] See, eg, Kim Rubenstein, 'Citizenship in Australia: Unscrambling Its Meaning' (1995) 20 *Melbourne University Law Review* 503, 515–25.

the work of the English political scientist Harold Laski who in 1938 wrote about the rights of citizen workers.[109] The British labour law scholar Professor Keith Ewing has made the Laski connection and has argued for political citizenship to encompass industrial citizenship.[110] In my recent Whitlam Lecture, I have tried to further this aspect of the citizenship debate in Australia.[111]

It is exciting to see that in his splendid new book titled *From Subject to Citizen*,[112] Professor Alastair Davidson has argued that industrial citizenship can be traced back to our constitutional founders. Professor Davidson makes this point when he writes:

> The real triumph of the founding fathers was the adoption of s 51(xxxv) of the new Constitution, giving the Commonwealth power over industrial disputes extending beyond any one State. This effectively put the major issue of social rights on a national scale — the relations between capital and labour — into the hands of a court.[113]

In my judgment, the insertion of the labour power into the *Australian Constitution* was a recognition by the founders of our federal nation that its citizen workers should possess the right to have their employment conditions vetted by machinery which is independent of the executive. In other words, the Commission is not merely a creature of the enabling statute which was enacted by Parliament. On the contrary, the establishment of the Commission represents part of the constitutional framework of our nation.

While he did not use the word 'citizenship', Henry Higgins understood perfectly the political dimensions of our collective labour law where conditions of labour are governed by an independent body. As he showed in his many judgments (and especially in his 1907 *Harvester*[114] decision), the purpose of conciliation and arbitration is to enhance the rights of persons at work. In other words, this atypical court is part of the political process. After all, as Higgins viewed federal conciliation and arbitration, it was his 'new province for law and order'[115] because it enabled citizen workers to obtain collectively determined wages and other social benefits by the processes of the law and without the need to engage in industrial disputation.

In August 1997 in the High Court's *Riordan Case*[116] which related to employer challenges about the ambit or scope of various industrial disputes, Kirby J reminded us that conciliation and arbitration 'has contributed to the equalisation of costs of labour throughout Australia and hence to the growth of a national

109 Harold Laski, *A Grammar of Politics* (5th ed, 1967) 106–13.

110 Keith Ewing, 'Citizenship and Employment' in Blackburn (ed), above n 107, 99.

111 McCallum, 'Crafting a New Collective Labour Law for Australia', above n 5.

112 Alastair Davidson, *From Subject to Citizen: Australian Citizenship in the Twentieth Century* (1997).

113 Ibid 56.

114 *Ex parte McKay* (1907) 2 CAR 1 ('*Harvester*').

115 This was the title which Higgins gave to his book of collected essays on Australian conciliation and arbitration See Henry Higgins, *A New Province for Law and Order: Being a Review by Its Late President for Fourteen Years of the Australian Court of Conciliation and Arbitration* (first published 1922, 1968 ed).

116 *Attorney-General (Qld) v Riordan* (1997) 146 ALR 445 ('*Riordan Case*').

economy.'[117] Throughout most of this century, conciliation and arbitration has participated in welding this continental nation together. It has bestowed benefits upon workers, and the equality of this bestowing has played an important part in the creation of a national economic structure and a largely egalitarian society where social rights are protected.

If the proponents of independent labour tribunals remain silent, conservative governments will continue with their strategy of downgrading these bodies. We do not want to find ourselves in the position of the Blair Labour government which is having to rebuild collective labour law virtually from scratch. The British government has just established a Low Pay Commission to set a minimum wage, and, in order to rehabilitate industry sectors where collective bargaining is either weak or non-existent, industry sector bodies will be set up to facilitate labour regulation.[118]

VII FUTURE STRATEGIES

Unlike Great Britain, Australia still possesses a network of independent labour tribunals. It is time for academic and practising lawyers to join hands with industrial relations and human resource managers, as well as with trade unionists and with employer association officials to re-fashion our labour law machinery for the next century. New strategies are required if independent tribunals and collective labour law are to survive into the second decade of the new millennium.

