

## **Contents Page: NZJER Special Issue, 2018, 43(2)**

<b>Name</b>	<b>Title</b>	<b>Page Numbers</b>
Annick Masselot	Special Issue Editorial Note	1-4
Christina Inglis	A brave new technological world: Opportunities for gain and pain...	5-9
Judy Fudge	Regulating for Decent Work in a Global Economy	10-23
Judge Coral Shaw	Address to 2017 Biennial Conference of NZ Labour Law Society	24-26
Troy Sarina and Joellen Riley	Re-crafting the enterprise for the gig-economy	27-35
Paul Roth	Indigenous Peoples and Employment Law: the Australasian model	36-51
Jonathan Barrett and Amanda Reilly	Too Modest a Proposal? Work Rights under the Proposed Constitution Aotearoa	52-65
Alysia Blackham	Recent Developments in Australian and New Zealand age discrimination law: a comparative perspective	66-82
Ashleigh Dale	Addressing Modern Slavery in New Zealand Law	83-98

## Editorial note

ANNICK MASSELOT

Professor of law, University of Canterbury

This special issue of the *New Zealand Journal of Employment Relations* showcases some of the best papers presented at the Fourth Biennial Labour Law Conference of the New Zealand Labour Law Society held on 17-18 November 2017 in Christchurch. The conference focussed on labour law in transition in a global and technological world, with the theme intended to encompass new developments and emerging areas in labour law. The presentations covered a wide range of topics including: de-regulation of the workplace and competitive attitudes towards employment issues; aspects and implications of the recent amendments to health and safety laws; workplace stress, bullying and harassment; restructuring, redundancy and redeployment; modern workplace environments and cyber-work; and equality, human rights and precarious work. The conference attracted a large number of participants from within New Zealand, including academics, practitioners, judges from the Employment Court and members of the Employment Relations Authority as well as government and parliamentary officials and union members. A good range of Australian speakers attended the conference, as the New Zealand Labour Law Society has built good relations with the Australian Labour Law Association. Participants from Europe and Asia were also present.

A large number of excellent papers were presented at the conference and submitted for publication to a special issue of the *New Zealand Journal of Employment Relations*. As a result, two special issues will be published. This first special issue focusses specifically on the impact of technology on labour law and the relationship between human rights and employment law. The next special issue will include papers broadly concerned with health and safety and matters related to employment agreement.

It is important to acknowledge the financial support of the New Zealand Law Foundation, The Canterbury Law Review Trust and the School of Law at the University of Canterbury, without which, neither the Fourth Biennial Labour Law Conference of the New Zealand Labour Law Society nor the present publication would be possible.

There are eight articles in this first issue and a summary of this content is provided hereunder.

Chief Judge Christina Inglis – “A Brave New Technological World: Opportunities for Gain and Pain...”

Modern work is increasingly fragmented, with traditional employment relationships being replaced with “gig” relationships without clear division between employer and employee. While this new employment model may benefit the highly skilled and mobile, the uncertainty of fragmented employment may increase the vulnerability of those with dependents or reduced bargaining skills. Additionally, if issues do arise within these contemporary employment contexts, legal resolution of problems may be difficult due to the increasingly high cost of legal action, especially when the issue involves complex legal questions, such as whether an employer-employee relationship exists. Although the accessibility of legal action is being challenged through traditional means, such as pro bono work and Community Law schemes, it is worthwhile considering whether technology could hold the solution to this and other legal

issues. Technology may help streamline existing legal processes; for example, in improving research efficiency. Alternatively, it seems possible that technology could radically alter legal processes through providing online dispute resolution services. Whatever the case, as lawyers and academics, it is critical to keep an open mind to the possibilities of technology and its application to contemporary challenges in employment law.

Judy Fudge – “Regulating for Decent Work in a Global Economy”

The title of this article captures three important shifts in nomenclature in contemporary debates about labour law: from labour to work; from law to regulation; and from the national state to the global space. These shifts signal a trend towards broadening, not simply in the sense of expanding the personal scope of labour law, but, more radically, in terms of encompassing a plurality of platforms, techniques and spaces for regulating work. “Decent work” also captures a change in how we understand the normative basis for regulating work, which involves a movement away from unequal bargaining power and subordination to a more amorphous, contested and contextualised understanding of the values that work regulation ought to achieve. This article focusses on two aspects of the global economy – financialisation, and global value/supply chains – to illustrate the claim that it is opportune to move from an overarching narrative of labour law to one of regulating for decent work. This article will also provide some examples of what is meant by regulating for decent work in a global economy. To conclude, it suggests the importance of developing approaches to regulating for decent work that are both attentive to the path along which labour market institutions evolve and the need to avoid rosy-tinted nostalgia.

Judge Coral Shaw – “Reflections on the United Nations Dispute Tribunal 2009-2016”

Employment disputes between UN staff members were historically addressed internally through peer review, with a subsequent right of appeal to the UN Administrative Tribunal. However, this system for resolving UN employment disputes was inherited from the League of Nations and was highly inefficient. Members of the UN Administrative Tribunal were not required to have a legal or judicial background. Additionally, the Tribunal only met irregularly, creating a significant backlog of employment disputes. Even when decisions were made, the Tribunal was only able to produce non-binding recommendations. Despite criticisms of this system as early as 1995, a new UN employment dispute resolution process was not developed until 2009. In the 2009 reform, two tribunals were established: the Disputes Tribunal, and the Appeals Tribunal. Judges were elected by the General Assembly and came from international jurisdictions. Although UN leadership initially viewed this system with hostility, seeking to reduce the powers of the tribunals, attitudes have slowly and steadily changed. Today, the system, established by the 2009 reform, is highly regarded by UN leadership, and was publicly endorsed in 2015 by the Chef de Cabinet. The experiences of employment dispute resolution at the UN level demonstrates that, in any employment dispute context, lawyers and academics must speak up in order to ensure that the rule of law is maintained through the process of dispute resolution.

Troy Sarina and Joellen Riley – “Re-Crafting the Enterprise for the Gig-Economy”

New technological developments have heralded the era of the “gig economy” as workers increasingly move away from full-time employment. In the gig economy, digital platforms are used to mediate work contracts between customers and workers. Workers are employed for particular, time-limited tasks without expectation of continuing work. Existing literature has acknowledged that the new gig economy poses risks to workers’ employment rights and benefits. Although much scholarship has considered how to categorise gig economy work as employment, and thereby protect it under existing statutory frameworks, this article considers

an alternative approach to improving workers' benefits from the gig economy. Under the micro-entrepreneurship approach, co-operatives are utilised to bring significant benefits to gig economy workers through challenging the corporate groups' status of digital platforms. Co-operatives, which are democratically controlled by members and reliant on the economic contributions of members, have been encouraged by the ILO for a number of years and are popular in numerous areas, such as transport and construction. They have a strong heritage in New Zealand and are increasingly popular in Australia due to legislative changes. Although co-operatives have not been uniformly successful, it seems, today, that co-operatives may offer a viable means for modern workers to truly and equally participate in the "sharing economy".

Paul Roth – "Indigenous Peoples and Employment Law: the Australasian Model"

Indigenous values have been increasingly received in New Zealand and Australian workplaces since the 1980s. Today, a number of aspects of employment practice in Australasia support indigenous cultural values. Examples include extended leave allowing for attendance at cultural ceremonies and flexible approaches to bereavement leave, meaning that indigenous employees may be able to attend funerals for the broader indigenous community. The Australasian model can be contrasted with both the North American model and international labour standards. Although indigenous values in North America are less accepted in mainstream employment law than in Australasia, indigenous peoples receive significant sovereignty in their tribal reserves. Subsequently in tribal areas, indigenous values are a key aspect of employment practices. Considering international labour standards shows that the Australasian inclusion of indigenous values in the workplace is consistent with these standards. Overall, embracing indigenous values in the workplace is positive, improving indigenous worker engagement and worker wellbeing and reflecting the importance of indigenous identity. However, issues may arise where employers are faced with the difficult task of balancing competing cultural values or non-discrimination standards (for example, balancing gender discrimination issues and multiple indigenous approaches) or where managerial prerogative is challenged. Although inclusion of indigenous values in Australasian workplaces is beneficial, care must be taken to apply such values sensitively and in a balanced way.

Johnathan Barrett and Amanda Reilly – "Too Modest a Proposal? Work Rights Under the Proposed Constitution Aotearoa"

In 2016, Sir Geoffrey Palmer and Andrew Butler published "Constitution Aotearoa", a proposed written constitution for New Zealand. This proposed constitution includes an entrenched, supreme Bill of Rights with explicit mention of a number of civil political and socio-economic labour rights. Although such a high level of recognition for labour rights is overdue, Constitution Aotearoa still takes insufficient action to protect such rights. International human rights documents, such as the UDHR, ICCPR and ICESCR, explicitly protect labour rights and acknowledge these to be an important aspect of human dignity. Supreme human rights charters of numerous jurisdictions, including Germany, Canada, South Africa and the European Union, reflect this international protection of labour rights. However, comparing the proposed protection for labour rights in Constitution Aotearoa with alternative international approaches highlights the weaknesses of this new constitution. Critically, labour rights in Constitution Aotearoa are non-justiciable. The emphasis on non-justiciability arises from the Constitution's narrow and erroneous emphasis on the vertical state-citizen relationship. In addition to this weak protection of rights, the Constitution omits to protect important contextual principles of employment law, such as good faith. While Constitution Aotearoa's inclusion of diverse labour rights is a step towards greater recognition of such rights in New Zealand, this does not go far enough to protect these fundamental rights.

Alysia Blackham – “Recent Developments in Australia and New Zealand Age Discrimination Law: A Comparative Perspective”

Increasing life expectancies, coupled with pension and labour market reforms, have led to greater participation of the elderly in New Zealand and Australian workplaces. However, social attitudes towards elderly employment have not kept pace with demographic change. Ageist attitudes are still prevalent in both New Zealand and Australia, and age discrimination in recruitment and training of elderly workers is a significant concern. This article outlines the New Zealand and Australian statutory frameworks prohibiting age discrimination and discusses recent age discrimination jurisprudence. From this analysis, it is clear that age discrimination is ineffectively captured by both New Zealand and Australian law. A number of factors contribute towards this ineffectual treatment of age discrimination, including ageist judicial attitudes, the prevalence of alternative dispute resolution processes that settle strong discrimination cases out of Court and, therefore, do not create precedent, the procedural requirements for bringing Australian age discrimination claims, the flawed use of comparators in identifying age discrimination, and judicial failure to consider intersectionality. While legislative change is ultimately required to effectively address these issues, it is clear that the Courts must lead the way for this change with a “more sympathetic” approach to statutory interpretation of non-discrimination provisions in age discrimination jurisprudence.

Ashleigh Dale – “Addressing Modern Slavery in New Zealand”

Whether through exploitation of migrant workers coming for the Christchurch rebuild or through overseas recruitment agencies, media attention has illustrated that modern slavery is an increasing issue for New Zealand. Today, a number of statutes form a framework of laws that seek to prohibit modern slavery behaviours in New Zealand, including the Crimes Act 1961, the Immigration Act 2009, tax legislation and health and safety legislation. Although these laws have generally been recently amended to better address modern slavery behaviours, this framework is still inadequate in discouraging such behaviours in New Zealand. Change must be made both to the enforcement of the existing laws and to the legislation itself with clarification of existing standards and the introduction of new law. This could include increasing the number of labour inspectors, punishing serious breaches of employment law with higher penalties to ensure effective deterrence, educating migrant workers on their employment rights and providing appropriate avenues for pursuing breaches of migrant workers’ employment rights, clarifying the law around legitimate wage deductions, and creating a code for minimum accommodation standards. Although positive steps have been taken towards more effectively deterring and preventing modern slavery behaviours in New Zealand, more must be done to protect victims of modern slavery.

## **A brave new technological world: Opportunities for gain and pain...**

**Dinner speech to New Zealand Labour Law Society Conference  
24 November 2017**

**CHIEF JUDGE CHRISTINA INGLIS\***

E ngā mana  
E ngā reo  
Rau rangatira ma  
Tēnā koutou, tēnā koutou, tēnā koutou katoa

We are in the midst of great change which (I venture to suggest) employment law and those who practise in it are struggling to keep pace with. There are two particular threads to this on which I wish to focus. The first relates to the fragmentation of the traditional model of work and what this means for those caught up in it. The second relates to the sobering reality that the cost of pursuing legal rights in employment matters has become eye-wateringly daunting, if not prohibitive, for many. What relief might the brave new technological world offer? And at what potential risk?

The Employment Relations Act, and the minimum employment standards legislation which operates in a constellation-like effect around it, is premised on the traditional bilateral employment relationship. That model is now not the reality for many in an increasingly casualised and fragmented labour market. In the Court, the shift has manifested itself in a discernible upswing in the number of what I call ‘confused identity’ cases – cases involving litigants who do not know whether they are in an employment relationship or not.

The characterisation issue is of considerable importance as it determines whether a worker falls within the protective ambit of New Zealand’s employment legislation or not. This is often not the end of the matter as an increasing number of cases involve additional issues as to who (within what is often a complex web of company structures) the employer is, and whether it is possible to have joint or multiple employers.

While legislation is always speaking, and is said to move with the times, it is undoubtedly true that rapidly emerging ways of work present particular issues for the law. The casualisation of the workforce, multi-faceted relationships between workers and those engaging them to work, triangular and multilateral relationships with inter-connecting lines, and lengthy interlinked supply chains, all raise difficult issues as to the extent to which current laws apply.

---

\* Note from the editor: This is a speech given by Chief Judge Christina Inglis at the dinner of the Labour Law Conference on 24<sup>th</sup> November 2017. The Chief Judge wishes to acknowledge the invaluable contribution of Suzanne Innes-Kent, Judges’ Clerk at the Employment Court, to the preparation of this speech.

Many Gen-XYZers may well see significant benefits in having the freedom to bunny-hop between ‘gigs’, scooping up work via cyberspace, without the constraints of the traditional employment model being foisted upon them – although I am not sure that any empirical research has been done to support this rosy coloured assertion. Even if it is true, it must equally be true that this new and exciting way of working presents significant dangers to the most vulnerable members of society.

That is because the flexibility of such arrangements tends to suit highly skilled or mobile workers, who have the ability to cherry-pick and sell their own wares. It tends to bottom-feed on those who are unskilled, who have little or no bargaining power, who have dependents, and who are financially exposed. English may be a second language and they may have little or no knowledge of employment laws in New Zealand. They may find themselves working multiple jobs, engaged and disengaged at will, without protection, and open to significant abuse. There are undoubtedly some who view minimum employment standards as an unnecessary irritant and best avoided, and who try to find increasingly innovative ways to sidestep the costs associated with compliance.

All of this segues into my second point – the cost of pursuing employment rights. Much has been said about litigation costs and access to justice across all jurisdictions in New Zealand. Employment is no exception. A simple statistic may be said to illustrate the point. The generally applied daily rate for costs purposes in the Employment Relations Authority is \$4,500 per first day of hearing. It would take a person on the minimum wage 7.5 weeks to pay for one day in the Authority. Costs awards in the Employment Court are generally higher and it is not unknown for a party’s legal costs to exceed the financial value of a claim. Costs are likely to be higher where complex issues of employee and employer status arise, as they increasingly do.

It has been suggested that the rising cost of pursuing litigation has brought with it an upswing in the number of litigants appearing in person.<sup>1</sup> One estimate puts the percentage of such cases in the Employment Court at 40 per cent. This may be said to raise access to justice issues in a broad sense – to what extent are such litigants able to substantively engage in a process characterised by formal rules of procedure, evidential requirements, burdens of proof, difficulties of cross examination and legal submission? And might there be an invisible pool of would-be litigants, who the employment institutions never see?

A considerable amount of work, much of it pro bono by members of the employment bar, is being done in the employment sphere in New Zealand to assist such litigants. Former Chief Judge Graeme Colgan, in conjunction with the Auckland District Law Society, oversaw the establishment of a pilot scheme operating out of the Employment Court, with experienced practitioners volunteering their time to assist litigants with their pleadings. A further pilot scheme is currently being developed by the Community Law Centre for roll-out in the Employment Court, with the support of the New Zealand Law Society. The intention is to offer hand-holding, as required assistance to litigants bringing claims in the Court. The Employment Court has also put a considerable amount of effort into developing an extensive set of online resources, with links to source documents, to assist litigants in navigating their way through the Court process.

---

<sup>1</sup> See, for example, Helen Winkelmann “Access to Justice- Who needs lawyers?” (2014) 13 Otago LR 229.

What more might be done? These sorts of issues are being grappled with across the globe, and are not peculiar to the employment institutions in New Zealand. Some suggest that the traditional way of delivering legal services is out of step, and that lawyers and advocates might wish to reflect on what they are doing, how they are doing it, and what and how they are charging. That may be part of the equation, but it may also mean that the employment institutions themselves could usefully do some navel-gazing.

In a very interesting book called “Tomorrow’s Lawyers”, Richard Susskind proffers a number of suggestions, many of which are somewhat alarming (as he rightly points out) for conservative judges and lawyers who prefer to conduct hearings in walnut-veneered rooms and listen to gavels clanking down with a ceremonial thud on the bench.<sup>2</sup> Exciting, he suggests, for those with a little more vision and a desire to look forward, not backward.

I make no comment as to which category I fall into, or the perceived merits or otherwise of his views. But I do think it is worth reflecting on the sort of points he makes.

As one blawger<sup>3</sup> has recently observed, “The Romans said that ‘experience is the best teacher’”. He suggests the legal industry ask itself: “What kind of experience and resources – human and/or machine – are required to make legal services more accessible, efficient and better aligned with legal consumers’ needs, expectations, and means?”<sup>4</sup> Many would agree that such a question is worth asking, and attempting to answer.

Might it be that new information and communications technologies can be used innovatively to change and improve the way in which legal services are delivered, to harness technology to break down access to justice barriers?

Lord Justice Briggs plainly thinks so. In his final report on the Civil Courts Structure Review in the United Kingdom, he expressed the view that:<sup>5</sup>

... the single most pervasive and indeed shocking weakness of our civil courts is that they fail to provide reasonable access to justice for ordinary individuals or small businesses.

In recommending the development of an online court, he said:<sup>6</sup>

I consider that the objective of making the civil courts more generally accessible to individuals and small businesses, for a just resolution of their simpler and small to modest value disputes at proportionate cost, fully justifies the risks in stepping a little into the unknown ....

---

<sup>2</sup> Richard Susskind *Tomorrow's Lawyers: An Introduction to Your Future* (2nd ed, Oxford University Press, 2017).

<sup>3</sup> A cross between a lawyer and a blogger

<sup>4</sup> Mark A Cohen “The Legal Industry Needs Fresh Leadership with New Skill Sets” *Forbes* (online ed, 18 September 2017) <<https://www.forbes.com/sites/markcohen1/2017/09/18/the-legal-industry-needs-fresh-leadership-with-new-skill-sets/#5232aade67d7>>

<sup>5</sup> LJ Briggs “Civil Courts Structure Review: Final Report July 2016” at [5.14]; <<https://www.judiciary.uk/publications/civil-courts-structure-review-final-report/>>

<sup>6</sup> At [6.44].



Online dispute resolution is well accepted in the online world – eBay is the most frequently cited example. It is said to resolve more disputes via its online dispute resolution model than the English civil courts combined (around 16 million disputes a year, over 90 per cent of which are resolved by artificial intelligence, without human involvement).<sup>7</sup> Interestingly, high levels of satisfaction are reported by disputants, even if they lose, because the process tends to be regarded as efficient and transparent (transparency being equated with a perception of fairness).

An online court has been trialled in Israel and in British Columbia, and an online money claims court is operating in the United Kingdom (for amounts up to £10,000). An online interactive triaging service, designed to help litigants in person articulate their grievances and guide them through the litigation process, has operated in the Netherlands.

At age 20, a computer science undergraduate (not a lawyer) developed a legal chatbot – Do Not Pay – a machine with artificial intelligence with which the client can chat to secure legal information relevant to their particular problem.<sup>8</sup> Another programme (which goes under the catchy name “Ross”), when asked the question “Can a satirical article be defamatory?” took 15 seconds to provide an opinion backed up by relevant cases and statutes, and offered a confidence score about the chances of success.<sup>9</sup>

Of course employment relationships are more nuanced than financial transactions – the payment of money for goods and services provided. That is made clear by the Act, underscored by its actual title (the *Employment Relations Act*). To what extent could, for example, online settlement technology deal with the relational aspect of much of the work the employment institutions do? How would it fit with a legislative model which recognises the importance of the mutual obligations of good faith, the need to be constructive in seeking to resolve employment relationship issues and which provides for reinstatement as a remedy, over and above cold hard cash? What of the jealously guarded right to a day in court? What of the vagaries of technology and the ability to determine credibility issues in dispute of fact hearings in a virtual setting?

Do perceived complexities in the way in which technology might assist in the employment sphere mean that the conversation is a dead duck? I hope not.

There is an understandable concern that technology will run ahead of our capacity to manage it. The reality is that the design of online tools is in the hands of humans, not machines. The gatekeepers of the justice system must play a pivotal role in any developments. These might range from using technology to help us do the things we already do, such as improved data retrieval, research and e-discovery; to providing data-rich sources of information to inform our processes and procedures, and offer useful insights into the sort of claims being brought and by whom; or to fundamentally change the nature of the hearing of disputes through online dispute resolution services and courts conducted with limited or no human intervenor.

---

<sup>7</sup> Ian Macduff “Digital Access to Online Resources” (At the Bar, New Zealand Bar Association, December 2017) at 23-25.

<sup>8</sup> Mark A Cohen, above, n3.

<sup>9</sup> See, for example Karen Turner “Meet ‘Ross’, the newly hired legal robot” *The Washington Post* (online ed, May 16, 2016) <[https://www.washingtonpost.com/news/innovations/wp/2016/05/16/meet-ross-the-newly-hired-legal-robot/?utm\\_term=.4a17eab2bce1](https://www.washingtonpost.com/news/innovations/wp/2016/05/16/meet-ross-the-newly-hired-legal-robot/?utm_term=.4a17eab2bce1)>

Much of what is done by lawyers and advocates in progressing claims in the Employment Relations Authority and the Employment Court is informed by case management and trial methodologies which have built up over many years, and which are grounded in a traditional way of working, processing and transmitting information. Those ways may seem comforting to many, but may well seem incomprehensible to many others, including litigants in person.

It is perhaps likely that as remote means of communication grow as an alternative to face to face communication (in all aspects of life) the current cultural norms attaching to legal process will also change.

All of this reinforces the utility of starting a conversation about some of the ways in which technology might assist in employment matters. Depending on your perspective, three broad drivers of this conversation might be identified: the cost to litigants of access to justice; the cost to governments of funding legal institutions and the pressure to find efficiencies; and the impetus of technology itself.

To what extent should we be getting behind the wheel to enhance access to the employment institutions for employees and employers, to address issues of cost effectiveness and proportionality, coupled with consideration of the sort of safeguards which would be necessarily have to be put in place?

Tēnā koutou, tēnā koutou, tēnā koutou katoa.

# Regulating for Decent Work in a Global Economy

JUDY FUDGE\*

## Abstract

The title of this article captures three important shifts in nomenclature in contemporary debates about labour law: from labour to work; from law to regulation; and from the national state to the global space. These shifts signal a trend towards broadening, not simply in the sense of expanding the personal scope of labour law, but, more radically, in terms of encompassing a plurality of platforms, techniques and spaces for regulating work. “Decent work” also captures a change in how we understand the normative basis for regulating work, which involves a movement away from unequal bargaining power and subordination to a more amorphous, contested and contextualised understanding of the values that work regulation ought to achieve. I focus on two aspects of the global economy – financialisation, and global value/supply chains – to illustrate my claim that it is opportune to move from an overarching narrative of labour law to one of regulating for decent work. I will also provide some examples of what I mean by regulating for decent work in a global economy. To conclude, I suggest the importance of developing approaches to regulating for decent work that are both attentive to the path along which labour market institutions evolve and the need to avoid rosy-tinted nostalgia.

## I. Introduction

The title of this article, “Regulating for Decent Work in a Global Economy” is designed to capture three important shifts – from labour to work, from law to regulation, and from the nation state to the global space – in labour law debates. These shifts signal a broadening, not only in the sense of expanding the personal scope of labour law, but, more radically, in terms of encompassing a plurality of platforms, techniques and spaces for ensuring that working people enjoy autonomy and security, and are treated with dignity and in a non-discriminatory manner at work. Moreover, the term “decent work” involves a change in how we understand the normative basis for regulating work, a movement away from unequal bargaining power and subordination to a more amorphous, contested and contextualised understanding of the values that work regulation ought to achieve.<sup>1</sup> My argument is that this shift is beneficial. Not only does it not distract from the traditional preoccupations of labour law – which is embodied in the International Labour Organization’s (ILO) maxim that labour is not a commodity –

---

\* Professor Judy Fudge, School of Labour Studies, McMaster University. I would like to thank re:work, IGK Work and Human Lifecycle in Global History Humboldt-Universität zu Berlin, for hosting me while I finished the article, Kent Law School, where I was employed when I began the article, and Professor Annick Masselot for the invitation to visit New Zealand and present the first version of this article. All errors are my own.

<sup>1</sup> Gerry Rodgers, Decent Work as a Goal for the Global Economy, 2007, available at <[http://fdm.rio20.net/sites/default/files/IMG/pdf\\_Rodgers\\_-\\_Decent\\_Work\\_as\\_a\\_Goal-2.pdf](http://fdm.rio20.net/sites/default/files/IMG/pdf_Rodgers_-_Decent_Work_as_a_Goal-2.pdf)>.

more importantly, this shift better reflects how work is engaged and performed in the global economy and the types of regulation needed to make work decent.<sup>2</sup>

My argument proceeds in four stages. The first is descriptive and briefly explains what this shift in nomenclature entails, using the ILO's 1999 Decent Work agenda as my starting point. The second part focusses on two features of the contemporary global economy – financialisation, and global supply or value chains – which I argue require us to reconsider the traditional pillars of labour law if we are going to be successful in regulating for decent work. The third part outlines the goals of labour market regulation and sketches a functional approach to regulating for decent work. The fourth part provides a couple of illustrations of what regulating for decent work might entail. I conclude by emphasizing the importance of appreciating the path dependence of labour market institutions and regulations without at the same time being held hostage to the past.