The 1990s, I venture to think, will become known as the decade of the computer revolution. These new technologies, I am sure, will lead to as much job realignment as did the creation of the steam-driven machines of the industrial revolution some 200 years ago. As Australia lacks a large domestic market to soak up our home-grown goods, we possess no internal cushion for our manufacturing industries as the developed world shifts to an information-driven economy.[119] If we are to manage these and other employment changes in a cooperative manner, independent labour tribunals will be indispensable actors in this process. It is essential to adopt strategies to both strengthen and to assist the evolution of our industrial tribunals so that they will have the confidence to adopt a pro-active approach to mediation in order to assist workers as old jobs die and as new patterns of employment emerge.

Throughout this period of rapid change, we must ensure that independent labour relations tribunals are given the capacity to set minimum terms and conditions of employment, to grant remedies to all individuals who have had

[117] Ibid 472.

[118] On these aspects of rebuilding collective labour law machinery, see the work of the left-wing British think tank called the Institute of Employment Rights; see, eg, Keith Ewing (ed), *Working Life: A New Perspective on Labour Law* (1996). For comment on this work from an Australian perspective, see Richard Mitchell, 'Book Review' (1997) 10 *Australian Journal of Labour Law* 244.

[119] For perceptive thoughts on current economic and social changes, see Robert Theobald, 'The Future of Work' (unpublished lectures delivered on Radio National, 31 August – 28 September 1997) <http://www abc.net.au/rn> (copy on file with author).

their human rights diminished at work (including unfair and/or discriminatory terminations), and not merely to settle industrial disputes, but to possess broad powers to prevent the occurrence of industrial disputation.

As this evening's lecture has demonstrated, the furtherance of independent tribunals requires two things. There must be a recognition of their place within the Australian political structure as independent guarantors of the human rights and minimum terms and conditions of citizen workers. It is clear that cooperation from the judiciary is also required. The judges must free themselves from their shackles and engage in lateral thinking about the development of modern labour law remedies in this speedily changing world. We can no longer afford 20 years of legal precedent before the High Court is able to fashion modern remedies like reinstatement. The manner in which the English House of Lords has been coming to grips with a deregulated labour relations system is an example which our High Court could emulate.

In closing, let me say that one useful legal strategy for revitalising the Commission is to modernise our approach to the labour power. Hitherto, Parliament has used this power to establish machinery to settle interstate labour disputes. This has necessitated the creation of 'paper disputes', usually by trade unions, to invoke the power of the Commission.[120] While our economy was an industrialised one, and while union membership was relatively high, this was a sensible strategy. Now that our economic foundations are shifting and that trade union members now make up slightly less than one third of our workforce,[121] the industrial dispute is an outdated legislative tool. However, the words of the labour power are 'conciliation and arbitration for the prevention and settlement' of labour disputes. In other words, it is a power not only for settling interstate labour disputes, but also for preventing them. Over the years, several judges have stated that Parliament should invoke the prevention limb of the power to increase the capacity of the Commission to govern labour relations.[122] In the 1989 *Wooldumpers Case*, for example, Deane J said:

> If the Constitution means what it says when it confers a broad power to make laws with respect to conciliation and arbitration for the prevention of interstate industrial disputes in the abstract, it is far from evident either that there is any constitutional need to make the manufacture of an interstate dispute, whether paper or real, a condition of the existence of jurisdiction conferred pursuant to that grant of legislative power or that it would not suffice for constitutional purposes if, e.g., the grant of jurisdiction to an expert tribunal such as the Commission were merely conditioned upon the opinion of the tribunal that cir-

120 For comment on the creation and operation of industrial disputes for jurisdictional purposes, see *Riordan Case* (1997) 146 ALR 445, 470–6 (Kirby J)

121 In June 1995, according to returns from trade unions, trade union members made up 40% of the workforce: Australian Bureau of Statistics, *Trade Union Statistics, Australia* (1996) 8. However, returns from trade union members show that in August 1996, trade union membership had fallen to 31.1% of the workforce: Australian Bureau of Statistics, *Trade Union Members, Australia* (1996) 9 For further details on trade union statistics, see Stephen Deery, David Plowman and Janet Walsh, *Industrial Relations: A Contemporary Analysis* (1997) [7 15], [7 21], [7.27]

122 For an early suggestion to this effect, see *Merchant Service Guild of Australasia v Newcastle & Hunter River Steamship Co Ltd [No 1]* (1913) 16 CLR 591, 643–4 (Higgins J).

> cumstances exist in which the tribunal's conciliation or arbitration procedures may be conducive to the prevention of interstate industrial disputes.[123]

The *Workplace Relations Act 1996* (Cth) uses a portion of the prevention limb of the power to facilitate agreement-making.[124] What is now required is for Parliament to make full use of the prevention element to broaden the powers of the Commission so that the finding of an interstate industrial dispute is no longer a precondition to the exercise of the Commission's power to promulgate terms and conditions of employment and to certify agreements. In my judgment, it is likely that the High Court would uphold this broad constitutional approach.[125] Old fashioned concepts like the *Metal Trades* doctrine[126] — which holds that awards only bind the industrial disputants (that is, employers, trade unions and their members) — would no longer be of relevance to federal industrial law. Under the *Workplace Relations Act 1996* (Cth), it is the corporations power which is used to uphold certified agreement-making[127] without the need to create an industrial dispute.[128] However, as the corporations power only applies to — in the main — trading or financial corporations, unincorporated employers (which are usually small businesses) cannot utilise these provisions.[129] However, the prevention element in the labour power would fill in this gap and enable agreements to be made which would cover all employees under federal law. Similarly, the prevention element would enable the passage of laws whereby the Commission could set terms and conditions of employment for industrial and/or occupational sectors of the economy. I contend that this approach to the making of federal labour law is the best method of ensuring the survival and enhancement of the Commission in the early years of the next millennium.

123 (1989) 166 CLR 311, 328; see also 320–1 (Mason CJ).

124 *Workplace Relations Act 1996* (Cth) s 170LP, which must be read together with the definition of 'industrial situation' in s 4(1). This concept was first introduced into legislation by *Industrial Relations Reform Act 1993* (Cth) ss 26, 170MA(2), 170QH(1)(a), 170QH(3)(a).

125 See, eg, the broad approaches taken to the scope of the labour power in *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188; *Victoria v Commonwealth* (1996) 138 ALR 129; *Riordan Case* (1997) 146 ALR 445.

126 *Metal Trades Employers Association v Amalgamated Engineering Union* (1935) 54 CLR 387 ('*Metal Trades*'). For details on this doctrine, see McCallum and Pittard, *Australian Labour Law*, above n 29, 365–80; Karen Wood and Ron McCallum, 'Crafting the Law: The High Court and Superannuation as an Industrial Matter' (1995) 8 *Australian Journal of Labour Law* 121.

127 *Workplace Relations Act 1996* (Cth) ss 170LJ–LK.

128 As the recent *Quickenden Case* has shown, the *Metal Trades* doctrine prevents agreements from binding non-unionist employees which prevents agreements from placing obligations on all employees in the enterprise: *Re National Tertiary Education Industry Union; Ex parte Quickenden* (1996) 140 ALR 385 ('*Quickenden Case*'). See generally Greg McCarry, 'Some Problems with Industrial Agreements Certified under Commonwealth Legislation Present and Proposed' (1996) 15 *Australian Bar Review* 33.

129 For comment on the reach of the corporations power, see Leslie Zines, *The High Court and the Constitution* (3rd ed, 1992) 70–93; Tony Blackshield and George Williams, *Australian Constitutional Law and Theory. Commentary and Materials* (2nd ed, 1998) 617–46.