## II. Decent Work, Regulation and the Global Economy

In his first report to the International Labour Conference in June 1999, Director-General, Juan Somavia, declared that “The primary goal of the ILO today is to promote opportunities for women and men to obtain decent and productive work in conditions of freedom, equity, security and dignity”.<sup>3</sup> This report signalled the launch of the ILO's decent work agenda, which sets out four strategic objectives: first, the attainment of full employment; second, workers' rights, especially those included within the Fundamental Declaration of Principles and Rights at Work; third, social protection; and fourth, social dialogue. The underlying thrust of decent work is to integrate the economic goals of production and income with the social goals of integration, personal identity and dignity.<sup>4</sup> A distinctive feature of decent work is that social dialogue is at its heart.

Significantly, decent work is much broader than the traditional scope of employment and labour law, which has been confined to individuals engaged under a contract of employment. Decent work goes beyond waged work in formal enterprises to capture informal work from waste picking and street vending to solo self-employment, such as gig work. It serves to break down the conceptual and regulatory barriers that channel work relations into different legal categories or jurisdictions, such as employment or commercial law.<sup>5</sup> It also chips away at the separation between the workplace and the household, which is symbolised by the ILO's 2011 convention – Decent Work for Domestic Workers.<sup>6</sup>

---

<sup>2</sup> ILO, 26th Sess., *Declaration concerning the aims and purposes of the International Labour Organization*, (1944), being Annex 1(a) to the *ILO Constitution [1944 Declaration of Philadelphia]*. Reprinted in Ian Brownlie, ed., *Basic Documents in International Law*, 5th ed. (Oxford: Oxford University Press, 2002) at 53-54.

<sup>3</sup> ILO, Decent Work. Report of the Director General, Report I-AI, International Labour Conference, 87th Meeting, Geneva (June 1999) at 3.

<sup>4</sup> Rodgers, above n 1.

<sup>5</sup> Judy Fudge “Feminist Reflections on the Scope of Labour Law: Domestic Work, Social Reproduction, and Jurisdiction” (2014) 22(1) *Feminist Legal Studies* 1-23.

<sup>6</sup> Domestic Workers Convention, 2011 (No. 189), Convention concerning decent work for domestic workers (Entry into force: 05 Sep 2013) Adoption: Geneva, 100th ILC session (16 Jun 2011); Domestic

From the outset, a difficult challenge has been developing a mechanism for measuring and assessing progress towards decent work.<sup>7</sup> Attempts to develop indices capable of being synthesised into a single indicator were abandoned in part because decent work is an abstract and subjective concept.<sup>8</sup> The fact that the ILO is a tripartite institution, unlike other United Nations' bodies, also makes it difficult to agree about how to measure explicitly normative concepts.<sup>9</sup> But at the same time, that indicators can popularise a concept, they can also be very rigid. Instead of developing an index, a Tripartite Meeting of Experts on the Measurement of Decent Work in Geneva in 2008 identified a global template of qualitative and quantitative indicators that could be used to measure progress towards decent work at the country level.<sup>10</sup> Decent work is a flexible concept because it is applicable to countries across all levels of economic development. Although it incorporates some universal values such as freedom of association and non-discrimination, it also reflects the values and possibilities of each society. Decent work is also a progressive concept; it has a floor, but no ceiling.<sup>11</sup>

Despite the difficulties in measuring it, decent work has become the guiding contemporary image of an acceptable or desirable working life. During the UN General Assembly in September 2015, decent work and the four pillars of the Decent Work Agenda became integral elements of the new 2030 Agenda for Sustainable Development.<sup>12</sup> The Decent Work Agenda radically broadens the ILO's traditional constituencies to focus on people at the periphery of formal systems of labour and social protection.<sup>13</sup>

The shift in focus from law to regulation is also crucial. Traditional tools of labour law have been standard setting and the facilitation of collective self-regulation through collective bargaining. While they continue to be important, we must, as John Howe admonishes, challenge our lawyerly assumptions about what regulation is, who engages in it, and on what basis it should be assessed and understood.<sup>14</sup>

---

Workers Recommendation, 2011 (No. 201) Recommendation concerning Decent Work for Domestic Workers Adoption: Geneva, 100th ILC session (16 Jun 2011).

<sup>7</sup> Dharam Ghai, "Decent Work: Concept and Indicators" (2003) 122 *International Labour Review* 125; Naushen Nizami and Narayan Prasad, *Decent Work: Concept, Theory and Measurement* (Palgrave Macmillan, 2017).

<sup>8</sup> Kirsten Sehnbruch, Brendan Burchell, Nurjk Agloni and Agnieszka Piasna (2015) 46 "Human Development and Decent Work: Why some Concepts Succeed and Others Fail to Make an Impact" *Development and Change* 197 at 211.

<sup>8</sup> Edward Webster, Deborah Budlender and Mark Orkin, "Developing a diagnostic tool and policy instrument for the realization of decent work" (2015) 154 *International Labour Review* 123.

<sup>9</sup> Sehnbruch, Burchell, Agloni and Piasna, above n 8 at 211.

<sup>10</sup> Ibid, 126; ILO, Chairperson's report. Tripartite Meeting of Experts on the Measurement of Decent Work, Geneva, 8–10 Sept 2008 at 6–17.

<sup>11</sup> Edward Webster, Deborah Budlender and Mark Orkin, "Developing a diagnostic tool and policy instrument for the realization of decent work" (2015) 154 *International Labour Review* 123 at 125.

<sup>12</sup> Resolution adopted by the General Assembly on 25 September 2015 Transforming our world: the 2030 Agenda for Sustainable Development, United Nations, General Assembly, A/RES/70/1, 21 October 2015, Goal 8; ILO, 2030 Development Agenda, Targets for Goal #8: Decent work and economic growth, available at <[http://www.ilo.org/global/topics/sdg-2030/goal-8/WCMS\\_403787/lang--en/index.htm](http://www.ilo.org/global/topics/sdg-2030/goal-8/WCMS_403787/lang--en/index.htm)>.

<sup>13</sup> Deirdre McCann and Judy Fudge, "Unacceptable forms of work: A multidimensional model" (2017) 156 *International Labour Review* 147.

<sup>14</sup> John Howe, "A Different World: The Regulatory Project in Labour Law" in John Howe, Anna Chapman and Ingrid Landau (eds) *The Evolving Project of Labour Law* (Federation Press, 2017) 71 at

Some traditionalists fear that this shift from hard to soft law, to nudges from commands, and to private actors away from public authorities is a cloak for a deregulatory agenda.<sup>15</sup> However, I view this shift from law to regulation as a welcome departure from the straitjacket of legal positivism to an acceptance of the need to study law in action. I advocate adopting a socio-legal approach that begins with social relations and social activity, and then moves to legal categories rather than the traditional legal method, which starts with legal categories and then moves to social activity. The starting point for regulation should be the social activities bound up in work relations and not the existing legal categories of employee, worker or independent contractor.

Moreover, instead of a narrow focus on state law, it is also critical to embrace the concept of “regulatory space”, which:

contains that regulatory power – measures or interventions that seek to change the behaviour of individuals or groups – is not held solely by governments but dispersed throughout a number of bodies or groups such as firms..., non-governmental and supra-governmental agencies, standard-setting organisations, credit-rating agencies, business and professional associations, trade unions, religious organisations, courts, tribunals, peer groups, and others.<sup>16</sup>

As labour lawyers, we are familiar with collective bargaining, which creates norms under the shadow of state law. We need to draw on our understanding of the importance of parties’ self-regulation in appreciating the plurality of norm generation. To be successful, any regulatory strategy must both engage with, and be internalised by, the social actors whose behaviour is the subject of regulation. For these reasons, it is imperative to explore a wider range of tools and institutions for regulating work that falls outside the traditional repertoire of labour law.

It is also critical to appreciate that the economy is global. Despite the wishes of national populists who want to reconstruct tariff barriers and return to a world in which a few dominant countries, such as the US or a handful in Europe, set the terms of international trade, this state of affairs is no longer possible nor, from the perspective of most former colonies, desirable. While it is true that labour’s relative success in previous decades in securing protection was dependent on embedding the full ambit of the market within the social and political realm of the nation state, it is also true that the post-war compromise was limited to a very few advanced industrial states and that many citizens in the first world were treated as second class in the workplace.<sup>17</sup>

---

72; see also John Howe, “Labour regulation now and in the future: Current trends and emerging themes” (2012) 59 *Journal of Industrial Relations* 209.

<sup>15</sup> Harry Arthurs, “Corporate Self-Regulation: Political Economy, State Regulation and Reflexive Labour law” in Brian Bercusson and Cynthia Estlund (eds) *Regulating Labour in the Wake of Globalization: New Challenges, New Institutions* (Hart Publishing, 2008) at 76-78.

<sup>16</sup> Arie Freiberg, *The Tools of Regulation* (Federation Press, 2010) at 18-19; Colin Scott, “Analysing Regulatory Space: Fragmented Resources and Institutional Design” (2001) *Public Law* 329.

<sup>17</sup> See the discussion in Judy Fudge “Challenging the Borders of Labour Rights” in Darcy DuToit (ed) *Labour Law and Social Progress Holding the Line or Shifting the Boundaries? Bulletin for Comparative Labour Relations*– 92 (Kluwer 2016) 73.

Moreover, the empirical evidence of the race to the bottom is mixed.<sup>18</sup> Society has become more unequal, but today we are witnessing a reconfiguration of the north south divide to one which is intra-national – look at the north in the United Kingdom or the rust belt in the United States– and zonal.<sup>19</sup> The problem is that the structural causes of many injustices in the globalising world, including financial markets, offshore factories, investment regimes and global media, are not located within the territory and authority of the nation state.<sup>20</sup> The election of Trump in the United States and the referendum in favour of leaving the European Union in the United Kingdom may simply be the death throes of the old regime of hegemonic states on the global stage and the birth of new ones. Only time will tell.

### III. The Global Economy: Financialisation and Supply chains

Yet, it is clear that globalisation, understood as the increasing mobility of capital, services and goods across national boundaries, which is facilitated by digital technology and free trade agreements, has weakened the supports upon which the standard employment relationship were built.<sup>21</sup>

The standard employment relationship is a regulated employment relationship, which provides security of income and employment and insures for social risk in exchange for preserving managerial prerogatives to direct and control the workplace. Its institutionalisation depends upon several other pillars that must be firmly embedded; these are the welfare state, social democratic political parties, industrial trade unions, a sexual division of social reproductive labour and vertically integrated firms. What the standard employment relationship does is link capitalist work relations to the wider risk-sharing role of the welfare state.<sup>22</sup> The standard employment relationship was both the basis for, and outcome of, labour law in general and collective bargaining in particular. Large manufacturing firms needed a stable supply of workers disciplined to accept managerial authority, and these workers, in turn, formed industrial unions in order to both limit that authority and to obtain employment and income security. Workers' legal claims to wage or job protection were routed through the corporate asset pool. State policies, such as protective tariff walls and the regulation of financial markets, also supported the rise of large vertically integrated corporations that were embedded in national territories. The institution of the standard employment

---

<sup>18</sup> For a discussion of the literature see Judy Fudge and Guy Mundlak, "Justice in a Globalizing World: Resolving Conflicts Involving Workers Rights Beyond the Nation State" in Yosi Dahan, Hanna Lerner, Faina Milman (eds) *Global Justice and International Labour Rights* (Cambridge University Press, 2016) 121.

<sup>19</sup> Edward, Peter and Sumner, Andy, *The Geography of Inequality: Where and by How Much Has Income Distribution Changed Since 1990?* (September 5, 2013). Center for Global Development Working Paper No. 341. Available at <[https://www.cgdev.org/sites/default/files/edward-sumner-geography-of-inequality\\_1\\_0.pdf](https://www.cgdev.org/sites/default/files/edward-sumner-geography-of-inequality_1_0.pdf)>

<sup>20</sup> Fudge and Mundlak, above n 18.

<sup>21</sup> This section derives from Judy Fudge, "The future of the standard employment relationship: Labour law, new institutional economics and old power resource theory" (2017) 59 *Journal of Industrial Relations* 374.

<sup>22</sup> Simon Deakin, "What Exactly is Happening to the Contract of Employment? Reflections on Mark Freedland and Nicola Kountouris's Legal Construction of Personal Work Relations" (2013) 7 *Jerusalem Review of Legal Studies* 135 at 136.

relationship is the manifestation of a compromise between competing interests and logics brokered by democratic states.

I want to focus upon two features of the contemporary global capitalist economy – financialisation, and global supply chains – that undermine the supports for the traditional conception of labour law. Financialisation refers to the shift from industrial to financial capitalism. The increasingly autonomous realm of global finance has altered the underlying logic of the industrial economy and the inner workings of democratic society.<sup>23</sup> At the macro level, financialisation is a regime of accumulation that has succeeded the Fordist regime. Faced with increased international competition and domestic demand for shareholder return in the 1970s, American manufacturers have off-shored production and controlled foreign supply chains to cut down costs. Neo-liberal policies that deregulated the financial market further facilitated and promoted financialisation.<sup>24</sup> Productivity gains are not reinvested in the corporation, but, instead, are distributed to shareholders or used to purchase financial products. The income of rentiers has come at the expense of wage earners. Increased income inequality and high levels of household debt have simultaneously increased the systemic risk in financialised capitalism.<sup>25</sup>

At the meso level, financialisation refers to the shareholder value approach, which has become the dominant corporate governance model.<sup>26</sup> Corporate restructuring to promote shareholder value and, most strikingly, managers' income, result in job loss, wage and benefit roll backs, and intensified work. While the United States and the United Kingdom have been leaders, it is clear that shareholder value has been shaping the institutional practices in countries around the globe. This process of financialisation has weakened workers' bargaining power through decentralisation and reduced the level of employment protection.<sup>27</sup>

Although the rise of financial elites and the strength of the rentier and managerial classes are critical to understanding the shareholder value strategy, the mechanisms by which it is disseminated and transmitted are complicated, and extend to the state and to wage earners. The switch from pay-as-you-go state pension systems to funded pension schemes and the provision of tax benefits for individual investment in mutual funds encourage citizen-earners to invest in financial markets and actively promote the financialisation of everyday life. Individuals are responsible for managing their own risk and the approved way of doing so is to seek high rates of return in the equity market. Instead of embedding the market in the social, states increasingly expand the market into the social. Crouch characterises this change in the role of the welfare state as the shift from public Keynesianism, in which the state takes on debt, to privatised Keynesianism in which citizens are encouraged to take on debt to stimulate the

<sup>23</sup> Natascha Van der Zwan, "Making sense of financialization" (2014) 12 *Socio-Economic Review* 99 at 100.

<sup>24</sup> Sanford Jacoby, "Finance and Labor: Perspectives on Risk, Inequality, and Democracy" (2008) 30 *Comparative Labour Law and Policy Journal* 17; David Harvey, *A Brief History of Neo-liberalism* (Oxford, Oxford University Press, 2005).

<sup>25</sup> Simon Deakin and Aristeia Koukiadaki, "The sovereign debt crisis and the evolution of labour law in Europe" in Nicola Countouris and Mark Freedland M (eds) *Resocialising Europe in a Time of Crisis* (Cambridge University Press, 2013)163.

<sup>26</sup> Van der Zwan, above n 23.

<sup>27</sup> Thibault Darcillo, "Do Interactions between Finance and Labour Market Institutions Affect the Income Distribution?" (2016) 30 *Labour: Review of Labour Economics and Industrial Relations* 235.



economy. As a result, wage earners are increasingly capital owners.<sup>28</sup> This dual identity creates problems for creating and maintaining political coalitions that support the decommodification of labour.

Financialisation calls into question some of the key elements in the Fordist compromise for industrial capitalism that were central to the emergence of a standard employment relationship. I want to focus on one, which is the large manufacturing firm. The institutionalisation of the standard employment relationship was dependent upon the rise of the large manufacturing firm with which it evolved. Changes in how the firm is organised and to how work is contracted and deployed tend to undermine the standard employment relationship.

David Weil describes how the large vertically integrated firms that were essential to the consolidation of the standard employment relationship have shed employment and transferred it to a complicated network of smaller business units, with the result that employment has become more precarious.<sup>29</sup> This fissuring of the workplace allows key firms to focus on core competences, discard workers, and reduce costs, and it represents a response to pressures from capital markets. Significantly, new technologies enable lead firms to maintain control over their brand or product through the imposition and monitoring of standards while simultaneously transferring employment and risk outside their corporate boundaries.

The ability to fissure workplaces across national boundaries compounds the difficulty that states and unions have in maintaining or expanding the standard employment relationship. A distinctive feature of global capitalism is the increased permeability of national employment and business systems, through trade, production chains and international ownership. The ease with which firms can adopt different organisational forms enables them to disaggregate different components of production and service provision around the globe. The core activities of production, consumption and circulation, as well as their components (capital, labour, raw materials, management, information, technology and markets), are organised on a global scale through a network of linkages between economic agents. Global production and supply chains proliferate, and new technologies have resulted in the expansion of global services. The ILO estimates that, worldwide, one in five jobs are linked to global supply chains.<sup>30</sup>

The expansion of transnational value chains disrupts dominant frameworks for understanding and analysing employment relations, which focus either on the firm or the implications of different national contexts for firms, such as varieties of capitalism.<sup>31</sup> Lakhani, Kuruvilla and Avgar argue that varieties of capitalism approaches are limited when it comes to understanding the employment relationship in cross-national value chains. Not only do varieties of capitalism approaches assume institutional stability, which is problematic in light of the changes generated by

---

<sup>28</sup> Colin Crouch, "Privatised Keynesianism: an unacknowledged policy regime" (2009) 11 *British Journal of Politics and International Relations* 382.

<sup>29</sup> David Weil, *The Fissured Workplace Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press, 2014).

<sup>30</sup> ILO, *Work Employment and Social Outlook: Trends 2015* (International Labour Organization, 2015) at 133.

<sup>31</sup> Tashlan Lakhani, Sarosh Kuruvilla and Ariel Avgar, "From the Firm to the Network: Global Value Chains and Employment Relations Theory" (2013) 51 *British Journal of Industrial Relations* 440.

globalisation and market liberalisation, they are not particularly useful for understanding how the connections between firms across national boundaries affects employment relations. For these reasons, they urge researchers to shift the focus of employment relations analysis away from the individual firm to the interconnected networks in which they belong. Global value chain theory suggests that different value chains create different relationships between firms in the network operating under multiple national systems, and they propose that employment relations will also vary across different value chain configurations. Thus, Lakhani, Kuruvilla and Avgar advocate moving the level of analysis to the value chain in order to identify the diverse lead firm-supplier configurations that operate across national and firm boundaries.

Transnational value chains provide a particularly potent threat to the integrity of industrial relations systems and to the standard employment relationship. The reconfiguration of value-added activities across national boundaries also poses major challenges for trade unions, both undermining organised labour in advanced political economies of the global North and “exacerbating difficulties for building collective worker organization in the global South”.<sup>32</sup> For this reason, the ILO has embarked on the long and highly contested journey of trying to develop an international instrument that seeks to cultivate decent work throughout global supply chains.<sup>33</sup> The configurational framework Lakhani, Kuruvilla, and Avgar propose provides an additional lens focussing on the global level that assists in identifying the conditions under which lead firms in transnational supply chains can be persuaded to “regulate” the employment relations of workers employed by their suppliers. The trick, however, is not to lose sight of the continuing significance of the territorial or local level.<sup>34</sup>

Not only is the vertically integrated firm fissuring, other pillars that supported the platform for labour law, the standard employment relationships, are weakening. The andro-centric model of a citizen (male) breadwinner with equality norms extended to women or migrants is not fit for purpose for these workers who need bespoke standards not the same ones.<sup>35</sup> The space of labour law, the territory of the nation state, no longer corresponds to how economic power is organised, and the traditional techniques, institutions and actors in labour law need to be broadened. Given the transformation in some of the pillars supporting the standard employment relationship and traditional conceptions of labour law, we need to consider a range of platforms for regulating work. I want to be clear that I am not calling for labour law to be abandoned. However, I do not think it is possible simply to stretch the existing platform of the contract of employment to encompass the wide range of work that needs to be regulated for it to be decent.

---

<sup>32</sup> Philip Taylor, “Putting Labour in its Place: Labour Process Analysis and Global Value Chains” in Kirstey Newsome, Jennifer Bair and Al Rainnie (eds) *Putting Labour in its Place: Labour Process Analysis and Global Value Chains* (Palgrave Macmillan, 2015) 1 at 11.

<sup>33</sup> ILO, *Decent work in global supply chains*, Report IV, International Labour Conference, 105th Session, 2016, ILC.105/IV.

<sup>34</sup> Neil Coe, “Labour and Global Production Networks: Mapping Variegated Landscapes of Agency” in Kirstey Newsome, Jennifer Bair and Al Rainnie (eds) *Putting Labour in its Place: Labour Process Analysis and Global Value Chains* (London, Palgrave, 2015) 171.

<sup>35</sup> Judy Fudge “Domestic Work, Mobility and Labour Law: Challenging Borders’ in Kerstin Ahlberg and Niklas Bruun (eds) *The New Foundation’s of Labour Law* (Peter Lang, 2017) 215.

#### **IV. The Goals of Regulating Labour Markets and a Functional Approach to Regulating Work**

The time is ripe to search for forms of regulation and institutions that are functionally equivalent to labour law. A functional approach to regulating for decent work would start with identifying the goals of regulation. On the basis of a review of the law and development and labour law literatures, Simon Deakin and Shelley Marshall have developed the following list of goals of labour market regulation, which includes:

- Economic coordination;
- Risk distribution;
- Demand management;
- Democratisation;
- Empowerment and
- Redressing the specific vulnerabilities and unfreedoms in a region or country.<sup>36</sup>

These goals should be the basis for any type of regulation for decent work.

After selecting the goals, the next step in developing regulatory interventions is to map the structure of the specific market. Organisational form interacts with the structure of markets to influence work arrangements. Some markets are structured in ways that increase the vulnerability of workers to poor outcomes and shifting risk from profit takers to workers. This risk shifting behaviour is frequently the case where large concentrated business entities have greater market power than the numerous small-scale entities with which they interact.

David Weil identifies four types of monopsony markets with distinctive competitive dynamics that cause or exacerbate worker vulnerability.<sup>37</sup> They are: strong buyers sourcing in competitive supply chains; central production co-coordinators managing large contracting networks; small workshops linked to large branded national industries; and small workplaces and contractors linked to common purchasers. Garment and food supply chains, fast fashion, residential home construction, petty agricultural production, courier companies, gig workers, and waste pickers fall into these monopsony markets.

The third step is to look for functional equivalents to the institutional role that the employer played in the standard employment relationship.<sup>38</sup> In some cases, the regulation of work would be similar in many respects to the traditional forms of labour law as it would focus on work as a relationship between entities that exercises economic or labour process control over the worker. Such entities would include an employer, a retailer, a supplier, or purchaser. However, in other contexts, such as household workers who are family members, street vendors who do not depend upon one or two suppliers,

---

<sup>36</sup> Simon Deakin, "Labour law and development in the Long Run" in Shelley Marshall and Colin Fenwick (eds) *Labour Regulation and Development: Socio-Legal Perspectives* (Edward Edgar, 2016) 33; Shelley Marshall, "Revitalizing labour market regulation for the economic South: New forms and tools" in Shelley Marshall and Colin Fenwick (eds) *Labour Regulation and Development: Socio-Legal Perspectives* (Edward Edgar, 2016) 288 at 292-3.

<sup>37</sup> David Weil, "Rethinking the Regulation of Vulnerable work in the USA: A Sector-Based Approach" (2009) 51 *Journal of Industrial Relations* 411.

<sup>38</sup> Marshall, above n 36 at 300.

or self-employed seamstresses, there is no entity that exercises control over the worker. In these cases, it is important to find other platforms and techniques for regulating work and protecting workers than those traditionally associated with labour law. For example, the income protective function performed by firms in employment relationships can be accomplished by a range of social security schemes that can be funded by a variety of revenue-raising methods.<sup>39</sup>

My contention is that many of the key problems that we must confront in regulating for decent work in a global economy are not simply matters of the classification. While there is a big problem with disguised or sham self-employment, which essentially involves questions about where to draw the lines between employees and independent contractors and whether there should be an intermediate category with diluted rights, these questions do not confront the critical problem: which is that the changing nature of firms and the organisation of production and the increasingly heterogeneous workforce no longer fit within our traditional labour law paradigm.<sup>40</sup> Furthermore, this traditional paradigm – a regulated and bilateral contract of employment – has never really come to grips with the perennial problem of informal work.<sup>41</sup>

Over the past 40 years, the prediction that the informal sector, which was characterised as a residual sector in developing countries, would be absorbed into the formal or capitalist economy as economies modernised, has proven to be incorrect.<sup>42</sup> In fact, in developing and developed countries, the informal economy has persisted and with it, low-skilled, poorly paid, intermittent, and insecure employment. Although wage and salary employment is gradually growing as a percentage of total employment worldwide, informal employment remains stubbornly high, comprising more than 50 per cent of non-agricultural employment in most regions of the developing world. According to Women in Informal Employment: Globalising and Organising (WIEGO), the share informal employment of all non agricultural employment is 82 per cent in South Asia, 66 per cent in Sub-Saharan Africa, 65 per cent in East and Southeast Asia and 51 per cent in Latin America. In the Middle East and North Africa, informal employment is 45 per cent of non-agricultural employment.<sup>43</sup> Changes in production and the ways in which firms pursue flexible forms of labour, such as casual labour, contract labour, outsourcing, home working and other forms of subcontracting that offer the prospect of minimising fixed non-wage costs, have strengthened the links between informal and formal economic activities. Thus, we have witnessed a process of ‘informalisation’ whereby “employment is increasingly unregulated and workers are not protected by labour law”.<sup>44</sup>

---

<sup>39</sup> Ibid.

<sup>40</sup> Judy Fudge, “Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation” (2006) 44 Osgoode Hall Law Journal 609.

<sup>41</sup> Kamala Sankaran, “Labour Law in South Asia” in Shelley Marshall and Colin Fenwick (eds) *Labour Regulation and Development: Socio-Legal Perspectives* (Edward Edgar 2016) 207 at 211.

<sup>42</sup> For a discussion of the definitions of informal sector, informal economy and informal employment see, Joann Vanek, Martha Alter Chen, Françoise Carré, James Heintz and Ralf Hussmanns, Statistics on the Informal Economy: Definitions, Regional Estimates & Challenges, WIEGO Working Paper (Statistics) N° 2, April 2014.

<sup>43</sup> Ibid, at 1.

<sup>44</sup> Judy Fudge and Deirdre McCann, Unacceptable Forms of Work: A Global and Comparative Study International Labour Office: Geneva 2015), 30-35, available <[https://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/documents/publication/wcms\\_436504.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_protect/documents/publication/wcms_436504.pdf)>

## V. Informal Workers and Platform-Mediated Work

Given the endurance and prevalence of informal work, my first set of examples about how to regulate for decent work begins with the initiatives and research of WIEGO. WIEGO is a global network focussed on securing livelihoods for the working poor, especially women, in the informal economy. WIEGO celebrated its 20<sup>th</sup> anniversary in November 2017.

WIEGO recognises that informal workers, like *all* workers, require a regulatory framework that protects their rights in the workplace, balances the needs of all stakeholders, and promotes a climate of stability and security. Moreover, working with groups of informal workers, WIEGO has developed a series of briefs on regulation designed for specific occupational sectors, such as domestic workers, home-based workers, street vendors and waste pickers, in countries as diverse as Mexico, Ghana, South Africa, Thailand, India and Cambodia.<sup>45</sup>

A good example of a successful regulatory initiative is the waste pickers in Pune, a city of over three million inhabitants in India.<sup>46</sup> Pune boasts robust recyclable materials markets where materials trading and processing operations are carried out. The markets consist of sub-markets that operate at different levels of trading activity. The lowest end is the retail segment in which waste pickers, who constitute the base of the pyramidal market structure, and itinerant waste buyers are the sellers. These workers, most of whom are women, comprise 76 per cent of the workers in the recycling market. Transactions are complex in this sub-market, with buyers and sellers changing places for different commodities. Towards the apex of the pyramid, there is progressive commodity specialisation. Recyclable materials transit to manufacturing industries through the higher levels of trade enterprises. Informal recovery and trading in recyclable materials is entirely market driven and flourishes without any subsidies.

A union, Kagad Kach Patra Kashtakari Panchayat (KKPKP), organised the waste workers at the bottom of the pyramid and sought recognition of its members as workers from the Pune Municipal Corporation. The union led a series of collective actions by aggrieved waste pickers that protested against abuse and discrimination. Since the waste pickers are not municipal employees, but instead are self-employed workers, the union used political leverage rather than traditional forms of collective bargaining to put pressure on the municipality.

The KKPKP first obtained identity cards for the workers from the municipal corporation, and the workers began to organise for secure income and clear access to the waste. As waste-picking activities became more organised, the municipality threatened to privatise the work of purchasing the waste. At that time, the union set up

---

<sup>45</sup> WIEGO, Empowering Informal Workers, Securing Informal Livelihoods, available at <<http://www.wiego.org/informal-economy/occupational-groups>>.

<sup>46</sup> The discussion of waste pickers in Pune is derived from Poornima Chikarmane, Waste Pickers in Pune, India, IEMS Informal Economy Monitoring Study, available at <<http://www.wiego.org/publications/city-report-informal-economy-monitoring-study-waste-pickers-pune-india>>; Poornima Chikarmane and Lakshmi Narayanan, 'Transform or Perish: Changing Conceptions of Work in Recycling' in Judy Fudge, With Kamala Sankaran, and Shae McCrystal (eds) *Regulating Work: Challenging Legal Boundaries* (Onati series) (Hart, 2012) 49.

a wholly worker-owned autonomous cooperative of waste pickers to purchase the waste and to act as a vehicle that would provide front-end waste management services to the city of Pune and recover user fees from households. The co-op and the municipal corporation entered into a formal memorandum of understanding for door-to-door collection of waste in 2008.

The workers wear uniforms, have access to sorting space at the co-op, and the union and the co-op provide group life and medical insurance to the workers as well as access to credit. Harassment has decreased and working conditions have improved. The waste pickers have a stable source of income and a firm identify as workers.

What is significant about this example is that it illustrates the range of membership-based organisations that are critical for regulating for decent work. In addition to their traditional role in collective bargaining, unions can exercise political power, establish co-operatives, engage in training or provide a hiring hall. Worker cooperatives are a form of enterprise that is owned and democratically controlled by their members, who are also workers/employees themselves. Both types of organisations, unions and cooperatives, have their place. However, it is critical for workers' organisations to identify the entity or authority most responsible for the issues over which they wish to negotiate. It is also important to recognise that the negotiating partner may differ for different issues even for a single group of workers.<sup>47</sup>

The second group of workers I want to focus on are workers whose employment is mediated by digital platforms, which is commonly referred to as crowdsourcing or the 'gig economy'. In crowdwork, workers complete small jobs or tasks through online platforms, such as Amazon Mechanical Turk, Freelancer, Upwork, Crowdfunder, Fiver, and Clickworker.<sup>48</sup> These platforms may create a demand for highly skilled labour or provide micro tasks that require minimal skill, training and rewards. They enable workers to reach a global market for their labour, increasing their chances of finding flexible, paid work. However, they can also reinforce a gender-based division of labour when women try to combine crowdwork with care obligations or forms of social exclusion for populations who do not have access to the internet.<sup>49</sup> In "work-on-demand via apps", which is known as gig work, workers perform duties, such as providing transport, cleaning, home repairs, or running errands, but the workers learn about these jobs through mobile apps, from companies such as Uber, Taskrabbit, and Handy.<sup>50</sup> A distinctive feature of these jobs is that they are performed locally. Both crowdwork and on-demand work manifest many of the same features found in the wider labour market, including casualisation, income instability and (not infrequently) a disguised employment relationship.<sup>51</sup>

---

<sup>47</sup> Debbie Budlender, "Informal Workers and Collective Bargaining: Five Case Studies" WIEGO Organizing Brief No 9 October 2013, available at <http://www.wiego.org/sites/default/files/publications/files/Budlender-Informal-Workers-Collective-Bargaining-WIEGO-OB9.pdf>.

<sup>48</sup> Valerio De Stefano, *The rise of the "just-in-time workforce": On-demand work, crowdwork and labour protection in the "gig-economy."* Conditions of Work and Employment Series WP 71, Geneva, ILO, 2016.

<sup>49</sup> Janine Berg, *Income security in the on-demand economy: Findings and policy lessons from a survey of crowdworkers.* Conditions of Work and Employment Series No. 74 Inclusive Labour Markets, Labour Relations and Working International Labour Office – Geneva, 2015.

<sup>50</sup> De Stefano, above n 48.

<sup>51</sup> Wayne Lewchuk. "Precarious jobs: where are they, and how do they affect well-being?" (2017) 28

Digital platforms, such as Amazon's Mechanical Turk or Uber, act as a form of 'internalised offshoring' to allocate work and provide services. The World Bank recently estimated that there were 48 million people registered on such platforms, though only around 10 per cent were considered to be active.<sup>52</sup> By disrupting traditional boundaries between nation states and legal categories, they call into question the paradigms of labour law.

Here again, it is important to go beyond seeing the problem as simply one of classification.<sup>53</sup> Troy Sarina and Joellen Riley move beyond this simple step and they urge gig workers to investigate the:<sup>54</sup>

potential for a different organisational form, better designed to ensure that the workers in a venture derive not just a minimal fee-for-service (as is presently the model for many gig economy platforms), but an opportunity to share in the profits of the venture, and to facilitate an efficient sharing of risks inherent in equipment ownership.

They argue that gig work via digitalised platforms may be particularly appropriate for organisations through the cooperative form, which is an organisational model that is an alternative to the for-profit corporation.<sup>55</sup> In fact, in South Africa, there is a cooperative called Coopify that runs an app for domestic workers that is designed to provide them with decent work.<sup>56</sup> Cooperatives will not solve all of the problems involved in commodifying labour, but they substitute democratic control by the workers for the profit maximising interests of shareholders. The cooperative form is not a panacea to the problem of labour exploitation, but it is an alternative model that challenges, rather than reflects, the mistaken belief that wealth trickles down and that undemocratic forms

---

*Economic and Labour Relations Review* 402.

<sup>52</sup> Siou Chew Kuek, Cecilia Maria Paradi-Guilford, Toks Fayomi, Saori Imaizumi, Panos Ipeirotis, The global opportunity in online outsourcing (Washington, D.C., World Bank Group, 2015) available at <<http://documents.worldbank.org/curated/en/138371468000900555/The-global-opportunity-in-online-outsourcing>>; One large recent study, McKinsey Global Institute, Independent Work: Choice, Necessity, and the Gig Economy (2016) [hereinafter MGI Study on Independent Work], found that 20 to 30 per cent of working age individuals in the U.S. and Europe engaged in some "independent work." Of those, most said that they did so by choice, either for their primary source of income (30 per cent) or for supplemental income (40 per cent). The remainder said they did "independent work" out of necessity, either as their primary source of income (though they would prefer a "traditional job") (14 per cent), or for supplemental income (16 per cent). Ibid, at viii.

<sup>53</sup> Stewart and Stanford identified five different options for regulating crowd source gig workers, which are 1) confirming and enforcing existing laws; 2) clarifying or expanding definitions of employment; 3) create a new category of 'independent worker'; 4) creating rights for workers, not employees; and 5) Reconsider the concept of an employer. Andrew Stewart and Jim Stanford, "Regulating work in the gig economy: What are the options?" (2017) 28, *The Economic and Labour Relations Review* 420.

<sup>54</sup> Troy Sarina and Joellen Riley, "Re-crafting the enterprise for the gig-economy" Paper presented at Fourth New Zealand Labour Law Society Conference, 24-25 November 2017, Christchurch, New Zealand, cited with authors' permission,

<sup>55</sup> A cooperative is defined by the International Cooperative Alliance, the International Labour Organization and the Government of South Africa as 'an autonomous association of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations through a jointly--owned and democratically-controlled enterprise.' ILO Promotion of Cooperatives Recommendation, 2002 (No. 193).

<sup>56</sup> Abigail Hunt and Fortunate Machingura, *A good gig? The rise of on-demand domestic work* Working Paper 7 Overseas Development Institute (London, 2016).



of economic organisation – the corporation – result in the greatest wealth for all. Cooperatives could help to create a true sharing economy.

## VI. Conclusion

Labour law regimes arose as solutions to problems that are endemic to labour markets.<sup>57</sup> However, the precise institutions and regimes that become embedded are context specific, with the result that subsequent regulations tend to follow an established path. The standard employment relationship and the labour laws with which are associated were solutions that were functional to resolving the recurring dilemmas in commodifying labour. The challenge now is to find functional equivalents.

At one level, this is an intellectual challenge. At the same time, as we must acknowledge the extent to which the past shapes the present, we must also avoid looking at the past through rose coloured glasses. The standard employment relationship was limited; and failing to acknowledge its limitations and only emphasising its achievements will not help us to address the regulatory challenges we face today. It is important to appreciate the extent to which the past was built on such institutionalised forms of subordination as patriarchy and colonialism. A return to the good old days is neither possible nor desirable.

Nativism and parochialism are not the solutions to deciding the difficult questions of entry to and membership in a territory. New ideas matter because ideas and discourse precede, legitimise and actuate policy change. Forging new foundations for labour law requires us to question and break down borders between production and social reproduction, the sexual division of labour, and nation states, to develop new forms of and vehicles for solidarity, and to appreciate the need to emancipate, and not simply to protect, society from capitalism.

However, it is important not to conflate the notion that “ideas matter” with the “power of ideas”.<sup>58</sup> Successful regulatory strategies must engage with social actors whose behaviour is the subject of regulation. The critical regulatory challenge for achieving decent work is to identify and institutionalise innovative forms of participatory governance alive to workers’ specific social location. This is the recurring struggle of labour law, collective self-organisation, and it is at the heart of regulating for decent work in a global economy.

---

<sup>57</sup> Judy Fudge, “Labour as a ‘Fictive Commodity’: Radically Reconceptualizing Labour Law” in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press, 2011).

<sup>58</sup> Huw Thomas and Peter Turnbull, “From horizontal to vertical labour governance: The International Labour Organization (ILO) and decent work in global supply chains” (2017) *Human Relations*, 19 First Published September 8, 2017.



## **Address to 2017 Biennial Conference of NZ Labour Law Society: Reflections on the United Nations Dispute Tribunal 2009-2016**

JUDGE CORAL SHAW\*

### **Introduction**

It is self-evident that a proper justice system should be independent, transparent, effective, efficient and adequately resourced.

The UN system of internal justice is its only form of administering justice for its staff members. By 1995, Secretary General Kofi Annan, in response to concerns expressed by both UN staff and management had acknowledged the need to address its inadequacies. It was 60-years-old and had been inherited from the League of Nations. It was based on a protracted peer review system that produced recommendations on staff members' employment disputes. Staff had a right to an appeal to the former UN Administrative Tribunal (former UNAT) but the Tribunal members did not need to be judges or even legally qualified. It sat irregularly and had a backlog of cases of least five years, and often more. Its decisions were non-binding so the Secretary General and management could choose to accept or reject them.

In 2006, a panel of external judicial experts reported to the General Assembly that the system was "outmoded, dysfunctional, ineffective and lacking in independence."<sup>1</sup>

Commentators stated that it was difficult to escape the conclusion that, by its own statute, the UNAT was more a political organ of the General Assembly than a truly independent and impartial judicial arm of the Organisation.<sup>2</sup>

The importance of having a proper system for the resolution of staff employment disputes in the UN cannot be underestimated. Through the Secretary General, who is effectively the CEO of the UN, the UN employs approximately 70,000 staff members across the globe (not including peacekeeping troops). These staff run the administration of the UN itself and administer and deliver UN projects in North, South and Central America, Europe, Africa and all Asia and the Pacific. As they are employed by an international organisation, rather than a

---

\* Judge Coral Shaw (retired), November 2017

<sup>1</sup> "The Redesign Panel on the United Nations system of administration of justice was established by the Secretary-General in January 2006 pursuant to resolution 59/283, in which the General Assembly requested him to establish a panel of external, independent experts to review and possibly redesign the system of administration of justice at the United Nations." (A/61/205) The members of the Redesign Panel were: Ahmed El-Kosheri, Diego Garcia-Sayan, Mary Gaudron, Kingsley C. Moghalu and Louise Otis

<sup>2</sup> Abdelaziz Megzari "The Internal Justice of The United Nations: A critical History 1945-2015", Blokker, N. M. (Eds.) *Legal Aspects of International Organizations*, Vol 56 (Brill | Nijhoff, The Netherlands, 2015).

government or individual employer, they have no recourse to any national system of employment or labour law. Hence the need for an internal system.

It took the slow wheels of UN bureaucracy and the machinations of geo-politics amongst the UN member states until 2009 to get the system up and running. Some of the dynamics at play during that time included reluctance by some member states to pay the increased costs of a proper system and the inevitable push back by some senior UN administrators who stood to lose their monopolistic control over human resource issues.

The new internal justice system which came into being on 1 July 2009 was two tiered with a full time Dispute Tribunal and an Appeals Tribunal. The judges<sup>3</sup> were selected from a wide range of national jurisdictions following an extensive selection process and election by the General Assembly. We (the first judges) were all aware of the huge expectations of the staff members and their various unions.

The failings of the previous system had been well advertised. In fact, they are narrated in the preamble to the General Assembly resolution that set up the new system and subsequent relevant resolutions<sup>4</sup>. We were appointed to an institution that was expected to remedy these failings; in hindsight, it was naïve of us to imagine that it would be smooth sailing. I offer a couple of examples where the new UN Internal justice system was subject to wilful and blatant attack by the administration of the UN.

First, some of the decisions of the new tribunals displayed a wider interpretation of what was applicable law than the former UNAT, in particular in relation to human rights principles and modern law of employment.

One of my early judgments was a case of equal pay for equal work, in which the Secretary General's legal advisors asserted that the Universal Declaration of Human Rights did not apply to UN staff members and that classification of posts (and hence salary levels) is subject solely to management's discretion, even to the extent that internationally acknowledged human rights may be violated. My decision, which found otherwise, received harsh criticism and was unsuccessfully appealed by the Secretary General.<sup>5</sup>

In its first annual report to the General Assembly, in 2010, on the new system of administration of justice<sup>6</sup>, the Secretary-General criticised at length the emerging jurisprudence of the new tribunals. It specifically mentioned my decision as an example and said:

The Secretary-General requests the General Assembly to confirm that the exercise of judicial review by the Dispute Tribunal and the Appeals Tribunal should be undertaken

---

<sup>3</sup> First UNDT judges: Judge Vinod Boolell (Mauritius), full-time judge based in Nairobi; Judge Memooda Ebrahim-Carstens (Botswana), full-time judge based in New York; Judge Thomas Laker (Germany), full-time judge based in Geneva; Judge Goolam Hoosen Kader Meeran (United Kingdom of Great Britain and Northern Ireland), half-time judge; Judge Coral Shaw (New Zealand), half-time judge; Judge Michael Adams (Australia), ad litem judge based in New York; Judge Jean-François Cousin (France), ad litem judge based in Geneva; Judge Nkemdilim Amelia Izuako (Nigeria), ad litem judge based in Nairobi.

<sup>4</sup> Recognising that the current system of administration of justice at the UN is slow, cumbersome, ineffective and lacking in professionalism, and that the current system of administrative review is flawed... General Assembly Resolution 6/261.

<sup>5</sup> *Chen v SG UNDT/2010/068* 22 April 2010; *SG v Chen* 2011-UNAT-107 11 March 2011

<sup>6</sup> Administration of justice at the United Nations  
Report of the Secretary-General to GA A/65/373

with full respect for the prerogatives of the General Assembly and for the role of the Secretary-General as the chief administrative officer of the Organization and for his prerogatives and responsibilities under the Charter of the United Nations.

In an obvious attempt to influence the Tribunals' decisions, the Secretary General proposed amendments to their statutes and rules of procedure, which would have narrowed down their statutory powers.

The second example happened in the early days of the new tribunal. The administration's steadfast refusal to comply with tribunal orders to produce documents threatened the ability of the Tribunal to properly consider cases. When the Appeals Tribunal predictably held that the Tribunal had the right to order the production of any document if it was relevant for the purposes of the fair and expeditious disposal of the proceedings, the Secretary General took great exception to this<sup>7</sup> and asked the General Assembly to:

Amend the statute of the Dispute Tribunal to recognize that where the production of confidential documents would undermine significant organizational interests, such as the security of staff members or the confidentiality of communications between the Organization and Member States, the Secretary-General may decline to produce confidential documents or portions thereof and the Dispute Tribunal may then draw appropriate and reasonable inferences from any such non-production.

Fortunately, the General Assembly declined to make such amendments although it did later amend the statute to limit the power of the Tribunal to make interlocutory orders against the Secretary General such as injunctive relief.

Eight years on, there is better acceptance of the Tribunals and their decisions. The internal justice system has, at last, captured the attention of the most senior managers within the Secretariat. In 2015, for the first time since 2009, the UN Chef de Cabinet strongly and publicly endorsed the internal justice system.

I believe that the principles of independence, transparency, effectiveness, efficiency are now respected by the UN administration in a way that was unthinkable only seven years ago. It is to the credit of then Secretary General Ban Ki Moon that he personally drove the project once it was underway, and eventually became its most vocal proponent. It is clear, with hindsight, that the submissions and tactics made on his behalf were driven in large part by legal and other officials who had been in charge of the old system and felt threatened by the new regime. At a meeting with judges in New York, Secretary General Ban told us that he now felt comfortable urging member states and other international organisations to respect the rule of law now that the UN was meeting its obligations in that regard.

What I have described demonstrates that systems of law that are designed to enforce the rights of employees are very vulnerable to being undermined by forces who believe that the control of employment relationships should rest predominately in the hands of employers. It takes vigilance by academics, practising lawyers, unions and judges to ensure that the rule of law, rather than the rule of employers, prevails.

---

<sup>7</sup> Ibid A/65/373

## Re-crafting the enterprise for the gig-economy

TROY SARINA\* and JOELLEN RILEY\*\*

### Abstract

Much of the voluminous literature emerging on the gig economy and the impact of “platform”-based work on labour standards focusses on the vulnerability of workers to particular forms of exploitation: low rates of pay, precarious engagement, and unsafe working conditions. Proposed solutions often focus on classification problems: should these workers be classified as “employees” to become entitled to various labour rights? Classifying the worker as an “employee” necessarily assumes the existence of an “employer”. This paper explores the potential for a (possibly) more radical solution to worker exploitation, by investigating an alternative form of business organisation for these kinds of enterprises. The cooperative (well known in Europe, and in agriculture in Australasia) may provide an appropriate enterprise model in the so-called “sharing” economy.

### I. Gig economy work and the challenge for labour lawyers

The emergence of new technologies in the last decade has had a profound impact on contemporary labour markets, and the arrangements under which many people work. An extensive literature is emerging on the impact of what has variously been described as the “sharing economy”, the “collaborative economy”,<sup>1</sup> and the “gig economy”.<sup>2</sup> We are living in an era where artificial intelligence and computer processing are influencing the way we live, the way economies operate and, most relevant to our concerns here, the way many people now work.

The gig economy, typified by digital platforms such as Uber (in the “rideshare”,<sup>3</sup> or passenger transport business) or Airtasker (in the odd job business), involves the intermediation by a digital platform, for a profit, of work contracts between customers or clients who require a service, and workers willing to provide that service. Some platforms offer physical and local services (transport, odd jobs); others provide services remotely (data entry, graphic design, coding), and can involve transactions between engagers and providers in different countries. The OECD Digital Economy Outlook 2017 estimates that, of the 49 million users of the digital services of “Upwork” and “Freelancer” in 2016, there were 10 times as many clients of the

---

\* Senior lecturer, Macquarie University Faculty of Business and Economics, [troy.sarina@mq.edu.au](mailto:troy.sarina@mq.edu.au)

\*\* Head of School and Dean, and Professor of Labour Law, The University of Sydney Law School, [joellen.riley@sydney.edu.au](mailto:joellen.riley@sydney.edu.au)

<sup>1</sup> See for example State of NSW Department of Finance, Services and Innovation, “The Collaborative Economy in NSW – A position paper”, November 2015.

<sup>2</sup> See for example *Crowdsourcing, the Gig-Economy and the Law* (2016) 37(3) Comparative Labor Law and Policy Journal, for a number of academic studies on the world of digitally-sourced work.

<sup>3</sup> This is the terminology adopted by the Road Transport (Public Passenger Services) (Taxi Industry Innovation) Amendment Act 2015 (ACT).

services in high income countries, and 4.5 times more providers of services from low income countries.<sup>4</sup>

Gig work does not necessarily require a long-term commitment from the worker (although it is clear that some workers are now making full-time careers as Uber drivers<sup>5</sup>). Typically, gig economy workers are engaged to complete a particular task (the gig) within a defined time with no expectation of future work.<sup>6</sup> As a result, and depending upon jurisdiction,<sup>7</sup> these workers are (generally) denied access to the statutory benefits and rights that employed workers' access, such as a minimum wage and the right to organise.<sup>8</sup> And this has been the focus of much of the emerging literature on the labour law implications of gig economy work.<sup>9</sup>

Of course, the fragmentation of work into short term "gigs" is nothing new. Labour law scholars have long observed that "employment" is no longer synonymous with full time work in a single enterprise. Three decades ago, Pollert observed that many modern organisations are comprised of a small core of full-time workers supplemented by an array of peripheral or "distanced" workers engaged on a part-time, casual or contract basis.<sup>10</sup> Nevertheless, recent technological advancements are accelerating the growth of peripheral work. A 2015 report by consulting firm Price Waterhouse Coopers suggests that up to 70 per cent of existing occupations are likely to be replaced or altered by technological advancements over the next five to 10 years.<sup>11</sup> In the United States, the proportion of the labour force working in the gig economy more than doubled in the five years to 2015 (up from 7.2 per cent to 14.4 per cent).<sup>12</sup> A similar spike in gig work has been recorded in Australia. Approximately 4.1 million or 32 per cent of Australia's working population had undertaken some form of freelance or gig based work in 2014, and this is projected to increase rapidly in the future.<sup>13</sup> According to the OECD Digital Economic Outlook 2017, the greatest "exponential" growth is in the platforms offering accommodation (AirBnB) and passenger transport (Uber and its rivals).<sup>14</sup>

<sup>4</sup> OECD Digital Economy Outlook OECD (2017), OECD Publishing, Paris, at 229.  
<<http://dx.doi.org/10.1787/9789264276284-en>>.

<sup>5</sup> According to the *OECD Digital Economy Outlook 2017*, at 231, Uber drivers in the United Kingdom and France drive, on average 27 hours per week. Time commitment is presently lower in Australia (19 hours per week) and the United States (20 hours).

<sup>6</sup> G Friedman, "Workers without employers: shadow corporations and the rise of the gig economy" (2014) 2 (2) *Review of Keynesian Economics* 171-188.

<sup>7</sup> In the United Kingdom, Uber drivers were found by an Employment Tribunal to be "workers" (but not necessarily "employees") for the purposes of the Employment Rights Act 1996, s 230(3)(b): see *Aslam, Farrer & Ors v Uber BV, Uber London and Uber Britannia Ltd*, Case Nos 2202551/2015, decided on 12 October 2016, affirmed in *Uber BV, Uber London and Uber Britannia Ltd v Aslam, Farrer & Ors*, UKEAT/0056/17/DA, 10 November 2017.

<sup>8</sup> Miriam Cherry & A Aloisi, (2016), "Dependent contractors in the gig economy: A comparative approach", (2016) 66 *American University Law Review*, 635-689 at 683.

<sup>9</sup> See the papers collected in *Crowdsourcing, the Gig-Economy and the Law* (2016) 37(3) *Comparative Labor Law and Policy Journal*.

<sup>10</sup> For example, see Anna Pollert, "The Flexible Firm: Fixation or Fact?" (1988) 2.3 *Work, Employment & Society* 281-316. See too John Atkinson, "Manpower Strategies for Flexible organisations", *Personnel Management*, August 1984.

<sup>11</sup> Price Waterhouse Coopers (PWC), *Future-proofing Australia's workforce by growing skills in science, technology, engineering and maths*, April 2015, <<https://www.pwc.com.au/stem.html>>, 1-24 at 10.

<sup>12</sup> Will Rinehart & Ben Gitis "Independent Contractors and The Emerging Gig Economy", *American Action forum*, 29 July 2015, <<https://www.americanactionforum.org/research/independent-contractors-and-the-emerging-gig-economy/>>.

<sup>13</sup> Frank Cheung, 'Australia's freelance economy grows to 4.1 million workers', *news.com.au*, 27 October 2015 <<https://www.news.com.au/finance/work/at-work/australias-freelance-economy-grows-to-41-million-workers-study-finds/news-story/629dedfaea13340797c68822f4f2a469>>

<sup>14</sup> OECD, above n 4 at 228.

Much labour law scholarship has been focussed on the risks of exploitation of the growing army of gig economy workers providing physical and digital services, and a common solution appears to be to test the prospects for categorising this kind of work as “employment”, and the platform intermediaries as employers.<sup>15</sup> The admirable object of this scholarship is to guarantee decent working conditions, living wages and a measure of job security for these workers, such as is enjoyed by employed workers.<sup>16</sup> Another solution to the risk of exploitation of labour in the gig economy, and one which accords with some of the rhetoric of the gig economy as an enabler of “micro-entrepreneurship”, is to focus instead on the ownership and control of the enterprise, and to consider ways to enable gig economy workers to share in the profits derived from their labour, and to exercise a greater measure of control over their own work. One way for platform-based entities to be owned and controlled by the workers themselves is to establish worker cooperatives, and new experimentation with worker cooperatives is already occurring around the globe.

## II. The corporate employer model.

Before we consider the features and potential benefits and pitfalls of worker cooperatives, it is useful to review the dominant organisational form in our economy (the for-profit corporation) and the relationship between the corporate employer and the worker. With the exception of those managerial employees who take up positions on the board of directors, employees are treated as “outsiders” in contemporary corporate law doctrine. The board of directors owes allegiance to the best interests of the company, and the company’s interests are generally confined to the interests of shareholders. The predominant philosophy of Anglo-American corporate law is that directors of corporations are bound to serve the interests of shareholders who effectively “own” the company,<sup>17</sup> so workers’ claims to share in corporate wealth must be satisfied by bargaining for wages and working conditions.<sup>18</sup> Negotiations with employees – especially when conducted collectively with employee representatives (typically trade unions), are characterised as contracting with external service providers. In this model, the only employees who share profits are those (usually managerial) employees who negotiate for performance-based bonuses. Employee share ownership schemes (where they are available) may provide an avenue for employees to share in the profits of the enterprise, but only in their capacity as shareholders. In our current corporate governance model, minority shareholders have a weak voice in corporate governance, and very little control over management.<sup>19</sup> But that is another story.

---

<sup>15</sup> See for example, employee rights advocate and barrister, Josh Bornstein’s opinion piece: <http://joshbornstein.com.au/writing/the-great-uber-fairness-fallacy-as-a-driver-how-do-you-bargain-with-an-app/>.

<sup>16</sup> See also Joellen Riley “Brand New ‘Sharing’ or Plain Old ‘Sweating’? A Proposal for Regulating the New ‘Gig Economy’” in Ron Levy, Molly O’Brien, Simon Rice, Pauline Ridge, Margaret Thornton (Eds.), *New Directions for Law in Australia: Essays in Contemporary Law Reform*, (2017, ANU Press, Canberra), 59-69, for a proposal to introduce a special regulatory scheme for this kind of work.

<sup>17</sup> See Richard Mitchell, Anthony O’Donnell, and Ian Ramsay, “Shareholder Value and Employee Interests: Intersections between Corporate Governance, Corporate Law and Labour Law” (2005) 23 *Wisconsin International Law Journal* 417 at 439.

<sup>18</sup> See Jennifer Hill, “At the Frontiers of Labour law and Corporate Law: Enterprise Bargaining, Corporations and Employees” (1995) 23 *Federal Law Review* 204.

<sup>19</sup> See Michael J Rawling, “Australian Trade Unions as Shareholder Activists: The Rocky Path Towards Corporate Democracy”, (2006) 28 *Sydney Law Review* 227-258.



Most online platforms which populate the gig economy are no different from traditional “bricks and mortar” for-profit corporations, despite the rhetoric of “sharing”. Uber, for example, is a corporate group,<sup>20</sup> created no doubt for the primary purpose of generating a surplus from the combination of investment in the “app” technology and the labour of drivers, to feed back to the innovators/owners.<sup>21</sup> Critical scholars have argued that, as the demand to extract surplus in traditional organisations intensifies managerial prerogative increases, inflexible work practices develop and, most disturbingly, workers are commodified.<sup>22</sup> This trend is intensified in the gig economy for a number of reasons. Firstly, the process of surplus extraction is contingent on the owner of the digital platform skimming a proportion of the fee paid to the gig worker by the end-user while at same time avoiding liability for any obligations to workers. Uber has sought to achieve this by classifying its contracts as contracts for the provision of telecommunication services by Uber to drivers, rather than as contracts for the provision of transport services by drivers to Uber.<sup>23</sup> On this basis, gig based work is not easily characterised as a traditional employment relationship, nor even as work performed under a service contract between a principal and a contractor. Characterisation of the driver/worker as an independent client of the telco platform is also consistent with the requirement that the worker provide the tools necessary to perform the work (in the case of Uber, the motor vehicle) and take the risks associated with ownership and operation of those assets. The significant burden of ownership and maintenance of the fleet of vehicles necessary to provide this passenger transport service is ‘outsourced’ to the individual drivers. And yet, apart from driving 24/7 to maximise revenue from their investment, drivers have little potential to improve the profitability of their micro-business because Uber sets prices for them, and fixes its own commission on fares (at 25 per cent according to the 2015 contract<sup>24</sup>).

Uber’s reservation of an entitlement to vary prices and its own commission rates without consultation with drivers has produced disputes in some markets. See, for example, the protests in New York in the United States in 2016, when Uber cut fares without warning by 25 per cent.<sup>25</sup>

Notwithstanding the clauses in the contract characterising drivers as telco customers, and denying any employment or other work provision relationship between Uber and the driver, the contract terms assert considerable power of discipline over the driver, by way of a right to

<sup>20</sup> The parent and platform owner is Rasier Operations BV, registered in the Netherlands.

<sup>21</sup> Although business press reports about Uber suggest that the overall business may not be profitable. See Biz Carson, “Uber booked \$20 billion in rides in 2016, but it’s still losing billions” Business Insider, 15 April 2017. Available at <<https://www.businessinsider.com.au/uber-2016-financial-numbers-revenue-losses-2017-4?r=US&IR=T>>. See also Eric Newcomer, “Uber lifting financial veil says sales growth outpaces losses” Bloomberg Technology, 15 April 2017, available at <[www.bloomberg.com/news/articles/2017-04-14/embattled-uber-reports-strong-sales-growth-as-losses-continue](http://www.bloomberg.com/news/articles/2017-04-14/embattled-uber-reports-strong-sales-growth-as-losses-continue)>.

<sup>22</sup> H J Van Buren III, M Greenwood & C Sheehan, “Strategic human resource management and the decline of employee focus”, (2011) 21(3) Human Resource Management Review 209-219.

<sup>23</sup> See the discussion of the Uber contract dated 23 December 2015 in Joellen Riley “Regulating Work in the ‘Gig Economy’” in Mia Rönnmar, Jenny Julen Votinius (Eds.), *Festskrift Till Ann Numhauser-Henning*, (2017 Sweden: Juristförlaget i Lund) at 669-683. A copy of this contract is on file with the author ([joellen.riley@sydney.edu.au](mailto:joellen.riley@sydney.edu.au)), and appears to accord in terms with the contract discussed by the UK Employment Tribunal in *Aslam, Farrer & Ors v Uber BV, Uber London and Uber Britannia Ltd*, Case Nos 2202551/2015, decided on 12 October 2016 affirmed in *Uber BV, Uber London and Uber Britannia Ltd v Aslam, Farrer & Ors*, UKEAT/0056/17/DA, 10 November 2017.

<sup>24</sup> See above n 23.

<sup>25</sup> See Adrian Chen “An Uber Labor Movement born in a Laguardia Parking Lot”, New Yorker, 8 February 2016, <<http://www.newyorker.com/business/currency/an-uber-labor-movement-born-in-a-laguardia-parking-lot>>

block the driver from using the platform if the driver's passenger approval ratings fall below an acceptable level.<sup>26</sup> This facility in the contract has produced complaints from some drivers that they enjoy no job security. *Oze-Igiehon v Rasier Operations BV*<sup>27</sup> is a case in point. Mr Mike Oze-Igiehon was a driver, who had undertaken substantial financial obligations to purchase a vehicle suitable for Uber work, but was blocked from the Uber app because of some adverse ratings. It was accepted that his contract with Uber was not an employment relationship, so his only claim against Uber was for breach of contract. In all the circumstances, it was held that Uber had not breached the contract by deactivating his use of the app following complaints, and indeed that Uber had no obligation under the contract to "prove that each complaint received was truthful and accurate".<sup>28</sup>

In summary, under the contractual arrangements with Uber, the drivers undertake the financial burdens and expenses of fleet provision and maintenance, they cannot set their own prices and so influence the profitability of their own work, and they have no guarantee of protection from capricious dismissal. In some respects, they are business people in their own right, owning their own vehicles and determining their own hours. In other respects, they are treated as servants, subservient to the dictates of the platform. In all respects, they have little say over the organisation of their work, and little opportunity to share in any wealth created by the enterprise.

### III. Identifying alternatives

There are respectable arguments that the working people who contribute much of the wealth of corporate enterprise should not be treated as outsiders, but as stakeholders with a legitimate claim to share in the wealth created from their collective endeavours.<sup>29</sup> Our concern is to investigate the potential for a different organisational form, better designed to ensure that the workers in a venture derive not just a minimal fee-for-service (as is presently the model for many gig economy platforms), but an opportunity to share in the profits of the venture, and to facilitate an efficient sharing of the risks inherent in equipment ownership. The for-profit corporation is not the only organisational model available in modern economies. Among alternative organisational forms is the co-operative.<sup>30</sup> We argue that cooperatives may provide a more appropriate organisational structure for gig economy businesses, given that gig economy businesses already rely heavily on investments made by the workers themselves.

### IV. Why cooperatives?

We argue that the current contractual arrangements in the gig economy risk delivering inequitable outcomes because platform owners are able to take a disproportionate share of the surplus derived from gigs, while bearing none of the liabilities of employing labour. If workers were part-owners of the enterprise, or formed their own cooperative enterprise to negotiate terms with the telco platform, gig economy workers may secure greater influence over the

<sup>26</sup> See Georgia Wilkins "Driver sues Uber after termination", Australian Financial Review, 19 May 2016, 9.

<sup>27</sup> [2016] WADC 174.

<sup>28</sup> Ibid at [93].

<sup>29</sup> See generally the collection of essays in Margaret M Blair and Mark J Roe (eds) *Employees & Corporate Governance*, Brookings Institution Press, Washington DC, 1999.

<sup>30</sup> A Fici, "An Introduction to Cooperative Law" in D Cracogna, A Fici, and H Henry, (eds), *International Handbook of Cooperative Law* (2013, Springer) at 6.



organisation of work, and over how income derived from the enterprise is distributed. Worker ownership may also contribute valuable knowledge to improve the provision of services by the enterprise. After all, the people working at the “coal face” in businesses can often see most easily the opportunities for further innovation and improvement. The question, then, is whether the cooperative is the right form of business organisation to achieve these ends.

There has certainly been encouragement of this form of business organisation by the International Labour Organisation (ILO) in the past and now more recently. The origins of cooperatives can be traced back to the International Co-operatives Alliance (ICA). This was a non-profit international association established in 1895 to help advance the cooperative model.<sup>31</sup> The Mondragon Corporation, established in 1956 as a federation of worker cooperatives, is perhaps the best known example of worker co-operative enterprise in Europe. There has been renewed interest in recent times in the worker co-operative. Economic downturn and business crises have generated interest in the potential for worker takeovers of failing companies.<sup>32</sup> In 2002, the ILO adopted a Recommendation (No 193) on Promotion of Cooperatives. The Preamble notes that cooperatives can play an important role in “job creation, mobilising resources, generating investment” and generally contributing to the economy. It also notes that “stronger forms of human solidarity at national and international levels are required to facilitate a more equitable distribution of the benefits of globalization”. Recommendation 193 encourages the “promotion and strengthening of the identity of cooperatives” (Art 2) by governments providing “a supportive policy and legal framework” (Art 6) to enable the development of effective cooperatives. A word of warning is sounded in Art 8(1)(b): National policies should “ensure that cooperatives are not set up for, or used for, non-compliance with labour laws or used to establish disguised employment relationships”. And particular reference is made to the potential value of cooperatives to address the phenomenon of the gig economy. Article nine provides:

Governments should promote the important role of cooperatives in transforming what are often marginal survival activities (sometimes referred to as the “informal economy” into legally protected work, fully integrated into mainstream economic life.<sup>33</sup>

Recommendation 193 is ambitious in its aims, but appears to have had some traction. According to a review conducted in 2015, “cooperatives are weathering the turmoil of the financial and labour markets relatively well”.<sup>34</sup> In 2009, the ILO published a Global Jobs Pact that recognised the role of cooperatives in job creation.<sup>35</sup> And 2012 was declared the UN International Year of Cooperatives.<sup>36</sup>

---

<sup>31</sup> See <<https://ica.coop/en/international-co-operative-alliance>>, for more information.

<sup>32</sup> See Rob Paton, *Reluctant Entrepreneurs: the Extent, Achievement and Significance of Worker Takeovers in Europe*, (1989, Open University Press, UK).

<sup>33</sup> ILO Recommendation No 193, Art 9.

<sup>34</sup> International Labour Office, *The Story of the ILO’s Promotion of Cooperatives Recommendation, 2002 (No 193) A review of the process of making ILO Recommendation No 193, its implementation and its impact twelve years after adoption*, (2015, ILO, Geneva).

<sup>35</sup> *Ibid* at 2.

<sup>36</sup> *Ibid*.

### A. Cooperatives in New Zealand

New Zealand has a long and strong history of cooperatives, beginning with the establishment of the Southland Building Land and Investment Society (now SBS Bank) in 1869.<sup>37</sup> The UN listed New Zealand as the most cooperative economy in its 2012 Year of Cooperatives. Recent estimates place the total revenue of cooperative enterprises in New Zealand at almost \$43 billion per annum, by far the largest contributor being Fonterra (at almost \$19 billion).<sup>38</sup> While the earliest cooperatives were in the agriculture (notably dairy) and development finance sectors, cooperative enterprises in trades (plumbing, hardware) developed after the Second World War. Cooperative enterprises are governed by the Co-operative Companies Act 1996 (NZ). First among the reasons for enacting this legislation, listed in its preamble, is “[T]o reaffirm the value of the co-operative company as a means of facilitating its shareholders carrying on business on a mutual basis”.<sup>39</sup>

### B. Cooperatives in Australia

While there is a new interest in worker cooperatives in Australia, like New Zealand, most Australian cooperatives have been in the agricultural or financial sectors (such as credit unions). In Australia, however, cooperatives have never been seen as the preferred organisational form for generating growth in the economy for a number of interrelated social and regulatory reasons, dating back to the time of Federation. According to Lyons, cooperatives struggled to find favour at this time because of Australian society’s tendency to emphasise individualism and consumerism rather than the cooperative ideals established by the ICA.<sup>40</sup> From a regulatory perspective, cooperatives failed to gain national recognition, because the Commonwealth power to regulate incorporated enterprises (in section 51 (xx) of the Constitution, commonly referred to the Corporations power) covered only foreign or “trading or financial corporations formed within the limits of the Commonwealth”<sup>41</sup>. Co-operatives did exist, but they were local or state-based entities which, due to their non-corporate status, were unable to operate or expand across state boundaries.

Some of these regulatory limitations have now been addressed with the introduction of uniform cooperative legislation across Australian states.<sup>42</sup> So despite initial social and regulatory obstacles, cooperatives have continued to grow in significance and coverage, particularly over the last five years as demand for more sustainable and democratised organisational forms increase. In 2016, there were over 2000 registered cooperatives in Australia comprising 29 million active members. The top 100 cooperatives had a combined turnover of over \$30.5 billion as well as a total asset holding of \$143.7 billion and operate in a number of key sectors of the economy including primary produce, financial services and consumer markets.<sup>43</sup> These include financial cooperatives, such as credit unions, agricultural cooperatives, community cooperatives as well as worker cooperatives.

<sup>37</sup> See Cooperative Business New Zealand <<https://nz.coop/>>.

<sup>38</sup> Ibid.

<sup>39</sup> Cooperative Companies Act 1996 (NZ) Long Title Paragraph (a).

<sup>40</sup> M Lyons, *Cooperatives in Australia: A background paper*, 2001 Australian Centre of Cooperative Research and Development (ACCORD).

<sup>41</sup> Australian Constitution, s 51(xx).

<sup>42</sup> Troy Sarina, “Australia”, in D Cracogna, A Fici, and H Henry, (eds.), *International Handbook of Cooperative Law* (2013).

<sup>43</sup> Business Council of Co-operatives and Mutuals (BCCM). 2016, National Mutual Economy Report-incorporating the top 100, 17, < <http://bccm.coop/publications/2016-national-mutual-economy-report/#.Wd2ez0xL08Y> >.

### *C. Worker cooperatives*

Worker cooperatives are already found in various sectors of the economy, including transportation, construction and professional services.<sup>44</sup> See, for example, a relatively new cooperative of health care nurses in California.<sup>45</sup> Rather than work as employees for a labour hire outfit, these health professionals have established (with the assistance of legal and business advice from the United Health Workers West Union) a cooperative to employ themselves. In Perth, the owners of a family business providing technical and repair services for scientific equipment have converted the enterprise into a worker-owned cooperative, called Galactic Scientific.<sup>46</sup>

Co-operatives UK Worker Co-operative Council publishes a guide to setting up and managing worker co-operatives (although there is presently no special cooperative legislation in the United Kingdom).<sup>47</sup> The elements of ensuring an effective collective include establishing an appropriate governance and management structure. Depending on size, the cooperative may adopt a flat management structure, where all members participate in management decisions, or a more complex structure. A team based structure can concentrate decision-making about aspects of the business into 'semi-autonomous teams' dedicated to that aspect of the business, and who elect representatives to form an overall governance body. A more hierarchical model may involve the selection (by election from members, or by recruitment of a specialist) of a general manager or managers to handle governance. In all cases, however, democratic control by members is a key principle of the cooperative model.

Another key principle is economic participation by all members. The UK Worker Cooperative Code recommends (as its third principle) that members agree to allocate a percentage of surpluses to reinvestment in collectively owned capital and reserves; agree to a pay and benefits structure for work; facilitate additional investment by members in the enterprise; and ensure that surpluses are distributed fairly and equitably among members according to contribution. The fourth principle is that cooperatives should be careful in any external capital raising that they do not compromise their independence and autonomy, and should adopt sound risk control and prudential practices.

Through this kind of enterprise, workers are able to jointly own and control the assets associated with the provision of their services, as well as share equitably in the proceeds from their own labour. The gig workers who are presently incurring significant financial debt to equip themselves to secure work (such as the Uber drivers who are required to own a late model motor vehicle), might share those costs and possibly secure some economies of scale, by ensuring that the co-operative owned and maintained the fleet.

The benefit of a governance model requiring democratic decision-making is that members of the cooperative can participate in decisions about the terms and conditions of the work they

---

<sup>44</sup> See above n 30 at 24.

<sup>45</sup> See Nithin Coca, 'Nurses Join Forces With Labor Union to Launch Healthcare Platform Cooperative', 21 August 2017 <<https://www.shareable.net/blog/nurses-join-forces-with-labor-union-to-launch-healthcare-platform-cooperative>>.

<sup>46</sup> See Employee Share Ownership, 'The common light bulb moment for Galactic Cooperative' 14 August 2017, available at cooperative in Perth <<http://www.employeeownership.com.au/news-archives/the-common-lightbulb-moment-for-galactic-cooperative/>>

<sup>47</sup> See <[www.uk.coop/sites/default/files/uploads/attachments/worker\\_co-operative\\_code\\_2nd\\_edition\\_0\\_0.pdf](http://www.uk.coop/sites/default/files/uploads/attachments/worker_co-operative_code_2nd_edition_0_0.pdf)>.

will undertake and, by doing so, may avoid the “take it or leave it” contractual arrangements presently associated with much gig economy work.

A further potential benefit of the cooperative governance model involves the more intangible benefits of autonomous and self-directed work. Social capital is generated, where organisations with a positive organisational culture or clear common purpose witness informal interactions between workers aimed at improving service delivery to customers. This social capital helps to generate a common language amongst workers, facilitate future information sharing, generate greater trust, and help capture technical skills and develop tacit knowledge.<sup>48</sup> This type of human capital is crucial for allowing organisations to solve complex problems, and to innovate. The type of innovation generated from enabling workers themselves to fashion their own work is another untapped resource that may be ignored in the rigidly regulated commercial exchanges of much gig economy work. Workers in a cooperative share a common objective and so have the incentive to share information and identify ways in which to continually improve the way their labour is deployed in organisation.

## V. Challenges

The authors’ research on cooperatives and their potential to provide better labour market outcomes for gig economy workers is still at a very early stage. The authors know that some worker cooperatives have failed, spectacularly on occasions, in the past, and there will be lessons to learn from interrogating the reasons for those failures. But the authors believe this is a project worth investigating. Gig economy workers are already shouldering significant investment costs in their work, so the argument that gig economy workers will be too impecunious to share in the investment and risk sharing aspects of cooperative endeavour seems misplaced. Many already experience a level of personal autonomy in decisions about when to work, but have limited (if any) avenues to negotiate the terms upon which they provide their labour. If these are truly “micro-entrepreneurs” presently running their own nano-scale businesses, it is surely worth investigating the scope for formation of collectives, governed on the basis of cooperative principles, to better promote the ideals manifested in ILO Recommendation 193.<sup>49</sup> While this solution may not suit all gig economy activities, it may provide an avenue for some of these self-employed workers to enjoy similar economies of scale to the enterprises that presently engage their labour, and similar opportunities to share in the wealth created by technological innovation. The “sharing economy” may live up to its own rhetoric.

---

<sup>48</sup> M Albenese & S Villani, “Organizational Models of Firms and Social Capital: The Different Aptitude of Capitalistic and Co-operative Firms in Accumulating Social Capital” in Anthony Jensen, Greg Patmore, and E Tortia, (eds), *Cooperative Enterprises in Australia and Italy: Comparative analysis and theoretical insights*, (2015, Firenze University Press, Firenze).

<sup>49</sup> For a treatise on these ideals, see Race Matthews *Jobs of Our Own: Building a Stakeholder Society; Alternatives to the Market and the State*, 2<sup>nd</sup> ed , (2009, The Distributist Review Press, Texas).

## Indigenous Peoples and Employment Law: the Australasian model

PAUL ROTH\*

This paper examines the relationship between Indigenous values and employment law in New Zealand and Australia, with some comparative reference to the position in North America and in relation to international standards.<sup>1</sup>

Since the 1980s, Indigenous values have emerged as a dynamic in the first world workplace, particularly in Indigenous enterprises, and enterprises and organisations with a strong Indigenous element or connection. One manifestation of this is the recent proliferation of Indigenous and Aboriginal chambers of commerce and business associations in Australasia and North America. The reasons behind the emergence of this dynamic are political, social and, particularly in North America, economic.

On the whole, trade unions have not been the driver of this development, but have responded to it by incorporating it, usually into their own social justice agendas, but also by taking the opportunity to acquire new members. In North America, the advent of the lucrative casino gaming industry onto tribal lands since the 1980s spawned a sudden interest in union organising on reservations, as well as Indigenous resistance to those efforts. In New Zealand and Australia, there has been increased recognition of Indigenous culture in employment agreements and the general law, which largely stems from the social, political and increasing economic influence of Indigenous consciousness.

### New Zealand

Employment in the New Zealand public sector provides for the *top down* accommodation of Māori values. The State Sector Act 1988 sets out a number of *good employer* obligations that are deemed necessary for the fair and reasonable treatment of public sector employees. These include:<sup>2</sup>

Recognition of —

- i. The aims and aspirations of the Māori people;
- ii. The employment requirements of the Māori people; and
- iii. The need for greater involvement of the Māori people in the Public Service.

As in other countries, the values promoted in public sector employment normally have a spin off effect on private sector employment.

More noteworthy are the *bottom up* influences of Māori culture on employment law and practices that will be canvassed below.

#### *Workplace issues relating to Māori*

---

\* Professor Paul Roth, Faculty of Law, University of Otago, New Zealand

<sup>1</sup> For a broader and historical comparative treatment that also covers unions and Indigenous voice, see Paul Roth, “Indigenous Voices at Work”, in Alan Bogg and Tonia Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (Oxford University Press, 2014), 96-121.

<sup>2</sup> State Sector Act 1988, s 56(2)(d).

There are a number of workplace issues that particularly affect Māori.<sup>3</sup> Most workplaces operate in accordance with mainstream non-Māori cultural values and assumptions, with the result that Māori can feel excluded or marginalised. Where workplaces do recognise the importance of Māori values and issues, there is an expectation that Māori workers should provide guidance and leadership on Māori issues. This can result in extra pressures upon individuals and can even render employment more precarious. For example, in one case a Māori social worker was dismissed, *inter alia*, for an inadequate understanding of *tikanga Māori*,<sup>4</sup> despite the fact that employment was on the basis that training and guidance would be provided.<sup>5</sup> The dismissal was found to be unjustified. In another case, a Māori employee complained of unjustified disadvantage in her employment because she had been required to deliver Māori cultural training even though she had told her employer that she was not trained to do so.<sup>6</sup> Even where an employee is able to provide Māori cultural guidance, there is a further issue as to the terms upon which such extra contributions should be made, particularly concerning any special recognition or compensation for doing so.

Māori have a wider concept of the family (*whānau*) than non-Māori, and a wide set of obligations that are owed to one's *whānau*. This has implications for domestic purposes and bereavement leave,<sup>7</sup> as well as for special cultural occasions.<sup>8</sup>

Conversely, the role played by Indigenous values within a mainstream common law legal system can raise some challenging issues. When the promotion and implementation of Indigenous culture in the workplace relate to the treatment of employees, there are situations where Indigenous values do not always sit comfortably with employment law generally. In cases where employers seek to rely on Indigenous values or processes, the law will override the Indigenous approach to protect the rights of workers. This approach is consistent with art 17 of the United Nations Declaration on the Rights of Indigenous Peoples,<sup>9</sup> which implicitly renders Indigenous customs and values subject to domestic and international labour law. Moreover, art 46 subordinates Indigenous rights to domestic and international human rights standards, including the principle of non-discrimination. These aspects of the international standards have not always found favour with Indigenous people themselves.<sup>10</sup>

There may be instances when there is tension between Indigenous and non-Indigenous values. One flashpoint is the right to be free from sex discrimination. There have been a few occasions when there was Indigenous objection against fertile female workers working in areas that are *tapu*.<sup>11</sup> Sex discrimination was claimed in a Human Rights Review Tribunal case where a female employee of the Department of Corrections was forbidden to sit in the front row or speak at a workplace celebration for Māori graduates of a departmental programme.<sup>12</sup> She had mentored two of the graduates. After she

<sup>3</sup> See Public Service Organisation, *Māori Enterprise Delegate Guide* (November 2009), p 11.

<sup>4</sup> "Māori custom, the Māori way of doing things".

<sup>5</sup> *Waters v Aupouri Māori Trust Board* [1995] NZEmpT 380.

<sup>6</sup> *Scott v Chief Executive, Department of Corrections*, WA29A/06, 13 March 2006.

<sup>7</sup> See below, on special provisions in agreements and legislation that recognize this factor.

<sup>8</sup> See below, on *Good Health Wanganui v Burberry* [2002] 1 ERNZ 668.

<sup>9</sup> Adopted by a General Assembly resolution on 13 September 2007: General Assembly A/RES/61/295, 2 October 2007.

<sup>10</sup> The prioritisation of conventional international human rights standards over Indigenous values has been criticised as stemming from a Eurocentric perspective: see Sharon Venne, "The New Language of Assimilation: A Brief Analysis of ILO Convention 169," (1990) 53(2) *Without Prejudice*, at 60, and Catherine Iorns, "Australia Ratification of International Labour Organisation Convention No. 169" (1993) 1(1) *E Law - Murdoch University Electronic Journal of Law*, available at <<http://www.austlii.edu.au/au/journals/MurUEJL/1993/1.html>>

<sup>11</sup> Defined as "sacred, prohibited, restricted, set apart, forbidden" in the online *Māori Dictionary*, available at <<http://maoridictionary.co.nz/>>. In relation to Department of Conservation workers, see Angela Gregory, "Elder says tribe's ruling on woman 'act of paganism'", *New Zealand Herald*, 30 June 2000.

<sup>12</sup> *Bullock v Department of Corrections* [2008] NZHRRT 4 (19 March 2008).

disrupted the ceremony because of her treatment, the workplace Māori Staff Network lodged a complaint against her. Although the Tribunal made a finding of sex discrimination, no remedy was awarded. The Tribunal's decision in this case skirted around the difficult issue of how an employer should accommodate more than two legitimate interests in such a situation. The Tribunal recognised that the employer was in a difficult position and was taking steps to reconcile Indigenous rights with other rights. The employer's concern for respecting Māori culture and following proper Māori protocol in this instance could be viewed in light of the fact that relative to their numbers in the general population, Māori are over-represented in the criminal justice system.<sup>13</sup> Therefore, a proportionality test to weigh the importance of the respective cultural interests in the circumstances would probably be the appropriate approach to follow.

Indigenous cultural values may also conflict with the employer's managerial prerogative. This sort of issue has been encountered in other jurisdictions as well, where employers have variously sought to prohibit the wearing of religious or cultural symbols or items of dress, such as headscarves, turbans, beards, ceremonial daggers, niqabs, chadors and the like. The usual principle is that the employer can require a dress code so long as it does not breach discrimination laws. Sometimes breaches are justified in certain types of positions, such as where niqabs are prohibited where eye contact is a requirement of the job. In *Haupini v SRCC Holdings Ltd*,<sup>14</sup> an employer asked a Māori employee performing a food service role at a catered social function to cover up the traditional *moko* (tattoo) on her arm for a particular function. The employee was highly distressed at this request, which she regarded as offensive to her cultural identity, and she brought a discrimination case against her employer. The Human Rights Review Tribunal commented that the case raised issues "at an intersection between significant cultural expectations on the one hand, and reasonable concerns of an employer to be able to manage the appearance of its staff working in a 'frontline' role on the other."<sup>15</sup> The employee's claim failed. The Tribunal accepted expert evidence that the wearing of *moko* was not exclusive to Māori, and that the question whether a tattoo design was *moko* or not was highly subjective:<sup>16</sup> "it is necessary to look at each piece of work on its own and make a personal judgment about whether what is being worn can be described as *moko* or not."

The Tribunal did not find that there was so close a connection between the tattoo design in question and the employee's ethnicity or race that there was direct discrimination against the employee because she was Māori. The Tribunal noted that discrimination on the grounds of culture was not provided for under New Zealand's Human Rights Act 1993.<sup>17</sup> The Tribunal also found that there was no indirect discrimination, as the evidence failed "to establish that there is a disproportionate negative effect on Māori in being asked to cover a tattoo of the kind in question in this case".<sup>18</sup>

Relations within a *whānau* also can give rise to difficulties in relation to employment matters where one *whānau* member is in a position of authority over another, which is not uncommon in *kōhanga reo*, or *whānau*-based Māori *language nests*, and other organisations. In mainstream employment law, this could give rise to unfairness, where poor family relations might act as an *accelerant* to problems in the workplace, but a Māori workplace may require a different approach in principle. For example, in *Timu v Te Runanga O Kirikiriroa Trust Inc*,<sup>19</sup> where a Māori health services

<sup>13</sup> About half of the male prison population, and about 60 per cent of female prisoners, are Māori: see *Over-representation of Māori in the criminal justice system: An exploratory report*, Policy, Strategy and Research Group, Department of Corrections, (Wellington, September 2007) 6.

<sup>14</sup> *Haupini v SRCC Holdings Ltd* [2011] NZHRRT 20; (2011) 9 HRNZ 668; (2011) 9 NZELC 93,952.

<sup>15</sup> At [2].

<sup>16</sup> At [49].

<sup>17</sup> At [53].

<sup>18</sup> At [64].

<sup>19</sup> *Timu v Te Runanga O Kirikiriroa Trust Inc* [2012] NZERA Auckland 216 (25 June 2012).



provider dismissed a young casual worker, the Employment Relations Authority raised an issue as to a possible conflict of interest. It seemed inappropriate that the employee's manager, her stepfather, was involved with the disciplinary action against her; it would have been preferable to involve someone else instead. The employer explained the interaction between the parties in terms of the traditional Māori principles of *whanāungatanga* ("kinship, family connection"), *manaakitanga* ("support, care"), and *tino rangatiratanga* ("self-government, self-determination"). The Authority, "reflecting upon the overall situation, including the culture of the Runanga",<sup>20</sup> concluded that, in the present case, the family relationship did not raise any unfairness in relation to the employee, and the employee did not claim otherwise. The Authority commented, however, that "the situation was less than best practice in an employment relations setting", but the employee was not disadvantaged by the family relationship. In other circumstances, unfair pressure may be brought to bear on an employee, and the employee may feel bullied.

### *Recognition of Māori values in New Zealand employment law*

Employers are expected to accommodate Māori values and practices where workplaces acknowledge a commitment to them. Such workplaces tend to be run by Māori, or are Māori in nature (such as Māori language schools, Māori media, health provider and welfare organisations), or are public sector agencies, particularly those with a particular Māori connection or relevance (Ministry of Māori Development, Department of Corrections, Ministry of Education, Ministry of Health).

The most obvious recognition of Māori values is the provision in some employment agreements for cultural leave in order to attend important occasions and ceremonies.<sup>21</sup> There is similar provision for such leave in some Australian employment agreements and awards (see below). In New Zealand, the statutory provisions for sick leave recognise the possible cultural dimensions of bereavement leave. After enumerating the various types of conventional close relations that entitle workers to the taking of bereavement leave, there is a catch all provision that provides for the taking of bereavement leave where the employer accepts that a *relevant factor* applies,<sup>22</sup> which includes:

- a) the closeness of the association between the employee and the deceased person;
- b) whether the employee has to take significant responsibility for all or any of the arrangements for the ceremonies relating to the death;
- c) any cultural responsibilities of the employee in relation to the death.

In one case, the Employment Relations Authority accepted that a worker whose *whangai* brother died ought to have been given three days' bereavement leave, rather than only one, under the applicable collective agreement, as well as the legislation, because it was an "immediate relative" who had died.<sup>23</sup> *Whangai* is an informal customary practice whereby a blood relative is given to a family to raise. The deceased was the worker's first cousin in eurocentric terms, but he had come to live with the worker's family when he was five years old and was raised as a son by the worker's parents. As an adult, he cared for his elders, lived in the family home, and had his name carved on the headstone of the worker's father. The collective agreement defined "immediate relative" as including a "brother" or "sister", and incorporated the provisions of the Holidays Act. Neither the agreement nor the legislation defined "brother", but the Authority held that, in the circumstances, "the word 'brother' should be interpreted

<sup>20</sup> At [38]. "Runanga" is a tribal board, assembly, or authority.

<sup>21</sup> This is sometimes offered as paid leave. For example, the Secondary Teachers' Collective Agreement 2015-2018 provides for paid leave of up to six weeks: cl 6.6.5. Available at:

<<http://www.education.govt.nz/assets/Documents/School/Collective-Employment-Agreements/Secondary-Teachers-Collective-Agreement/SecondaryTeachersCA20152018.pdf>>.

<sup>22</sup> Holidays Act 2003, s 69(2) and (3)(a)-(c).

<sup>23</sup> *Minhinnick v New Zealand Steel Ltd* [2016] NZERA Auckland 335.



in a way that recognises the relationship of a whangai brother”.<sup>24</sup> The Authority found that the worker had suffered an unjustified disadvantage grievance, and he was awarded \$1,000 for his distress. The two days’ annual leave that he had to use to attend the funeral were reinstated.

Some agreements contain problem resolution processes that, while compatible with ordinary employment law principles, provide for the resolution of employment problems in a *Māori context and manner*. In one collective agreement, this was defined as involving the following features:

- (i) Meetings can be held on a *marae*;<sup>25</sup> (ii) There is face to face engagement; (iii) There can be *whānau* [extended family] support for all involved; (iv) Guidance and advice is often provided to everyone concerned by *kaumātua* [elders] and *kuia* [female elders].<sup>26</sup>

Another collective agreement provides for a dual-track grievance procedure: a conventional track and a Māori cultural track for those who choose it.<sup>27</sup> The latter, labeled *korero tahi kaupapa* (“talking it out in the Māori way”), involves the grievance first being raised at a low level with one’s immediate manager in order to arrive at a resolution; then, if unsuccessful, raising it with the CEO to seek a resolution; and finally, meeting with elders (*kuia*, *kaumātua*) and *whānau* on a *marae* and, therefore, outside the place of employment in a culturally appropriate location for resolving issues in a Māori way. In the Māori Studies department of a Polytechnic, there was a clause in the employment contract that provided for *hui*<sup>28</sup> to resolve interpersonal problems involving probationary staff.<sup>29</sup> The aim of such processes (variously called *hui* or *wānanga*<sup>30</sup>) is to talk out the issue and reach a consensus at the end of the discussion that forms a binding resolution of the issue.<sup>31</sup> Similarly, in the Māori Television Service, there is a form of internal mediation that is used involving *hohou rongo* (“making peace”) meetings.<sup>32</sup>

Despite the recognition of Māori custom in the workplace, conventional employment law rights still apply to disciplinary processes, so that any Māori-based values or policies must be consistent with basic requirements of reasonableness and fairness. Despite the ostensibly voluntary nature of such dispute resolution, it must still satisfy the same standards of fairness that apply to everyone under New Zealand employment law, as held in the early case of *Te Whānau a Takiwira Te Kohango Reo v Tito*,<sup>33</sup> where the Employment Court emphasised that the following of a customary process does not exclude

<sup>24</sup> At [37].

<sup>25</sup> This is the courtyard of a Māori meeting house, or the meeting house itself.

<sup>26</sup> See the Secondary Teachers’ Collective Agreement 2015-2018, cl 3.5.1(b), available at: <<http://www.education.govt.nz/assets/Documents/School/Collective-Employment-Agreements/Secondary-Teachers-Collective-Agreement/SecondaryTeachersCA20152018.pdf>>.

<sup>27</sup> The Te Rau Kōkiri multi-employer collective agreement (8 June 2012) between the New Zealand Nurses Organisation and Ahipara Health & Resource Trust and others, which covers health workers employed by Māori health providing agencies and trusts.

<sup>28</sup> Defined by the online *Māori Dictionary* as “gathering, meeting, assembly, seminar, conference”: see <<http://maoridictionary.co.nz/>>.

<sup>29</sup> *Fraser v Manukau Polytechnic*, AEC 71/96, 31 October 1996. Such *hui* were not intended to be disciplinary in nature; see further discussion below.

<sup>30</sup> Defined by the online *Māori Dictionary* as “seminar, conference, forum”: see <<http://maoridictionary.co.nz/>>.

<sup>31</sup> See, for example, *Gibson v Ngati Porou Hauora Incorporated* [2008] NZERA (Auckland) 799 (7 April 2008), where the employer sought to deal with a serious employment matter in a Board *hui* “in accordance with the culture of [the Ngati Porou Hauora Incorporated, a health services provider] and tikanga Māori, by seeking consensual termination of the employment to allow a dignified departure of [the employee].” *Tikanga* is defined in the online *Māori Dictionary* as “correct procedure, custom, habit, lore, method, manner, rule, way, code, meaning, plan, practice, convention”: see <<http://maoridictionary.co.nz/>>.

<sup>32</sup> *Mercer v Maori Television Service* [2009] NZERA 477 (Auckland) (30 July 2009), at [2]. In that case, after the process the employee concerned was provided with a written review that set out nine performance issues and the expectations associated with these, which he accepted.

<sup>33</sup> *Te Whānau a Takiwira Te Kohango Reo v Tito* [1996] 2 ERNZ 565, 573.

the ordinary requirement of fairness. In that case, the *wānanga* process involved discussion conducted by a *whānau* group of the two employees concerned, with everyone enjoying unlimited speaking rights, until a binding resolution was framed and unanimously agreed to by all concerned. The Court commented that this was “no more than a process, like any other process that an employer may choose when considering termination of employment”.<sup>34</sup> The Court, however, went on to caution:<sup>35</sup>

The fact however that certain actions which are the subject of a grievance claim and challenged for fairness, were performed validly in a customary context cannot throw up a shield preventing the eyes of the Court from probing the customary actions to see if they complied with the law’s requirement that they be fair ... [What] the Court must decide ... is not whether the employer has justified the terminations of employment by showing they occurred in a valid customary way, but whether the terminations complied with the law.

The issue in this case centred on whether the employees concerned had freely consented to termination of their employment. The Court accepted that, in some circumstances, even reluctant acceptance of the will of the majority of the *whānau* could be considered to amount to free consent to termination by way of mutual agreement, but in the case at hand, this had not occurred.

Likewise, in *Skipwith-Halatau v Ngati Kapo (Aotearoa) Inc*,<sup>36</sup> the employee successfully contended that the *hui* that led to her dismissal was defective. It did not require an agenda to be notified in advance, and thus she had no notice that her employment would be considered by the *hui*. The Court held that mainstream employment law applied to the employer notwithstanding the Māori nature of the enterprise, though the law could, in so far as there was no inconsistency:<sup>37</sup>

allow for the special characteristics of any employment relationship including, in this case, the expectation of the parties that *tikanga Māori* will be basis of the parties’ dealings with each other.

The employer, however, still needed to comply with “[t]he law’s essential requirements of fairness and reasonableness in circumstances leading to, and of, dismissal”, which “mould to and accommodate these *kaupapa*.”<sup>38</sup> The Court recognised that procedural flaws in the use of *hui* for dealing with employment disciplinary matters can lead to an unfair result. This was also the result in *Rerekura v Presland*,<sup>39</sup> where the Court found fault with a suspension and disciplinary investigation based on a procedurally flawed *hui*.

*Hui* can also be used for non-disciplinary matters in the workplace, such as interpersonal conflicts. In *Fraser v Manukau Polytechnic*,<sup>40</sup> a *hui* was held to deal with the deteriorating relationship between a probationary lecturer and the head of the Polytechnic’s Māori Studies department. There was a clause in the employee’s employment contract that provided for such *hui* where problems arose in relation to probationary staff. The Court rejected the employee’s argument that this was an “unauthorized disciplinary *hui*” to deal with administrative and professional complainants against him,<sup>41</sup> and

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> *Skipwith-Halatau v Ngati Kapo (Aotearoa) Inc* [1997] NZEmpC 165.

<sup>37</sup> At [12].

<sup>38</sup> Ibid. *Kaupapa* is defined in the online Māori Dictionary as “matters for discussion, subjects”: see <[www.maoridictionary.co.nz](http://www.maoridictionary.co.nz)>.

<sup>39</sup> *Rerekura v Presland* AC 68/03, 17 December 2003.

<sup>40</sup> *Fraser v Manukau Polytechnic* AEC 71/96, 31 October 1996.

<sup>41</sup> At 7. There had also been complaints against the worker concerning “attendance at required times, record keeping, expenses claims and other significant administrative matter”: *Fraser v Manukau Polytechnic*, at 9.

accepted that this was merely a “cross-cultural conflict resolution mechanism”.<sup>42</sup> It was not an element in a disciplinary process against the employee and, therefore, the idea of procedural fairness was not applicable to this particular type of *hui*. The Court commented:<sup>43</sup>

Neither in this case, nor generally in my opinion, is it helpful to rigorously and narrowly analyse the processes of dispute resolution mechanisms such as *hui* in terms of what may be monocultural employment law principles. Whilst the outcome of different dispute resolution techniques will no doubt be relevant, as in this case it was, it would be unreasonable for the Tribunal or the Court to find an employer’s resultant action unfair and without justification merely because the culturally and agreed process undergone does not itself conform with monoculturally accepted and recognized rules of fairness.

The Court found that the decision to dismiss the employee turned on the inability of the participants to reach a consensus as to the co-existence of employees, rather than on the outcome of the *hui*.

In *Good Health Wanganui v Burberry (Burberry)*,<sup>44</sup> the leading case in this area, the Employment Court held that an employer’s obligations to accommodate Māori values are heightened where there is an express policy to that effect, and a matter concerns a Māori employee working in a Māori setting. The employee was a Māori mental health worker for a hospital’s Māori mental health unit who sought 3 days’ leave to attend a Māori festival where she was responsible for the provision of health services. Her employer had granted her leave to attend this event for the previous 17 years. After some delay, she was denied leave at the last minute, having already made arrangements to attend the festival and for her work to be covered. She had tried to convince her manager to allow her to attend the festival, and she emphasised its cultural importance to her, but to no avail. Despite this, she went ahead and attended the festival, and was summarily dismissed on her return.

The Court found that the dismissal was unjustified on the basis that it was unreasonable and unfair that the employee had been refused leave to attend the festival since the refusal was notified too late and without considered justification. Moreover, the employer failed to accept that attendance at the festival, and the importance of keeping her word to the festival organisers, was culturally important to the employee. The dismissal process was also faulty in that it was conducted with undue haste and in a culturally insensitive manner. The Court found that the onus was on the employer to be culturally sensitive, not on the employee to assert her *mana Māori*: “The fact that an employee is Māori and is working in a Māori setting should have been sufficient to alert them to a need for an appropriate procedure.”<sup>45</sup> The Court noted that the employee’s managers were “genuinely surprised at the fact that cultural issues had been raised after the event” and that the employee had not asked for cultural support or procedures during the dismissal interview.<sup>46</sup> The Court’s perception was that, while the employer made provision for Māori issues, it was more of an *annexure* than an integrated part of the workplace culture. The Court remarked that the employer should have been particularly alerted to the cultural aspects of what they were doing as the employee concerned in the case was obviously Māori and had been hired to deal specifically with cultural issues in relation to mental health patients. The Court also noted that new Māori employees were welcomed by a traditional Māori *powhiri* ceremony, but:<sup>47</sup>

---

<sup>42</sup> At 8.

<sup>43</sup> Ibid.

<sup>44</sup> *Good Health Wanganui v Burberry* [2002] 1 ERNZ 668. For case comment, see Catherine Iorns Magallanes, “Cultural sensitivity in the Employment Court” [2003] NZLJ 153, and Paul Roth, “Employment Law” [2003] NZLR 609, 620-621.

<sup>45</sup> *Burberry*, at [58].

<sup>46</sup> At [57].

<sup>47</sup> Ibid.

The question must be asked why, having been granted that respect on their arrival, they could not be afforded the dignity of a *poroporoaki* or farewell. If it is appropriate at the beginning of employment it should be appropriate at the end even when the circumstances are difficult.

*Burberry* was referred to in a subsequent redundancy case, where the employer was also found to have fallen short of the required standard of procedural fairness by not taking cultural matters into account. In *Benton v New Zealand Tertiary College (Benton)*,<sup>48</sup> the Employment Relations Authority similarly found fault with the employer for not arranging an appropriate farewell for the redundant employee.<sup>49</sup> During her time at NZTC, Dr Benton had been associated with aspects of its programme which addressed Māori cultural issues and had been welcomed on her appointment in a way in which she was able to *mihi* or greet and introduce herself to colleagues. It would have been appropriate for NZTC to similarly ensure she could be farewelled in a dignified manner. That was so whether the standard of NZTC's conduct in that regard was measured against specific Māori cultural values – about which it offered courses to its own students – or the general social value of treating respectfully someone who was losing their position on the “no fault” basis of redundancy.

*Burberry* and *Benton* illustrate that the Court's approach falls within conventional mainstream employment law principles. Where actions affecting workers are concerned, their individual circumstances, including cultural factors, are relevant considerations when the fair and reasonable treatment to which they are entitled to under common law and statute is being assessed. The cases also show that the Court can take into account Māori emotional sensibilities and values. In *Burberry*, the Court took into account the ways in which the employer was culturally in the wrong in the way it handled the Māori employee's dismissal, and it considered the impact of the harm on the employee. The employee gave evidence that she was unable to work after the dismissal because of the emotional and psychological effect on her. It “impacted on her culturally, *wairua* (spiritually), *tinana* (physical wellbeing), *hinengaro* (emotional psychological mental health), and *whanāu* [in terms of family].”<sup>50</sup> The way the dismissal process was carried out was blind to the Māori cultural aspect. The Court found that the escorting of the employee to her office and being told to pack up and leave was culturally inappropriate from the employee's perspective, and referred to her reaction:<sup>51</sup>

To be marched over to community mental health by two men – being Māori, being an older woman coming towards a point where I am able to take *kuia* [elder] status, that was degrading and they couldn't even have another woman there present during the meetings or even their *tumuaki* [“head, director”] or *kai whakapiringa* [Māori cultural advisor and provider of collegial support].

The Court found that, during the dismissal interview, the employee was feeling *whakamā*, or extreme embarrassment and shame, which has been described as follows:<sup>52</sup>

Analysis of the situations in which *whakamā* occurs reveals a variety of causes: shyness, shame not only for wrongdoing but also for being suspected of it, embarrassment over falling short in some respect, feelings of injustice, powerlessness and frustration. The common denominator seems to be “feeling at a disadvantage, being in a lower position morally or socially”, whether as a result of your own actions or another's. To be *whakamā* is to be “put out of one's place”, “pushed off a secure base.” Occasionally, *whakamā* involves hostility directed outward in the

<sup>48</sup> *Benton v New Zealand Tertiary College* [2011] NZERA (Auckland) 429 (3 October 2011) .

<sup>49</sup> At [27]

<sup>50</sup> *Good Health Wanganui v Burberry* [2002] 1 ERNZ 668, [34].

<sup>51</sup> At [41].

<sup>52</sup> At [55], quoting from Joan Melge, Patricia Kinloch, “Talking past each other”, Victoria University Press, 1995, 23.

form of dirty looks and critical asides but, in general, a person who is *whakamā* retreats from social contact and turns in on themselves. They are victim not agent, and though their behavior is annoying it is not deliberately intended to annoy. A person who is *whakamā* does not consciously choose to feel and act that way and certainly cannot turn it on and off at will. Unconsciously, however, they are trying to get a message across to those around them – to “speak” by not speaking. Exactly what the message is is not immediately apparent and it must be carefully interpreted in order to select the right treatment.

In another case, however, the Court was unable to accept a cultural argument raised by an employee who was dismissed on the grounds of misusing sick leave. The employee argued that he had been unwell in a culturally broad sense.<sup>53</sup> The Court referred, in a shorthand way, to *rongowai* for what was described in the employee’s evidence as the Māori way “of identifying and treating physical and spiritual maladies in an individual”.<sup>54</sup> The employee was both physically and emotionally unwell, and he had been reluctant to speak of this “not least to the women who were his managers and those who assisted them, and were responsible for, or contributed to, his subsequent dismissal.”<sup>55</sup> The Court remarked that it would have been reasonable for the employer, as a Māori youth training establishment, to treat the employee in a culturally sensitive way, but it was unable to do so if unaware of the issues concerned. Accordingly, the employer could not be accused of having dismissed the employee unjustifiably if it did not know what was affecting the employee’s health and well-being.

The point that there can be a number of different perspectives on the application of a traditional notion was noted in an earlier case, where the Labour Court<sup>56</sup> remarked:<sup>57</sup>

Important influences in this case in evidence and submissions, were the concepts of *mana* and *tikanga Māori*. The perception of the participants in the case of these notions was largely consistent but there was no general agreement as to their application to the circumstances of the case....

We appreciate that each of these notions is susceptible of variations and gradations of meaning, often of a most subtle nature, depending on the context in which the terms are used and the circumstances to which they are applied. We accept the reality and the importance of these concepts to the people involved in this case and in their bearing upon the case itself and we have kept in mind the meaning, particularly of *mana*, in our assessment of the effect of the events on both the Board and Mrs Stephens. The sensitivities of Maoridom featured in our consideration of this case and we welcomed the introduction of the material relevant to those sensitivities.

### *Indigenous values and collective industrial relations*

When the New Zealand Nurses Organisation (nurses’ union) was attempting to negotiate a collective agreement that covered a number of Māori health service providers, some of the employer parties brought up the objection that joining with other employers in a multi-employer collective agreement would be inconsistent with the principles of *tinio rangatiratanga* (“sovereignty, self-determination,

<sup>53</sup> *Taiapa v Te Runanga O Turanganui A Kiwa Trust t/a Turanga Ararau Private Trading Establishment* [2013] NZEmpC 38 (18 March 2013).

<sup>54</sup> At [33].

<sup>55</sup> At [34].

<sup>56</sup> The Labour Court under the Labour Relations Act 1987 (1987 to 1991) was replaced by the Employment Court.

<sup>57</sup> *Central Clerical Workers Union v Taranaki Maori Trust Board* [Pre-1991] ERNZ 542, at 546.

autonomy”), which implied Māori control over all things Māori.<sup>58</sup> The Authority facilitator, however, did not accept this objection, because the blind schedules to the proposed agreement provided for “a degree of uniqueness and self-determination”, and at least 15 different employers from across the country already agreed in principle to the multi-employer collective agreement. The facilitator commented that he did “not consider that they would have done so as Māori and iwi organisations if this fundamentally breached the principle of *tinio rangatiratanga*.”<sup>59</sup> The facilitator went on to comment that the union’s members, who were generally Māori themselves, voted for the negotiation of the multi-employer collective agreement, and that “they are entitled to *tinio rangatiratanga* as well, meaning that that principle cannot greatly assist the recommendation process.”

The sort of tensions evident here between Indigenous self-determination and legislation requiring good faith collective bargaining, and between workers who want to bargain collectively and Indigenous employers who are reluctant to be bound by a multi-employer collective agreement is not unique to New Zealand, but has parallels in North America, where such tensions have arisen over the past few decades in connection with union organising on Indigenous reservations.<sup>60</sup>

## Australia

Since the mid-1990s, a number of employment agreements and collective awards have provided for recognition and accommodation of Aboriginal and Torres Strait Islander cultural values. In taking Aboriginal culture into account, it must be realised that the variety of obligations owed in different places and by different peoples is not uniform, so a degree of flexibility is required. Thus, the Australian Industrial Relations Commission has recognised that “[t]he areas of concern will vary from one locality to another as the cultural duties and responsibilities and needs of Aboriginal (Indigenous) employees vary from place to place.”<sup>61</sup> This means that care must be taken that the parties’ obligations are not overly prescriptive. The Commission commented that:

...a difficulty with specifying rights, duties and obligations with particularity ... is that there is not uniform observance of aboriginal culture and there are, therefore, many different cultural requirements amongst the aboriginal workforce. There are different family responsibilities depending on the adherence to tribal or kinship laws and whether persons of aboriginal descent are adherents to the aboriginal culture. If real progress is to be made in this most important area towards national reconciliation, appropriate and proper steps need to be taken in a careful and planned manner in order to achieve the stated objectives of the union and the employers with respect to employment covered by the Award.

The first industrial instrument that recognised the cultural and spiritual beliefs of Aboriginal workers was a 1995 Australian Industrial Relations Commission decision on the variation of a Western Australian local government industrial award.<sup>62</sup> The Commission decided that the industrial award

---

<sup>58</sup> This case involved a facilitation of bargaining when negotiations had reached an impasse: *Employment Relations Authority, Recommendations, Facilitation Te Rau Kokiri, New Zealand Nurses Organisation v Ahipara Health & Resource Trust and 49 ors*, G J Wood, ERA5346855; the application for facilitation was granted in *New Zealand Nurses Organisation v Ahipara Health and Resource Trust* [2012] NZERA (Wellington) 1 (9 January 2012).

<sup>59</sup> At [6].

<sup>60</sup> This New Zealand case, however, appears to be unique thus far, given the relatively recent proliferation of specialised Māori agencies as employers.

<sup>61</sup> *Re Federated Municipal and Shire Employees Union of Australia* (WA Div) (1996) 1(1) *Australian Indigenous Reporter* 32 (Dec 227/95, 31 January 1995).

<sup>62</sup> *Ibid.* For commentary, see Loretta de Plevitz, “Recognition in the workplace: *Re Federated Municipal and Shire Employees Union of Australia* (WA Div)”, (1995) 3(77) *Aboriginal Law Bulletin* 19. The Commission noted that the

should impose a general duty on employers in the following broad terms:

An employee, covered by this Award, who is an adherent to Aboriginal culture and who practices Aboriginal spiritual and/or religious beliefs, shall be afforded a reasonable opportunity by his or her employer to follow and practice the requirements of that culture or spiritual or religious belief.

The Commission accepted that the provision of adequate and culturally appropriate bereavement leave, adoption and maternity leave, and paid holiday leave for the National Aboriginal and Islander Day of Celebration, was essential for increasing Aboriginal employment so that employment obligations would not be an impediment to the cultural and spiritual needs of Aborigines. As has been noted elsewhere:<sup>63</sup>

Flexible work arrangements such as cultural and ceremonial leave and Indigenous-specific provisions can assist Indigenous employees remain employed when they face competing demands from the workplace as well as their family, community and cultural obligations.

In particular, the Commission recognised that Aboriginal people required more frequent and longer bereavement leaves because of the importance of attending funerals of kin; the existence of extended kinship networks; the great distances that often have to be travelled in order to attend funerals; and the fact that the low average lifespan of Aboriginal males entails more frequent attendance at funerals during one's working life. The Commission observed that "attendance at funerals is the major social activity that brings together relevant people". It stated:

It is an essential feature of aboriginal culture that when a person dies, all those who have a kinship relationship to the deceased person should and, in some cases must, attend the funeral ceremony. There is a very strong belief that the spirit is reluctant to leave the body of the deceased person and, if it does not leave in a proper manner and return to the place from whence it came, there is likely to be trouble, and even death, in the relevant community. Persons who do not give effect to this fundamental duty may forfeit their right to become elders in the Aboriginal community and may, in some circumstances, even be ostracized by their fellows.

In addition to greater flexibility in leave entitlements for Aboriginal workers, the Commission also made provision for appropriate induction and training in accord with their culture when Aboriginal workers were hired. In relation to dispute resolution processes, Aboriginal culture was also ostensibly accommodated by entitling Aborigines to be represented by a person of their own choosing, which could include a fellow employee, since there was some anthropological evidence that in Aboriginal society, it is often not regarded as proper to speak on behalf of oneself.<sup>64</sup> Where the chosen representative is a fellow employee, they may not suffer any loss of wages or other benefits arising from their participation in any stage of the dispute settlement procedure.<sup>65</sup>

Another issue tackled by the Commission was how to approach the application of the clauses relating to Aboriginal people, since two-thirds of Aboriginal people are of mixed descent, and the population

---

matter before it raised "questions for determination which, as far as I aware, have not previously been decided by this Commission or by a State industrial tribunal."

<sup>63</sup> Boyd Hunter, Matthew Gray, "Workplace Agreements and Indigenous-Friendly Workplaces" (2013) 8(8) *Indigenous Law Bulletin* 7, 7.

<sup>64</sup> This point has been queried as an "extrapolation from one particular observation to all Aboriginal societies": *ibid*, 20.

<sup>65</sup> See also *Municipal Employees Rottneest Island Award 1992 – re Award simplification – PR916454* [2002] AIRC 374 (5 April 2002), cl 8.4.

adheres to Aboriginal culture to varying degrees. To get around the issue of whether the burden would be on employers to assess Aboriginality, the Commission decided that the most appropriate approach was self-identification as an Aborigine and identification by the Aboriginal community.<sup>66</sup>

The Commission commented generally on the variations it had made to the award as follows:

The variations to be made to the award are intended to make a contribution to the acceptance and recognition of the rights of employees to practice their cultural and spiritual duties without loss of employment rights. To make such provision is not to afford special treatment to one class of employees. Rather, it is to afford a proper recognition of equality.

The approach and variations accepted for the West Australian local government award in respect of Aboriginal workers have since become more commonly found in public sector industrial agreements elsewhere. Aside from the public sector, there are other sectors where there is a business case for including Aboriginal-specific provisions: mining companies that operate on or near Aboriginal lands, which will be likely to accommodate the needs of local Aboriginal workers and community (which could be described as a “social licence”);<sup>67</sup> organisations that deal with Aboriginal matters and issues; and Aboriginal enterprises and organisations.<sup>68</sup>

In relation to bereavement leave for Aboriginal and Torres Strait Islander employees, one staff policy broadly defines “immediate family” as also denoting:<sup>69</sup>

[family members] by marriage, adoption, fostering, or traditional kinship, and ... staff member’s spouse, former spouse, domestic partner or former domestic partner, child or adult child, parent, brother, sister, grandparent, foster-grandparent, step-grandparent, grandchild, in-law relative, guardian, ward, or person with respect to whom the staff member has an Indigenous kinship relationship of equivalent significance, or a person who stands in a bona fide domestic or household relationship with a staff member including situations in which there is implied dependency or a support role for the staff member.

Provisions for ceremonial leave for those of Aboriginal and Torres Islander descent are common for workplaces with Aboriginal workers or that want to encourage Aboriginal employment. A study of registered federal workplace agreements for the period 1997-2013 found that the proportion of lodged agreements with cultural or ceremonial leave increased from about two per cent to over five per cent over the period, and the proportions of employees covered by these agreements with ceremonial leave provisions grew from about 15 per cent of employees to about 25 per cent.<sup>70</sup> With regard to Aboriginal-specific provisions generally, between 1997 and 2013 the estimated proportion of federal agreements with such provisions increased from about 0.5 per cent to just over two per cent, and the proportion of

---

<sup>66</sup> Compare the definition of “Aboriginal person” as “a person who identifies as such and furthermore is regarded as an Aboriginal person by members of his or her community”: *Municipal Employees Rottne Island Award 1992 – re Award simplification* – PR916454 [2002] AIRC 374 (5 April 2002), cl 4.1.

<sup>67</sup> See David Brereton, Joni Parmenter, “Indigenous Employment in the Australian Mining Industry” (2008) 26(1) *Journal of Energy & Natural Resources Law* 66; Ciaran O’Faircheallaigh, “Aboriginal Mining Company Contractual Agreements in Australia and Canada: Implications for Political Autonomy and Community Development” (2010) 30(1-2) *Canadian Journal of Development Studies* 69.

<sup>68</sup> Boyd Hunter, Matthew Gray, “Workplace Agreements and Indigenous-Friendly Workplaces” (2013) 8(8) *Indigenous Law Bulletin* 7, 9.

<sup>69</sup> Australian National University, Personal Leave Policy, para 8, available at <[https://policies.anu.edu.au/ppl/document/ANUP\\_000552](https://policies.anu.edu.au/ppl/document/ANUP_000552)>.

<sup>70</sup> Boyd Hunter, Matthew Gray, “Workplace Agreements and Indigenous-Friendly Workplaces” (2013) 8(8) *Indigenous Law Bulletin* 7, 10.



employees having access to such provisions under federal agreements increased from about four per cent to just under nine per cent.<sup>71</sup> These provisions tend to be concentrated in the public administration/safety and health care/social assistance sectors.<sup>72</sup>

One personnel policy provides that cultural leave for Aboriginal staff members may also include “leave to fulfil ceremonial obligations which may include cultural events, initiation, birthing and naming, funerals and smoking or cleansing, and sacred site or land ceremonies”.<sup>73</sup> Typically, provision is made for 10 days’ unpaid leave per year.<sup>74</sup> There may also be paid leave for attendance at official activities during National Aboriginal and Torres Islanders Week in July. A common type of award provision provides that:<sup>75</sup>

An employee covered by this award, who is an adherent to Aboriginal culture and who practises Aboriginal spiritual and/or religious beliefs, shall be afforded a reasonable opportunity by their employer to follow and practise the requirements of that culture or spiritual or religious belief. Where this involves time away from work, arrangements will be made for the employee concerned to take annual leave or accumulated rostered days off for the purpose, if leave is not otherwise provided in the award. Alternatively, the employer and the employee concerned may agree to time off without pay. Provided that an employer may require reasonable evidence of the legitimate need for the employee to be allowed the required time off from work.

The Queensland Industrial Relations Act 2016 makes provision for up to five days of unpaid cultural leave.<sup>76</sup>

An award or policy may also undertake to provide Aboriginal employees with culturally appropriate induction training that incorporates recognition of Aboriginal beliefs and cultures.<sup>77</sup>

## International comparisons with the Australasian model

### *North American comparisons*

The position of Indigenous peoples in Australasia can be distinguished from that in North America in three main respects. Firstly, there is generally greater union engagement with Indigenous concerns in Australasia than in North America. This may be due to the size of the respective countries, and the visibility and prominence of Indigenous peoples in Australasia, particularly New Zealand, in comparison with other disadvantaged minority groups. Secondly, Indigenous values in Australasia have been accommodated within mainstream labour law where not inconsistent with the laws of general application. Thirdly, and a significant difference between the two, is that many Indigenous

---

<sup>71</sup> Ibid.

<sup>72</sup> At 12-13.

<sup>73</sup> Australian National University, Personal Leave Policy, para 9, available at <[https://policies.anu.edu.au/ppl/document/ANUP\\_000552](https://policies.anu.edu.au/ppl/document/ANUP_000552)>. Cultural leave is also available for other staff members as well “for the purpose of observing or attending essential religious or cultural obligations associated with the staff member’s particular religious faith, culture or tradition”: para 5.

<sup>74</sup> See, for example, Nurses Award 2010, cl 33, available at <<http://awardviewer.fwo.gov.au/award/show/MA000034>>.

<sup>75</sup> Municipal Employees (Western Australia) Interim Award 2011 Municipal Employees (Western Australia) Interim Award 2011, cl 23.10, available at <<http://forms.wairc.wa.gov.au/awards/MUN001/p1/MUN001.html>>.

<sup>76</sup> Section 51(2). This was carried over from s 40A(1) of the Queensland Industrial Relations Act 1999.

<sup>77</sup> See, for example, the University of Queensland, *Handbook of University Policies & Procedures*, Aboriginal and Torres Strait Island Employment Policy, 5.30.19, available at <<http://www.uq.edu.au/hupp/?page=50247>>.

people in North America live on tribal reserves<sup>78</sup> that enjoy a degree of sovereignty and self-determination that is jealously guarded. This has caused friction between tribal hierarchies and unions seeking to organise on Indigenous land, often with the support of federal authorities in the United States (the National Labor Relations Board (“NLRB”) under the National Labor Relations Act 1935 (“NLRA”)) and, in Canada, provincial labour relations boards. In the United States, this tension has produced legal pluralism in relation to labour law that has no counterpart in Australasia.

The impetus for this development has been the burgeoning Indian casino gaming industry, ‘the new buffalo’,<sup>79</sup> which has brought jobs and prosperity to Indigenous reserves, as well as many non-Indigenous workers,<sup>80</sup> since the late 1970s. Today, the Indian casino industry earns over US\$31 billion, and represents over 43 per cent of all casino gambling in the United States. There are currently 460 Native American casinos that are operated by 244 out of 565 federally recognised tribes.<sup>81</sup>

This development had its origin in a Native American couple’s successful legal battle against a local tax assessment on their mobile home, which was situated on a reservation in Minnesota. The United States Supreme Court held that states did not have the right to impose taxes on Native American property without Congressional authorisation.<sup>82</sup> This ruling enabled Native Americans to get into the reservation gambling business without being subject to state regulation or taxes. Among the first to take advantage of this ruling were the Seminole tribe in Florida, which opened a high stakes bingo operation that was open six days a week, whereas Florida state law limited such gambling to two days a week with a \$100 jackpot limit. The tribe successfully defended its gaming business in the United States Court of Appeals,<sup>83</sup> and this case opened the way for other tribes to follow suit. The Cabazon Band of Mission Indians in California won a similar case in the Supreme Court in 1987.<sup>84</sup>

At the same time that states unsuccessfully sought to impose their laws on Native American reservations, Indian casinos and unions were engaged in litigation concerning whether the federal NLRA applied on reservations. A key case was decided by the NLRB in 2004,<sup>85</sup> and affirmed by a federal appeals court in 2007,<sup>86</sup> which agreed that tribal businesses could be subject to the NLRA depending on the particular Indian treaty with the United States government, and whether the tribe employed non-Indians and catered to non-Indians. Other federal courts, however, held differently. In *NLRB v Pueblo of San Juan*,<sup>87</sup> the federal court upheld a Pueblo right-to-work law that gave employees the right to work without having to join a union. The court held that the NLRA did not displace the

<sup>78</sup> About 34% in the United States, see Stella U Ogunwole, *We the People: American Indians and Alaska Natives in the United States*, US Census Bureau (February 2006) 14 <

[https://www.bia.gov/sites/bia.gov/files/assets/public/press\\_release/pdf/indc-001819.pdf](https://www.bia.gov/sites/bia.gov/files/assets/public/press_release/pdf/indc-001819.pdf)>; and about 40 per cent in Canada, see Statistics Canada, ‘2006 Census: First Nations people’ <<http://www12.statcan.ca/census-recensement/2006/as-sa/97-558/p16-eng.cfm>>.

<sup>79</sup> Ambrose Lane, *Return of the Buffalo: The Story Behind America’s Gaming Explosion* (Bergin & Garvey, Westport 1995).

<sup>80</sup> For example, only 85 out of 1150 employees of the Great Blue Heron Casino were Mississaugas of Scugog Island (which only had a population of 173), and in the early 2000s, only 700 of 3700 employees of Casino Rama were Mnjikaning First Nations: see Yale D Belanger, ‘Labour Unions and First Nations Casinos: An Uneasy Relationship’, in Yale D Belanger (ed), *First Nations Gaming in Canada* (University of Manitoba Press 2011) 295.

<sup>81</sup> See the 500 Nations website at <[https://www.500nations.com/Indian\\_Casinos.asp](https://www.500nations.com/Indian_Casinos.asp)>.

<sup>82</sup> *Bryan v Itasca County*, 426 US 373 (1976).

<sup>83</sup> *Seminole Tribe of Florida v Butterworth*, 658 F 2d 310 (5th Cir, 1981).

<sup>84</sup> *California v Cabazon Band of Mission Indians*, 480 US 202 (1987).

<sup>85</sup> *San Manuel Indian Bingo & Casino v NLRB*, 341 NLRB 1055 (2004).

<sup>86</sup> *San Manuel Indian Bingo & Casino v NLRB*, 475 F 3d 1306 (DC Cir 2007). The decision was widely criticised; see, for example, Bryan H. Wildenthal, ‘Federal Labor Law, Indian Sovereignty, and the Canons of Construction’ (2007) 86(2) Oregon Law Review 413, and ‘How the Ninth Circuit Overruled a Century of Supreme Court Indian Jurisprudence—And Has So Far Gotten Away With It’ [2008] Michigan State Law Review 547.

<sup>87</sup> 276 F 3d 1186 (10th Cir 2002).

tribe's jurisdiction over economic relationships within its territory.<sup>88</sup> In the face of legal uncertainty, parties seemed reluctant to pursue a "winner take all" approach through appeal to the Supreme Court. Instead, various strategies have been adopted by tribes to avert NLRB regulatory attention. Chief among these strategies is the adoption of tribal labour codes, which are expected to provide for some form of collective bargaining.<sup>89</sup> There are currently scores of such codes in reservations around the United States.

The most recent development should bring an end to the struggle between Native American tribes and unions. This is the proposed Tribal Labor Sovereignty Act, of 2017,<sup>90</sup> which would exempt tribes and their gaming facilities from collective bargaining under the NLRA. It would not bar organised labour on reservations, but it leaves the issue up to tribal governments. This legislation has been under consideration in Congress since 2004 and is currently awaiting a vote in the Senate. Republicans unanimously support it, and Democrats are finding it difficult to oppose it. While it is an anti-union measure, and unions form a powerful Democratic party constituency, the legislation provides for the preservation of Native American rights and is broadly supported across Indian country, so it presents a political problem for Democrats.

### *International labour standards relating to Indigenous peoples*

The Australasian model is consistent with international labour standards, which do not go as far as the American model in terms of Indigenous self-determination.

There are two international instruments that contain provisions that relate specifically to the labour rights of Indigenous peoples: the International Labour Organization's Convention concerning Indigenous and Tribal Peoples in Independent Countries 1989 (No 169),<sup>91</sup> and the United Nations Declaration on the Rights of Indigenous Peoples 2007.<sup>92</sup> These instruments mainly seek to target discrimination and ensure that Indigenous workers enjoy the same labour standards as other workers. While the ILO Convention provides for the recognition of Indigenous values in the workplace, this is only "where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights".<sup>93</sup> The United Nations Declaration, unlike the ILO

<sup>88</sup> On the inconsistency between the *San Manuel* and *San Juan* decisions, see Vicki J. Limas, "The Tuscarorganization of the Tribal Workplace" [2008] Michigan State LR 467.

<sup>89</sup> See Kaighn Smith, Jr, *Labor and Employment Law in Indian Country*, (Drummond Woodsum MacMahon 2011). Indigenous labour codes in Canada appear to have met with less success, since generally reserves fall under provincial labour legislation unless s 35 of the Constitution Act 1982 applies (wherever the issue of "Indianness" arises), in which case federal jurisdiction applies to First Nations workplaces. For an unsuccessful attempt at an Indigenous labour code covering band members, see *Saskatchewan Indian Gaming Authority (SIGA) v National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)* [2003] 3 CNLR 349; Yale D Belanger, "Labour Unions and First Nations Casinos: An Uneasy Relationship", in Yale D Belanger (ed), *First Nations Gaming in Canada* (University of Manitoba Press 2011) 288. In *R v Pamajewon* [1996] 2 SCR 821; 138 DLR (4th) 204, the Supreme Court of Canada found that First Nations gaming fell under Provincial law as casino gambling was not a traditional Indian activity.

<sup>90</sup> "A bill to clarify the rights of Indians and Indian tribes on Indian lands under the National Labor Relations Act", S 63, sponsored by Senator Jerry Moran (Republican, Kansas), introduced on 9 January 2017.

<sup>91</sup> Adopted 27 June 1989; entered into force 5 September 1991. This Convention replaces ILO Convention 107 on the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries 1957, which took an outmoded paternalistic and assimilationist approach. This approach is still evident in its accompanying Recommendation concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries 1957 (No 104).

<sup>92</sup> See above n 9.

<sup>93</sup> Article 8(2). Only 22 countries have ratified this convention. New Zealand, Australia, Canada, and the United States have not ratified it, nor are they likely to. Indigenous groups themselves have not supported ratification, since it does not recognise aspirations to self-determination and expressly (in art 1(3)) does not acknowledge Indigenous populations as

Convention, does not advert to the possibility of Indigenous systems or customs accommodated within or separate to a mainstream labour law system.

## Conclusion

The incorporation of Indigenous culture into employment law, where applicable, may be viewed as a positive development for a number of reasons. Firstly, given that unemployment tends to be higher among Indigenous people, the incorporation of Indigenous values in workplaces recognises that cultural demands are not easily met within a “one size fits all” framework, which can act as an impediment to Indigenous people taking up employment. Thus, in Australia, where unemployment is particularly high among Aborigines and Torres Strait Islanders, the past two decades have seen the adoption of more flexible provisions in contracts and collective instruments to enable more Indigenous people to take up employment that allows for the fulfilment of cultural obligations. Secondly, cultural well-being significantly relates to career satisfaction. A recent New Zealand study has indicated that Māori respondents enjoyed the highest level of career satisfaction where workplace cultural wellbeing was high.<sup>94</sup> Thirdly, and conversely, workplace dissatisfaction has a negative effect upon worker health, with a lack of workplace satisfaction, respect, and fairness being relevant factors.<sup>95</sup> Finally, there is an ethical argument that if one identifies as Indigenous, one should be able to choose to live as an Indigenous person, and this includes operating as an Indigenous person in one’s working life. Workers who identify as Indigenous need their own culture to survive and develop, and Indigenous culture has no home other than in the land that was originally theirs.

Recognising Indigenous values in the workplace, however, is not entirely unproblematic. Although there is a distinctive Indigenous approach to workplace matters, there can at times be tension, if not outright conflict, between worker and Indigenous interests. Where the workforce is mixed Indigenous/non-Indigenous, or where there is some incompatibility between ethnic consciousness on the one hand, and labour or gender consciousness on the other, there can be friction. There can also be more than one Indigenous approach, as indicated where an Indigenous employer and an Indigenous worker have a difference of view as to the application of Indigenous values, as has arisen in some of the New Zealand cases. The North American experience has also shown that there can be tension where an established traditional hierarchy is being challenged, or where Indigenous workers push for mainstream workers’ rights.<sup>96</sup>

---

“peoples” entitled to self-determination at international law in terms of arts 1(2) and 55 of the United Nations Charter.

<sup>94</sup> Jarrod M Haar, Dave M Brougham, “An Indigenous Model of Career Satisfaction: Exploring the Role of Workplace Cultural Wellbeing” (2013) 110(3) *Social Indicators Research* 873.

<sup>95</sup> See, for example, Lois M Verbrugge, “Work satisfaction and physical health” (1982) 7(4) *Journal of Community Health* 262-283; Keith James, Chris Lovato, Gillian Khoo “Social Identity Correlates of Minority Workers’ Health” [1994] 37(2) *Academy of Management Journal* 383-396.

<sup>96</sup> See Brock Pitawanakwat, “Indigenous Labour Organizing in Saskatchewan: Red Baiting and Red Herrings” (2006) 58 *New Socialist* 32

## Too Modest a Proposal? Work Rights under the Proposed Constitution Aotearoa

JONATHAN BARRETT\* and AMANDA REILLY\*\*

### Abstract

Constitutional lawyers, Sir Geoffrey Palmer and Andrew Butler, have sought to spark debate by publishing a proposed constitution, including a Bill of Rights, for Aotearoa New Zealand (Constitution Aotearoa). The current New Zealand Bill of Rights Act 1990, which is neither entrenched nor superior legislation, guarantees freedom of association but is otherwise silent on work rights. In addition to affirming freedom of association, and freedom from forced labour, Constitution Aotearoa includes three provisions expressly relating to work rights. These are the non-justiciable rights to resort to collective action in the event of a conflict of interest; to satisfactory health and safety conditions; and to earn one's living in an occupation freely entered into. Is this too modest a proposal which misses the opportunity to provide strong and abiding, fundamental rights for everyone who works? This article seeks to answer that question by drawing on other bills of rights, including those of Canada, Germany and South Africa, and the Charter of Fundamental Rights of the European Union, to consider the work rights which might be included in a new constitution for New Zealand.

### I. Introduction

Sir Geoffrey Palmer and Andrew Butler have sought to spark debate by publishing a proposed constitution, including an entrenched, legislatively-superior Bill of Rights, for Aotearoa New Zealand (Constitution Aotearoa). In addition to guarantees of freedom of association,<sup>1</sup> and freedom from forced labour,<sup>2</sup> article 106 of Constitution Aotearoa includes three provisions expressly relating to work rights (and three other socio-economic rights). These work rights are the non-justiciable rights to resort to collective action in the event of a conflict of interest; to satisfactory health and safety conditions; and to earn one's living in an occupation freely entered into. Are these proposals too modest and miss the opportunity to provide strong and abiding, fundamental rights for everyone who works? This article seeks to answer that question by drawing on other bills of rights – those of Canada, Germany and South Africa,<sup>3</sup> and the Charter of Fundamental Rights of the European Union – to consider which work rights might be included in a new constitution and how that should be done.

This article is structured as follows: firstly, the work rights proposed in Constitution Aotearoa are outlined; secondly, a brief survey of work rights enshrined in other rights charters is

---

\* Dr. Jonathan Barrett, Senior Lecturer, School of Accounting and Commercial Law, Victoria University of Wellington, New Zealand

\*\* Dr Amanda Reilly, Senior Lecturer, School of Accounting and Commercial Law, Victoria University of Wellington, New Zealand

<sup>1</sup> Geoffrey Palmer and Andrew Butler *A Constitution for Aotearoa New Zealand* (Victoria University Press, Wellington, 2016) at 65 (Constitution Aotearoa, art 91).

<sup>2</sup> At 64 (Constitution Aotearoa, art 85).

<sup>3</sup> We are aware that other constitutions, say, those of post-Soviet countries may also be of interest but have limited our research in the interests of manageability.

conducted. This survey informs the analysis of the proposed work rights in the next section which then leads to the conclusion.

## II. Constitution Aotearoa and work rights

Constitution Aotearoa includes two civil and political (International Covenant on Civil and Political Rights (ICCPR)<sup>4</sup>-style) rights associated with the workplace. Article 85 provides “[e]veryone has the right not to be held in slavery or servitude, or required to perform forced or compulsory labour” and article 91 provides “[e]veryone has the right to freedom of association”.<sup>5</sup> Article 106 provides for six socio-economic (International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>6</sup>-style) rights, including:

- d) the right of every worker to resort to collective action in the event of a conflict of interests, including the right to strike:
- e) the right of every worker to enjoy satisfactory health and safety conditions in their working environment:
- f) the right of workers to earn their living in an occupation freely entered upon.

Unlike ICCPR-style rights, these ICESCR-style rights are qualified and are essentially instrumental in nature. Thus, despite the terminology of enforceable rights being used, these “rights” are, in fact, “non-justiciable principles”. Further, the preamble to the socio-economic section commences with the phrase “[i]n making provision for the social and economic welfare of the people”, which implies that the work rights identified are not considered ends in themselves. It is arguable that many other rights, such as freedom of expression or the right to vote, are mere instruments for achieving autonomy, personhood or dignity.<sup>7</sup> Indeed, drawing a long bow, we might argue that freedom from slavery is not in itself an inherent good, but is asserted because slavery obviates realisation of a Kantian conception of autonomy.<sup>8</sup> Nevertheless, such rights that are typically seen as ends in themselves are not couched in instrumental terms. Work rights should be included in the same category.

---

<sup>4</sup> UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 [ICCPR].

<sup>5</sup> Other rights, such as equality, privacy, freedom of expression and so forth, may also be relevant to the workplace.

A right to freedom of association may also be fence-sitting on the part of Palmer and Butler. Employers have traditionally argued for freedom of association, whereas “the trade unions emphasize the *right* to associate along with its derivatives”. See Guy Mundlak “Human Rights and Labor Rights: Why Don’t the Two Tracks Meet?” (2012) 34 Comp Lab L & Pol’y J 217 at 232. Palmer and Butler appear to elide the long-established jurisprudential distinction between a freedom (or liberty) and a right. Glanville Williams defines a ‘liberty’ as “any occasion on which an act or omission is not a breach of duty”. See Glanville Williams “The Concept of Legal Liberty” (1956) 56(8) Colum L Rev 1129 at 1129. “When a liberty is stated, it is generally by way of expressing the limits of a legal duty. Thus freedom of speech, which is a liberty, represents the limits of the duty not to utter defamation, blasphemy, obscenity, and sedition.” At 1130.

<sup>6</sup> UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3 [ICESCR].

<sup>7</sup> See, for example, Stanley Fish *There’s No Such Thing As Free Speech: And It’s a Good Thing, Too* (Oxford University Press, New York, 1994).

<sup>8</sup> See Robert Johnson and Adam Cureton “Kant’s Moral Philosophy” in Edward N Zalta (ed) *The Stanford Encyclopedia of Philosophy* (Fall 2017 ed) <www.plato.stanford.edu>.

Palmer and Butler explain their choice thus:<sup>9</sup>

We have considered a number of overseas models and have decided that the best approach for New Zealand is to explicitly recognise a number of socio-economic rights in Constitution Aotearoa, but make them explicitly non-justiciable (capable of being settled by law or the action of a court). So the courts will not be able to enforce them; but citizens will be able to draw on them to make State institutions accountable.

When introduced, New Zealand Bill of Rights Act 1990 (NZBORA), for which Palmer was the patron, was described as a “Clayton’s Bill of Rights”.<sup>10</sup> Based on the tagline for a non-alcoholic drink (“It’s the drink I have when I’m not having a drink”), it was said to be “the bill of rights you have when you don’t want a bill of rights”.<sup>11</sup> It appears that Palmer and Butler may be perpetuating such fence-sitting or textual legerdemain with regard to the work rights affirmed in Constitution Aotearoa.

NZBORA is not a code. Section 28 provides:<sup>12</sup>

An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part.

Important work rights, which represent New Zealand’s commitment to human rights instruments, including International Labour Organisation (ILO) conventions,<sup>13</sup> are included in legislation, notably the Employment Relations Act 2000.<sup>14</sup> A key purpose of Constitution Aotearoa is to “[s]et out the rules, principles and processes about government in one document so they are accessible, available and clear”.<sup>15</sup> But this desideratum does not extend to rights. Article 80 continues the uncertainty of NZBORA by providing other rights and freedoms are not affected by the new constitution.<sup>16</sup> It is not implausible to conclude that the authors of

---

<sup>9</sup> Palmer and Butler, above n 1, at 171.

<sup>10</sup> See David Haywood “Clayton’s Bill of Rights” Public Address (27 March 2006) <www.publicaddress.net>.

<sup>11</sup> Haywood, above n 10.

<sup>12</sup> NZBORA, s 28.

In a dissenting judgement in *Brooker v Police* [2007] NZSC 3 at [166], in particular, Thomas J persuasively argued that privacy (not included in NZBORA) was a principle that ought to be balanced against freedom of expression (included in NZBORA).

<sup>13</sup> See Ministry of Business, Innovation & Employment *International Labour Conventions Ratified by New Zealand* (2015) <www.mbie.govt.nz>.

<sup>14</sup> An object of the Act is “to promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively”. See Employment Relations Act 2000, s 3(b). A purpose of the *Employment Relations Act 2000* (s 3(b)) is “to promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively.” Margaret Wilson (then Minister of Labour) explains: the Employment Relations Act was an attempt to comply with both Conventions 87 and 98. I suspected the attempt would fail because of the continuing restrictions on the right to strike when bargaining collectively, for example, secondary boycotts. This turned out to be correct. Although there were extensive discussions with the ILO officials, the ILO would only agree that the Act complied with Convention 98 but not 87. See Margaret Wilson “ILO – Role New Zealand Government: Reflections of a Former Minister of Labour” (2000) 35(3) NZJER 6 (unpaged). Wilson does not discuss C138.

<sup>15</sup> Palmer and Butler, above n 1, 25.

<sup>16</sup> There may be prudence in this approach but if the drafter says “this is the bill of rights but we may not have included all rights”, Courts and others are not prompted to focus their minds on rights that are not expressly included.

Constitution Aotearoa have concerned themselves principally with the structure of government, but have not taken rights into serious consideration.

### III. Work rights under selected human rights documents

This part of the article considers corresponding provisions from selected human rights instruments with a view to illuminating the relevant provisions of Constitution Aotearoa. With regard to universal human rights, it is pertinent to recall the following statement in the Vienna Declaration and Programme of Action:<sup>17</sup>

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

In other words, a human rights state (*Rechtsstaat*), such as New Zealand, may not be selective and treat human rights as if they were options on a cafeteria menu.<sup>18</sup> Yet the labour rights, which are enshrined in the principal human rights instruments, are commonly relegated below other rights. Guy Mundlak argues:<sup>19</sup>

There is no disjuncture between labour rights and human rights. The parallel tracks [identified by Kevin Kolben] emerge from the fact that different agents draw on these rights in different ways. Consequently, the relationship between ... labor rights or human rights, requires asking: *who* uses the human rights discourse (or, alternatively, a labor rights discourse), *how* and *why*.

In the workplace, human dignity is often at risk, and so asserting rights which preserve and promote personhood is critical.

#### i. Universal Declaration of Human Rights

Article 4 of the Universal Declaration of Human Rights (UDHR)<sup>20</sup> prohibits slavery and servitude. Article 20 guarantees “freedom of peaceable assembly and association”, including the right not to be compelled to join an association. Freedom of association does not, of course, only relate to trade unions,<sup>21</sup> although, in practice, they are an important manifestation of that

---

<sup>17</sup> UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23 at [5].

<sup>18</sup> Paula Bennett, then Minister of Police, outraged many when she argued that gang members should have fewer human rights than other members of society. See, for example, Isaac Davison “Bill English: Paula Bennett wrongly described National's anti-gang policy” *The New Zealand Herald* (online ed, Auckland, 4 September 2017).

<sup>19</sup> Mundlak, above n 5, at 230. See also Judy Fudge “The New Discourse of Labor Rights: From Social to Fundamental Rights?” (2007) 29 Comp Lab L & Pol’y J 29; Larry Savage “Workers’ Rights as Human Rights” (2009) 34(1) Labor Stud J 8; Kevin Kolben “Labor Rights as Human Rights?” (2010) 50 Va J Int’l L 449; Virginia Mantouvalou “Are Labour Rights Human Rights?” (2012) 3 ELLJ 151.

<sup>20</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III) [UDHR].

<sup>21</sup> Totalitarian states have historically suppressed civil society associations and brought them under state control. See S Wojciech Sokolowski “Philanthropic Leadership in Totalitarian and Communist Countries”



liberty. It is notable, then, that article 23(4) specifically grants a person “the right to form and to join trade unions for the protection of his interests”. This article includes other important work rights, those being, “to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment”;<sup>22</sup> “to equal pay for equal work”;<sup>23</sup> and “to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection”.<sup>24</sup> Finally, under article 24, “[e]veryone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay”.

As a declaration, the UDHR is primarily of moral force, and generally its principles must be expressed in the more specific language of treaties to legally bind ratifying countries.<sup>25</sup> This outcome is achieved by the ICCPR and the ICESCR.

## ii. ICCPR

Article 8 amplifies the principle of freedom from slavery and servitude into a legally comprehensible form, and article 26 prohibits traditional forms of discrimination. Unlike the UDHR, the rights of peaceful assembly and to freedom of association are covered in separate provisions (articles 21 and 22). Article 22 provides:

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests ...
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Virginia Leary observes that<sup>26</sup>

---

in Kathryn A Agard *Leadership in Nonprofit Organizations: A Reference Handbook, Volume 1* (Sage, Thousand Oaks (Cal), 2011) 138 at 142.

<sup>22</sup> UDHR, art 23(1).

<sup>23</sup> At art 23(2).

<sup>24</sup> At art 23(3).

<sup>25</sup> See Human Rights Commission *Human Rights in New Zealand Ngā Tika Tangata O Aotearoa* (2010) at 14 <[www.justice.govt.nz](http://www.justice.govt.nz)>.

The UDHR also records peremptory norms of international law. A peremptory norm of general international law (*jus cogens*) is “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”. See Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331, entered into force 27 January 1980, art 53. Racial discrimination, for example, is contrary to *jus cogens*.

<sup>26</sup> See Virginia A Leary “The Paradox of Workers’ Rights as Human Rights” in Lance A Compa and Stephen F Diamond (eds) *The Paradox of Workers’ Rights as Human Rights* (University of Pennsylvania Press, Philadelphia, 1996, 2003 ed) 22 at 29.

...membership of the ILO implies a commitment to freedom of association, regardless of whether the relevant ILO conventions on freedom of association have been ratified. This commitment is explicit in the [1919] ILO constitution and the [1944 ILO] Declaration of Philadelphia.

### *iii. ICESCR*

Article 6 recognises the right to work, including occupational choice. Signatory states are expected to pursue this right through measures including:<sup>27</sup>

...technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Article 7 concerns “just and favourable conditions of work”. In particular, states are expected to ensure workers are remunerated through:<sup>28</sup>

- (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
- (ii) A decent living for themselves and their families.

Furthermore, workers are guaranteed “[s]afe and healthy working conditions”<sup>29</sup>, equal opportunities for promotion, and rest and holidays. Article 8 sets out in detail rules on trade union membership.

## **IV. Germany**

Under article 9(3) of the German Basic Law:<sup>30</sup>

The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession. Agreements that restrict or seek to impair this right shall be null and void; measures directed to this end shall be unlawful.

Workers are also entitled to choose not to join a union.<sup>31</sup> Article 12 guarantees occupational freedom, and generally prohibits forced labour. Article 139 is a Sabbatarian guarantee but is partly justified on the grounds of “rest from work”.<sup>32</sup> While the work rights in the Basic Law are not extensive, it may be noted that German law has a monist approach to international

---

<sup>27</sup> ICESCR, art 6(2).

<sup>28</sup> At art 7(a)(i)-(ii).

<sup>29</sup> At art 7(a)(iii).

<sup>30</sup> Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by Article 1 of the Act of 23 December 2014 (Federal Law Gazette I p. 2438) [Translated by Christian Tomuschat and David P Currie].

<sup>31</sup> Martin Brassey and Carole Cooper “Labour Relations” in Matthew Chaskalson and others (eds) *Constitutional Law of South Africa* (Juta & Co, Cape Town, 1996) 30-1 at 30-25.

<sup>32</sup> For an overview of German labour law, see Nicole Elert and Christopher T Brooks *German Employment Law: 618 Questions Frequently Asked by Foreigners* (De Gruyter, Berlin, 2014).

treaties.<sup>33</sup> Broadly, then, once ratified, international treaties are automatically incorporated into German law, and enjoy a status on par with legislation, but a lower status than the constitution.<sup>34</sup>

## V. Canada

The Canadian Charter of Rights and Freedoms (the Charter)<sup>35</sup> is particularly relevant for New Zealand since it was the model for NZBORA,<sup>36</sup> albeit one imperfectly realised due to New Zealand's unwillingness to surrender Parliamentary sovereignty. Despite Canada's ratification of the three principal human rights instruments,<sup>37</sup> the Charter is narrow in its scope and privileges civil and political rights.<sup>38</sup> With regard to work rights, section 2(d) is most relevant inasmuch as it guarantees freedom of association. Furthermore, section 15 prohibits discrimination on the usual grounds.<sup>39</sup>

Soon after the adoption of the Charter, the Supreme Court of Canada held that freedom of association is an individual right which does not entrench the right to bargain collectively.<sup>40</sup> Following 'the Labour Trilogy cases',<sup>41</sup> for almost 30 years, it was law that the Charter does not guarantee a right to strike. However, a new trilogy of Supreme Court cases has reversed those decisions.<sup>42</sup>

Craig Neuman criticises the new trilogy on the following grounds:<sup>43</sup>

<sup>33</sup> For monists, domestic and international law are both parts of a single global legal system. See Ian Brownlie *Principles of Public International Law* (7th ed, Oxford University Press, Oxford, 2008) at 31-33.

<sup>34</sup> David Sloss "Domestic Application of Treaties" (2011).

On the relationship between the Basic Law and the Treaty on European Union see Roman Kwiecień "The Primacy of European Union Law over National Law Under the Constitutional Treaty" (2005) 6(11) Ger LJ 1479.

<sup>35</sup> Constitution Act 1982 (Canada), part 1.

<sup>36</sup> See Susan Glazebrook "The New Zealand Bill of Rights Act 1990: its operation and effectiveness" Paper presented at the South Australian State Legal Convention, Adelaide, 22 and 23 July 2004. The charter was also influential on the development of the South African Bill of Rights. See John Dugard "A Bill of Rights for South Africa" (1990) 23(3) Cornell Int'l LJ 441.

<sup>37</sup> In the orthodox view, Canada is a dualist country. See Elisabeth Eid *Interaction between International and Domestic Human Rights Law: A Canadian Perspective* (2001) <[www.icclr.law.ubc.ca](http://www.icclr.law.ubc.ca)>.

<sup>38</sup> Compare with Quebec's Charter of Human Rights and Freedoms, RSQ c C-12, article 46 of which provides: "Every person who works has a right, in accordance with the law, to fair and reasonable conditions of employment which have proper regard for his health, safety and physical well-being."

<sup>39</sup> On labour rights in Canada, see Donald D Carter et al *Labour law in Canada* (5th ed, Kluwer International, The Hague, 2002); Judy Fudge "Constitutionalizing Labour Rights in Canada and Europe: Freedom of Association, Collective Bargaining, and Strikes" (2005) 68(1) Current Legal Problems 267.

<sup>40</sup> See *Professional Institute of the Public Service of Canada v Northwest Territories (Commissioners)* (1990) 72 DLR (4th) 1.

<sup>41</sup> *Reference Re Public Service Employee Relations Act (Alberta)* [1987] 1 SCR 313; *Public Service Alliance of Canada v Canada* [1987] 1 SCR 424; *Retail, Wholesale and Department Store Union v Saskatchewan* [1987] 1 SCR 460.

<sup>42</sup> *Mounted Police Association of Ontario v Canada (AG)* 2015 SCC 1, [2015] 1 SCR 3; *Meredith v Canada (AG)* 2015 SCC 2, [2015] 1 SCR 125; *Saskatchewan Federation of Labour v Saskatchewan* 2015 SCC 4, [2015] 1 SCR 245. For a discussion, see Canadian Foundation for Labour Rights *2015 New Labour Trilogy CFLR Forum Report* (2015).

<sup>43</sup> Craig Neuman "The Supreme Court's New Labour Trilogy: Momentous Decisions and a Modest Critique" (2016) 25(2) Constitutional Forum constitutionnel 17 at 17.

The Supreme Court generally follows a "living tree" approach to the Constitution, rather than originalism. See WJ Waluchow "Democracy and the living tree Constitution" (2011) 59(4) Drake L Rev 1001.

- (i) it ignores the reasonably clear intent of the drafters of the *Charter*; (2) it has been inconsistent and unpredictable, producing destabilizing effects; and, (3) it usurps to the judiciary a role in regulating labour relations that is better left to legislators.

Since Canada has a complex labour jurisprudence and a large body of sophisticated academic analysis, we are reluctant to make comment on the Charter and the case law generated by section 2(d) in relation to freedom of association and trade union membership and activity. Nevertheless, from a necessarily superficial observation of Canadian legislation, case law and commentary, which has been conducted instrumentally with the narrow purpose of illuminating Constitution Aotearoa, we suggest:

First, that a country's constitution should correspond with its international promises. Canada is obliged in terms of its general UN and specific ILO commitments to promote collective bargaining and to guarantee the right to strike under appropriate circumstances.<sup>44</sup> Notwithstanding jurisprudential concerns,<sup>45</sup> in deciding the new trilogy of cases, the Supreme Court has recognised that collective action is a critical instrument for achieving worker dignity. At a level of fundamental principle, this brings Canadian law back in line with the country's international human rights undertakings.<sup>46</sup>

Second, the early cases, rather than the later cases, caused uncertainty by denying a right which is fundamentally necessary for workers if they are to pursue their interests. What use is the freedom to join a trade union if that union is unable to bargain collectively and ultimately to strike? It was obvious that unionised workers would persist in asserting the right to bargain collectively – that is why people have formed trade unions from the time of the Tolpuddle Martyrs.

Third, it is uncontroversial to argue that courts are not well equipped to set labour policy. In the Alberta public service case,<sup>47</sup> McIntyre J observed:<sup>48</sup>

Our experience with labour relation has shown that the courts, as a general rule, are not the best arbiters of disputes which arise from time to time ... judges do not have the expert knowledge always helpful and sometimes necessary in the resolution of labour problems.

But the issue of the right to strike is not a quotidian dispute which arises from time to time, such as the timing of meal breaks or hourly wage rates, rather it is a matter of enabling fundamental human rights. Article 23(4) of the Universal Declaration of Human Rights (UDHR) guarantees a person “the right to form and to join trade unions for the protection his interests”: generally, those interests are most effectively protected through collective bargaining and action. Had Canada honoured its human rights obligations, workers' rights to bargain collectively and to strike should have been unambiguously guaranteed by the Charter,

---

<sup>44</sup> For a discussion of freedom of association, collective action and the right to strike, see Bernard Gernigon, Alberto Otero and Horacio Guido *ILO Principles Concerning the Right to Strike* (International Labour Office, Geneva, 1998) <www.ilo.org>.

<sup>45</sup> See Brian Langille “The Condescending Constitution (or, The Purpose of Freedom of Association is Freedom of Association)” (2016) 19 Canadian Lab & Emp LJ 335.

<sup>46</sup> Canada ratified ILO C138 in 2016, thereby becoming a party to all eight fundamental ILO conventions.

<sup>47</sup> *Reference Re Public Service Employee Relations Act (Alberta)* (1987) 38 DLR (4<sup>th</sup>) 161.

<sup>48</sup> At 233-4.

and not left to the Supreme Court to ultimately and, perhaps, reversibly,<sup>49</sup> recognise. This is an important lesson for New Zealand.

## VI. South Africa

The South African Bill of Rights prohibits slavery, servitude and forced labour.<sup>50</sup> A right to picket is included in a freedom of assembly guarantee.<sup>51</sup> “Everyone has the right to freedom of association”<sup>52</sup> and “[e]very citizen has the right to choose their trade, occupation or profession freely.”<sup>53</sup> Section 23, which is the key labour relations guarantee, provides:

1. Everyone has the right to fair labour practices.
2. Every worker has the right-
  - a. to form and join a trade union;
  - b. to participate in the activities and programmes of a trade union; and
  - c. to strike...
5. Every trade union, employers’ organisation and employer has the right to engage in collective bargaining ...

Section 27(4) of the 1993 Interim Constitution restricted the right to strike to the purposes of collective bargaining.<sup>54</sup> This restriction was not carried through into the 1996 Constitution and thereby opened up the possibility for politically-motivated strikes. However, in terms of the Labour Relations Act 1995 (South Africa), striking is only permitted in respect of an unresolved disputes with an employer.<sup>55</sup> According to Halton Cheadle, this restriction has not been challenged on constitutional grounds.<sup>56</sup>

Martin Brassey and Carole Cooper observe “it is rare to find a constitution that includes the broad and vague rights to a fair labour practice”,<sup>57</sup> but they recognise “labour law already has a kind of charter of fundamental rights of its own”.<sup>58</sup> In this regard, Maralize Conradie demonstrates how a right to fair labour practices can be seen in the context of the gradual erosion of unfair labour practices in the decades before the enactment of the Constitution.<sup>59</sup>

---

<sup>49</sup> See Langille, above n 45.

<sup>50</sup> Constitution of the Republic of South Africa 1996, s 13.

<sup>51</sup> At s 17. For a discussion of the right to picket, see Brassey and Cooper, above n 31, 30-43 – 30-44.

<sup>52</sup> Constitution of the Republic of South Africa 1996, s 18.

<sup>53</sup> At s 22.

<sup>54</sup> Employers do not enjoy a corresponding constitutional right to lock out employees in the event of a dispute. See Martin Brassey *Employment and Labour Law, Vol 1 Employment Law* (Juta & Co, Cape Town, 1998) at C3:2-C3:4. However, the Labour Relations Act 1995 (South Africa) treats strikes and lock outs even-handedly.

<sup>55</sup> See section 64 of the Labour Relations Act 1995 for the exact circumstances under which a strike is legal.

<sup>56</sup> See Halton Cheadle “Constitutionalising the Right to Strike” in Bob Hepple, Rochelle le Roux and Silvana Sciarra (eds) *Laws against Strikes: The South African Experience in International and Comparative Perspective* (FrancoAngeli, Milan, 2015) 67 at 85. Brassey and Cooper, above n 31, at 30-35 argue the right should be interpreted purposively so that it is restricted to the protection of socio-economic rights, notably terms and conditions of work. This interpretation might still allow strikes to protest, for example, against legislation contrary to workers’ interests or perhaps, even, against neoliberal policies.

<sup>57</sup> Brassey and Cooper, above n 31, at 30-15.

<sup>58</sup> At 30-44.

<sup>59</sup> M Conradie “The Constitutional Right to Fair Labour Practices: A Consideration of the Influence and Continued Importance of the Historical Regulation of (Un)fair Labour Practices Pre-1977” (2016) 22(2) *Fundamina* 63.

What lessons can be learnt from South Africa, which, since the end of Apartheid, has been active in assuming international obligations, for example, ratifying all the fundamental ILO conventions? First, a Bill of Rights can be more extensive than legislation. Second, the principle of fair labour practices can be seen as a local expression of UN and ILO basic principles.

## VII. European Union (EU)

The EU's Charter of Fundamental Rights<sup>60</sup> establishes extensive work rights, although these are generally subject to Union law and national laws and practices.<sup>61</sup> In addition to prohibitions on slavery and forced labour, including human trafficking;<sup>62</sup> freedom to choose an occupation and engage in work;<sup>63</sup> equality between men and women;<sup>64</sup> the EU "recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community".<sup>65</sup>

Article 27 provides: "Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases". Furthermore, in terms of article 28,

[w]orkers and employers, or their respective organisations, have ... the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action."<sup>66</sup>

"Everyone has the right of access to a free placement service."<sup>67</sup> In terms of article 30, "Every worker has the right to protection against unjustified dismissal". Article 31 provides:<sup>68</sup>

1. Every worker has the right to working conditions which respect his or her health, safety and dignity.
2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

Article 32 provides:<sup>69</sup>

The employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations. Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm

---

<sup>60</sup> Charter of Fundamental Rights of the European Union 2012/C 326/02.

<sup>61</sup> See, generally, Steve Peers and Angela Ward (eds) *The European Union Charter of Fundamental Rights* (Hart Publishing, Oxford, 2004).

<sup>62</sup> Charter of Fundamental Rights of the European Union, above n 60, at art 5.

<sup>63</sup> At art 15.

<sup>64</sup> At art 23.

<sup>65</sup> At art 26.

<sup>66</sup> At art 28.

<sup>67</sup> At art 29.

<sup>68</sup> At art 31(1) and (2).

<sup>69</sup> At art 32.

their safety, health or physical, mental, moral or social development or to interfere with their education.

Article 33 provides:<sup>70</sup>

To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

## VIII. Analysis of the Proposed Work Rights in Constitution Aotearoa

This part of the article analyses how the proposals in Constitution Aotearoa compare with other charters in relation to work rights. As a prelude to this, since New Zealand is a signatory to the three principal human rights instruments, it is pertinent to ask firstly whether the work rights in these basic sets of rights have been met. Compliance is illustrated in tabular form below:

Right	UDHR	ICCPR	ICESCR	Constitution Aotearoa
Freedom from slavery	YES	YES	NO	YES
Freedom from discrimination	YES	YES	NO	YES
Freedom of association	YES	YES	NO	YES
Union formation and membership	YES	YES	YES	YES (by implication)
Occupational choice	NO	NO	YES	YES
Health and safety	NO	NO	YES	YES
Equal pay	YES	NO	NO	NO (but does include non-discrimination)
Just and favourable pay	YES	NO	YES	NO
Rest and leisure	YES	NO	NO	NO

### 1. Comparison of national rights

#### a. Canada

As noted, NZBORA was based on the Canadian ICCPR-style charter. Consequently, any inclusion of ICESCR-style and environmental rights can be considered a progression from the Charter. To reiterate, the Vienna Declaration<sup>71</sup> illegitimizes a cafeteria approach to human rights.

#### b. Germany

Germany is, of course, bound by the EU Charter with which the Basic Law must be read. Nevertheless, two features of work rights under the Basic Law are particularly relevant for a constitutional review in New Zealand. First, once respect for equal human dignity is established as the fundamental informing principle of all human rights, all other rights need to be interpreted through the lens of dignity. Second, international promises on workers' rights are realised through the monist doctrine. This flow-through is indicated by the coherence between national laws and ILO conventions.

<sup>70</sup> At art 33(2).

<sup>71</sup> Vienna Declaration and Programme of Action, above n 17.

*c. South Africa*

The text of the South African Bill of Rights includes and mixes economic, social, cultural and environmental rights, along with traditional civil and political rights. Certainly, engagement with ICESCR-style rights has presented challenges for the Constitutional Court,<sup>72</sup> but these problems have not proved insurmountable for a judiciary which understands its role in a progressive, constitutional democracy.<sup>73</sup> The principal lesson to be learnt from South Africa is that we should not shy away from asserting socio-economic rights because of concerns that courts will not be able to give them practical meaning.

**2. Advanced socio-economic rights (EU)**

The EU charter may be considered the state-of-the-art rights charter for work rights. In comparison, Constitution Aotearoa falls short by a wide margin. Ideally, we might want to enshrine rights that, in Baruch Spinoza's phrase, have an eye to eternity – and, of course, rights to life, dignity and fair treatment are 'eternal' – but they would also be capable of change by a three-quarters majority of a unicameral Parliament. Such change may not be easily achieved,<sup>74</sup> but if, say, striking became obsolete as a tool of collective action, it is not unimaginable that 75 per cent of legislators might agree that it should lose its constitutional guarantee.

**3. Constitution Aotearoa**

Constitution Aotearoa may present a coherent roadmap towards a New Zealand republic, but it is an uninspiring and dismal failure as a bill of rights, particularly with regard to work rights. Where is the engagement with the issues that really matter for people who work, commonly precariously, as employees, as volunteers, as so-called contractors or as care-givers outside the scope of the market?

The provisions of comparator bills and charters of rights have been adduced to demonstrate the timidity of the Constitution Aotearoa proposals. Difficulties faced by courts in enforcing socio-economic rights are not grounds for denying justiciability to work rights. Work rights may be instrumental in realising autonomy, personhood and dignity but, like other rights, they have their own intrinsic value.

What may lie at the root of Palmer and Butler's apparent textual legerdemain is a desire to restrict rights claims to the vertical relationship between state and citizen.<sup>75</sup> But work rights have an inherently horizontal dimension. Workers must have the constitutionally guaranteed right to enforce their rights directly against their employers.

We need to compare proposed constitutional rights with existing legal rights – including extant legislative rights into the constitution will protect those rights and prevent back-sliding: for

<sup>72</sup> See, for example, *Soobramoney v Minister of Health, KwaZulu-Natal* [1997] ZACC 17, 1998 (1) SA 765 (CC) on the distribution of finite health resources; *Minister of Health v Treatment Action Campaign (TAC)* [200] ZACC 15, (2002) 5 SA 721 on the provision of retroviral drugs; *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) on the right to adequate housing.

<sup>73</sup> Compare with Aharon Barak *The Judge in a Democracy* (Princeton University Press, Princeton (NJ), 2006).

<sup>74</sup> Gay marriage equality, which seemed like a consensus issue in metropolitan New Zealand at least, in fact only passed by a 64 percent majority.

<sup>75</sup> Article 76 provides:

The Bill of Rights applies only to acts done—

(a) by ... the State:

(b) by any person or body in the performance of any public function, power or duty conferred or imposed on that person or body.



example, Constitution Aotearoa proposes “*satisfactory* health and safety conditions”,<sup>76</sup> yet section 3(2) of the Health and Safety at Work Act 2015 is, in part, underpinned by “the principle that workers and other persons should be given the *highest* level of protection ... as is *reasonably practicable*” (emphasis added). It must be asked why judges can be entrusted with interpreting principles-based legislation but not a constitutional guarantee of the highest level of protection as is reasonably practicable. Similarly, the Employment Relations Act 2000, which itself is arguably a super-statute, legislates the principles of good faith, and trust and confidence. The inclusion of fair labour practices in the South African Bill of Rights was not revolutionary or exotic but reflected a decades-long movement away from unfair labour practices. Surely, good faith, and trust and confidence would be contextually-appropriate principles worthy of mention in a New Zealand Bill of Rights?

The content of Constitutions is greatly determined by the contexts from which they have emerged. The existential crises of Nazism and Apartheid respectively shaped the German and South African supreme laws; they are fundamentally informed by the respect for human dignity, which was previously denied to certain groups within those societies, and a desire to be fully accepted back into the community of nations. New Zealand has not faced (or cannot remember) such existential crises.<sup>77</sup> However, the *Taylor case* on the removal of prisoners’ voting rights has demonstrated the fragility of fundamental human rights in a context of Parliamentary supremacy.<sup>78</sup> Human rights are first mentioned in article 75 of Constitution Aotearoa. In comparison, the German Basic law asserts the fundamental nature of respect for human dignity in article 1(1), and substantive rights under the South African constitution start at section 7. It is unsurprising, then, that the Palmer-Butler consideration of work rights is cursory, arguably dismissive. For sure, the realisation of certain socio-economic rights, such as “the enjoyment of the highest attainable standard of physical and mental health”,<sup>79</sup> can only be achieved by executive government and do not lend themselves to direct justiciability. But that institutional inappropriateness does not mean that courts cannot play a review role over delivery. Furthermore, many work rights are substantively different from other socio-economic rights and do indeed lend themselves to justiciability. Ensuring fair remuneration, safe workplaces, and permitting positive discrimination for historically disadvantaged groups are examples of issues which properly fall within the scope and competence of judicial review.

## IX. Conclusion

In this article, we have outlined the work rights proposed in Constitution Aotearoa and compared them with the rights in both less and more extensive bill of rights. We have argued that constitutionally-enshrined work rights should be contextually-specific, such as the fair labour practices in South Africa which have developed from measures taken to counter unfair practices. Consequently, comparison with other jurisdictions may have limited usefulness. Nevertheless, differences can be seen between the bare, Canadian charter guarantee of freedom of association and the needs of workers. It took the Supreme Court three decades to close this gap, and then, perhaps, imperfectly. Conversely, the EU charter seems unnecessarily specific

<sup>76</sup> Compare with article 106(c) of Constitution Aotearoa which proposes “the right of everyone to the enjoyment of the *highest attainable* standard of physical and mental health” (emphasis added). Surely health and workplace safety are interrelated, perhaps inseparable rights?

<sup>77</sup> Ignorant or non-cognisant of the sanguinary New Zealand Wars, the ex-prime minister John Key famously observed that the New Zealand state had emerged without bloodshed. See “What war? Key’s abridged history” *Stuff* (online) 31 July 2009.

<sup>78</sup> See *Attorney-General v Taylor* [2017] NZCA 215 at [149]-[150] on the courts’ engaging in a dialogue about human rights with Parliament. (And, on prisoners’ voting rights thus far being ignored.)

<sup>79</sup> Constitution Aotearoa, art 106(c).

and might profitably have been left at a level of principle, rather than quasi-regulation. Despite differences, each country considered has committed itself to the three principal human rights instruments, as well as most ILO conventions. And so, in addition to local circumstances, international obligations ought to be taken into account in establishing constitutional guarantees. To reiterate, as affirmed by the Vienna Declaration and Programme of Action, “human rights are universal, indivisible and interdependent and interrelated”.<sup>80</sup>

The Bill of Rights proposed in Constitution Aotearoa commendably moves beyond the narrow civil and political rights of NZBORA to include socio-economic, and environmental rights, and makes Parliamentary legislation subject to judicial review on constitutional grounds. But the inclusion of non-ICCPR-style rights seems half-hearted. In particular, the proposal to make work rights non-justiciable lends itself to a resurrected Clayton’s comparison. The explanation, “courts will not be able to enforce them; but citizens will be able to draw on them to make State institutions accountable”,<sup>81</sup> unfortunately implies the rights you have when you don’t want to have rights.<sup>82</sup>

What the workplace of the future will look like is a matter of speculation but it can be reasonably assumed that the imbalance in negotiating power between labour and the organisation (private or governmental), which Otto Kahn-Freund tells us lies at the root of labour law,<sup>83</sup> will not disappear. Further, union memberships, collective bargaining and action, including the withdrawal of labour, will, for the foreseeable future, remain the most effective ways of recalibrating this imbalance. And so, bearing in mind rights may be restricted “by law as can demonstrably justified in a free and democratic society”,<sup>84</sup> generous work rights need unambiguous, positive expression – and, by necessity, horizontal effect.

---

<sup>80</sup> Vienna Declaration and Programme of Action, above n 17, at I(5).

<sup>81</sup> Palmer and Butler, above n 1, at 171.

<sup>82</sup> See Haywood, above n 10.

<sup>83</sup> See Otto Kahn-Freund *Labour and the Law* (Stevens, London, 1972) at 4.

<sup>84</sup> Constitution Aotearoa, art 77.

# Recent Developments in Australian and New Zealand Age Discrimination Law: A Comparative Perspective

ALYSIA BLACKHAM\*

## Abstract

As individuals live longer, healthier lives, both Australia and New Zealand are experiencing a dramatic demographic shift. In an effort to support older workers' increasing participation in the labour market, and recognise the dignity of workers of all ages, both jurisdictions have introduced age discrimination laws that prohibit discrimination on the basis of age in employment. However, ageism remains a serious challenge facing older workers in both jurisdictions. This article draws on comparative legal analysis of recent developments in age discrimination law in Australia and New Zealand, focussing particularly on developments in 2016, to consider emerging issues in the two jurisdictions. It argues that recent developments in age discrimination law in Australia and New Zealand reveal problematic tensions in the prohibition of age discrimination, that are likely to recur in years to come.

## I. Introduction

As individuals on average live longer, healthier lives, both Australia and New Zealand are experiencing a dramatic demographic shift. Figure 1 illustrates the substantial growth in the 'elderly' (that is, those over the age of 65) as a proportion of the population in both countries since 1970. While longer life expectancy is something to be celebrated, demographic ageing also brings with it a number of challenges,<sup>1</sup> including in relation to the sustainability of the labour market and pension systems. To manage these risks in both Australia and New Zealand, changes to pensions have been introduced to encourage (or compel) older workers to remain in employment for longer.<sup>2</sup> As Figure 2 illustrates, pension and labour market reforms have been fairly successful at increasing the labour market participation rate for 55-64 year-olds in Australia and New Zealand (though New Zealand has outstripped Australia in this regard since its pension reforms took effect in the early 1990s).

---

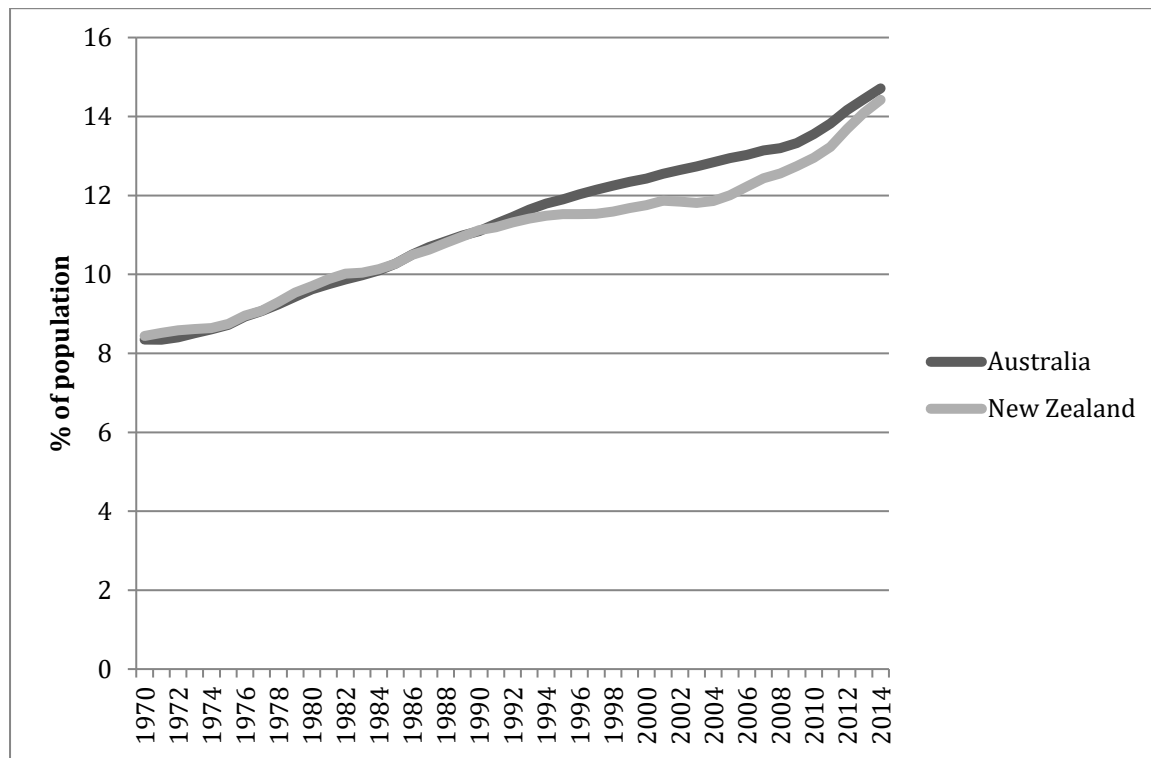
\* Dr Alysia Blackham, Senior Lecturer and Discovery Early Career Research Fellow, Melbourne Law School, the University of Melbourne.

This research was funded by the Australian Government through the Australian Research Council's *Discovery Projects* funding scheme (project DE170100228). The views expressed herein are those of the author and are not necessarily those of the Australian Government or Australian Research Council.

<sup>1</sup> Irene Ryan, Katherine Ravenswood and Judith K Pringle "Equality and Diversity in Aotearoa New Zealand" in Alain Klarsfeld and others (eds) *International Handbook on Diversity Management at Work: Second Edition Country Perspectives on Diversity and Equal Treatment* (Edward Elgar Publishing, Cheltenham, 2014) 175 at 179.

<sup>2</sup> Roger Hurnard *The effect of New Zealand Superannuation eligibility age on the labour force participation of older people* (New Zealand Treasury Working Paper, 05/09, November 2005).

**Figure 1: Elderly (those over 65) as a percentage of the population, Australia and New Zealand, 1970-2014 (Source: OECD Labour Force Statistics)**



**Figure 2: Employment rate for 55-64 year-olds, per cent of the age group, 1979–2016, by jurisdiction (Source: OECD Labour Market Statistics)**



In an effort to support older workers' increasing participation in the labour market, and recognise the dignity of workers of all ages, both jurisdictions have introduced age discrimination laws that prohibit discrimination on the basis of age in employment. While these laws could potentially have substantial instrumental significance for older workers, and are becoming more important with accelerating demographic change, there has been limited scholarly examination of age discrimination legislation in either New Zealand or Australia.<sup>3</sup> Further, there are substantial questions about the effectiveness of age discrimination legislation in practice. Empirical studies have illustrated that ageism – and gendered ageism in particular – remains a serious challenge facing older workers in both jurisdictions.<sup>4</sup> Age discrimination is particularly evident in recruitment,<sup>5</sup> meaning older workers are likely to spend longer out of work when made redundant;<sup>6</sup> in training;<sup>7</sup> and in persistent stereotypes about older workers held by both employers and older workers themselves,<sup>8</sup> particularly relating to older workers' lack of adaptability.<sup>9</sup>

These empirical studies echo the findings of surveys of older workers in Australia and New Zealand, which have found age discrimination to be widespread. In a 2014 prevalence survey of age discrimination in the workforce, based on telephone interviews with 2,109 Australians aged 50 years and over, 27 per cent of respondents reported experiencing age discrimination in employment in the previous two years.<sup>10</sup> Further, 32 per cent of respondents were aware of other people experiencing

<sup>3</sup> Though, in Australia, see Therese MacDermott "Older workers and extended workforce participation: Moving beyond the 'Barriers to work' approach" (2014) 14 IJDL 83; Therese MacDermott "Challenging age discrimination in Australian workplaces: From anti-discrimination legislation to industrial regulation" (2011) 34 UNSWLJ 182; Therese MacDermott "Affirming age: Making federal anti-discrimination regulation work for older Australians" (2013) 26 AJLL 141; Therese MacDermott "Resolving federal age discrimination complaints: Where have all the complainants gone?" (2013) 24 ADRJ 102; Therese MacDermott "Age Discrimination and Employment Law: The Sky's the Limit" (1998) 11 AJLL 144; Therese MacDermott "The Role of Mandatory ADR and Agency Engagement in Resolving Employment Discrimination Complaints: An Australian Perspective" (2015) 31 IJCLIR 27; Margaret Thornton and Trish Luker "Age Discrimination in Turbulent Times" (2010) 19 GLR 141; Lynne Bennington "Prime Age Recruitment: The Challenges for Age Discrimination Legislation" (2004) 3 Elder Law Review 27; Patricia Eastal, Channy Hiu Tung Cheung and Susan Priest "Too many candles on the birthday cake: age discrimination, work and the law" (2007) 7 QUTLJ 93; S Encel "Age discrimination in employment in Australia" (1999) 25 Ageing Int 69; S Encel "Age Discrimination in Law and in Practice" (2004) 7 Elder Law Review 13; Sue Field and Carolyn Sappideen "Anti-Discrimination - Some Observations from downunder, the Australian Experience on Age Discrimination" (2009) 3 J Intl Aging L & Poly 169. In New Zealand, see Mark Harcourt, Adrian Wilkinson and Geoffrey Wood "The effects of anti-age discrimination legislation: a comparative analysis" (2010) 26 IJCLIR 447; Mark Harcourt, Geoffrey Wood and Sonda Harcourt "Do Unions Affect Employer Compliance with the Law? New Zealand Evidence for Age Discrimination" (2004) 42 BJIR 527; Geoffrey Wood, Mark Harcourt and Sonda Harcourt "The effects of age discrimination legislation on workplace practice: A New Zealand case study" (2004) 35 Industrial Relations Journal 359.

<sup>4</sup> J Handy and D Davy "Gendered ageism: Older women's experiences of employment agency practices" (2007) 45 Asia Pac J Hum Resour 85; Michael McGann and others "Gendered Ageism in Australia: Changing Perceptions of Age Discrimination among Older Men and Women" (2016) 35 Economic Papers 375; Sonda Harcourt and Mark Harcourt "Do Employers Comply with Civil/Human Rights Legislation? New Evidence from New Zealand Job Application Forms" (2002) 35 J Bus Ethics 205. Historically, see MS Singer and Christine Sewell "Applicant Age and Selection Interview Decisions: Effect of Information Exposure on Age Discrimination in Personnel Selection" (1989) 42 Personnel Psychology 135.

<sup>5</sup> Handy and Davy, above n 4; McGann and others, above n 4; Harcourt and Harcourt, above n 4; Wood, Harcourt and Harcourt, above n 3. Historically, see Singer and Sewell, above n 4.

<sup>6</sup> Keith A Macky "Organisational Downsizing and Redundancies: The New Zealand Workers' Experience" (2004) 29 NZJER 63 at 82.

<sup>7</sup> Lance Gray and Judy McGregor "Human Resource Development and Older Workers: Stereotypes in New Zealand" (2003) 41 Asia Pac J Hum Resour 338.

<sup>8</sup> Judy McGregor and Lance Gray "Stereotypes and Older Workers: The New Zealand Experience" [2002] 18 Social Policy Journal of New Zealand 163; Gray and McGregor, above n 7.

<sup>9</sup> McGregor and Gray, above n 8; Gray and McGregor, above n 7.

<sup>10</sup> Australian Human Rights Commission *National prevalence survey of age discrimination in the workplace: The prevalence, nature and impact of workplace age discrimination amongst the Australian population aged 50 years and*

discrimination because of their age in the workplace in the last two years.<sup>11</sup> Discrimination was more likely to be experienced by those seeking paid work (58 per cent) than by those who worked for a wage or salary (28 per cent) or those who were self-employed (26 per cent),<sup>12</sup> implying that discrimination in recruitment is a particular problem in Australia.

The comparable figures in New Zealand are lower than those in Australia (though also more dated). For example, in a survey of 2137 New Zealand workers over the age of 55, conducted in 2000, 11.6 per cent of respondents said they had experienced less favourable treatment at work on the basis of age,<sup>13</sup> most commonly in relation to selection for training.<sup>14</sup> Similarly, in Statistics New Zealand's Survey of Working Life, which was a supplement to the Household Labour Force Survey in the December 2012 quarter, 10 per cent of older workers said they had experienced harassment, discrimination, or bullying at work in the last 12 months.<sup>15</sup> Older workers experienced less harassment, discrimination and bullying than the 35-54 age group but more than the 15-34 age group.<sup>16</sup> This is broadly consistent with the results of the New Zealand General Social Survey, conducted in 2010, which found that those over the age of 55 were least likely to experience discrimination in the last 12 months (see Table 1).

**Table 1: Experience of discrimination in the last 12 months by age (Source: New Zealand General Social Survey, 2010)**

	Total	Age group (years)						
		15-24	25-34	35-44	45-54	55-64	65-74	75+
Experienced discrimination in last 12 months (per cent)	10.4	14.2	11.6	12.0	11.5	8.5	3.9	2.8

This article presents comparative legal analysis of recent developments in age discrimination law in Australia and New Zealand, focussing particularly on developments in 2016. This comparison stems from a 'problem-solving' or sociological approach to comparative law, which examines how different legal systems have responded to similar problems (here, the challenges of demographic ageing and age discrimination in employment).<sup>17</sup> I commence with a brief discussion of the statutory framework in each jurisdiction for addressing age discrimination (Part II), before presenting an analysis of recent case law in each country (Part III). Finally in Part IV, I discuss the tensions that are emerging in the prohibition of age discrimination, which are likely to recur in future years.

---

*older* (Australian Human Rights Commission, 2015) at 18. Respondents were asked: '...during 2013 and 2014, have you at any time during those two years, been treated less favourably than other people in a similar situation because of your age or because of assumptions made about older people?': at 79.

<sup>11</sup> At 23.

<sup>12</sup> At 19.

<sup>13</sup> Gray and McGregor, above n 7, at 345.

<sup>14</sup> At 346.

<sup>15</sup> Statistics NZ "Workers aged 55+ keen to stay working full-time" (22 October 2013) Stats NZ <[http://archive.stats.govt.nz/browse\\_for\\_stats/income-and-work/employment\\_and\\_unemployment/workers-aged-55plus-article.aspx](http://archive.stats.govt.nz/browse_for_stats/income-and-work/employment_and_unemployment/workers-aged-55plus-article.aspx)>.

<sup>16</sup> Statistics NZ, above n 15.

<sup>17</sup> Esin Özücü "Developing comparative law" in Esin Özücü and David Nelken (eds) *Comparative law: a handbook* (Hart, Oxford, 2007) 43 at 52.

## II. Statutory Frameworks for Addressing Age Discrimination in Employment

In both jurisdictions, age discrimination in employment is regulated by both industrial statutes (in New Zealand, the Employment Relations Act 2000 (ERA); and, in Australia, the Fair Work Act 2009 (Cth) [FWA]); and human rights or equality statutes (in New Zealand, the Bill of Rights Act 1990 (BORA) and the Human Rights Act 1993 (HRA); in Australia, the Age Discrimination Act 2004 (Cth) (ADA) and equivalent state and territory legislation). Thus, claimants in both jurisdictions must choose between pursuing a claim under workplace law or equality/human rights law.<sup>18</sup> However, this choice is further complicated in Australia by the presence of equivalent equality statutes at the state and territory level, meaning claimants must also choose whether to pursue a claim in the Federal or state system.

### *a. Statutory Frameworks in New Zealand*

The New Zealand BORA establishes a general right to freedom from discrimination on the grounds listed in the HRA (which include age).<sup>19</sup> BORA only applies to acts by the government or those performing public functions, powers or duties.<sup>20</sup> While BORA does not allow courts to declare other statutes to be invalid or impliedly repealed,<sup>21</sup> an interpretation that is consistent with BORA is to be preferred.<sup>22</sup> Though a breach of the BORA discrimination provisions does not create individual rights, it does breach the HRA,<sup>23</sup> which can then lead to direct orders and individual remedies.<sup>24</sup>

The HRA prohibits discrimination in employment,<sup>25</sup> and includes age as a prohibited ground of discrimination.<sup>26</sup> However, 'age' in this context does not extend to those under the age of 16, and has only included those after 'superannuable' age since 1999. The HRA includes exceptions to the prohibition of age discrimination for acts authorised or required by enactment or law,<sup>27</sup> crews of ships or aircraft (if they are not New Zealand ships or aircraft) if they are engaged or applied for work outside New Zealand,<sup>28</sup> for reasons of national security if the individual is aged under 20 and secret or top secret security clearance is required,<sup>29</sup> for reasons of authenticity if being a certain age is a genuine occupational qualification,<sup>30</sup> for domestic employment in a private household,<sup>31</sup> where age is a genuine occupational qualification (for safety or any other reason),<sup>32</sup> for youth wages for those under 20,<sup>33</sup> and for retirement benefits in force prior to 1999.<sup>34</sup> Measures to ensure equality, if done in good faith, are also exempt.<sup>35</sup>

<sup>18</sup> See Employment Relations Act 2000, s 112; Human Rights Act 1993, s 79A. For claims relating to dismissal, claimants must use the personal grievance provisions in the Employment Relations Act: s 113.

<sup>19</sup> Bill of Rights Act 1990, s 19(1).

<sup>20</sup> Section 3.

<sup>21</sup> Section 4.

<sup>22</sup> Section 6.

<sup>23</sup> Human Rights Act 1993, ss 20I, 20L.

<sup>24</sup> Section 92I.

<sup>25</sup> Section 22.

<sup>26</sup> Section 21(1)(i).

<sup>27</sup> Section 21B(1).

<sup>28</sup> Section 24.

<sup>29</sup> Section 25(2).

<sup>30</sup> Section 27(1).

<sup>31</sup> Section 27(2).

<sup>32</sup> Section 30(1).

<sup>33</sup> Section 30(2).

<sup>34</sup> Section 30A.

<sup>35</sup> Section 73.

The HRA is expressly aimed at achieving the earliest resolution of disputes. The objects of Part 3 of the HRA (which relates to enforcement) include:<sup>36</sup>

...establish[ing] procedures that ... recognise that disputes about compliance ... are more likely to be successfully resolved if those disputes can be resolved promptly by the parties themselves; and recognise that, if disputes about compliance ... are to be resolved promptly, expert problem-solving support, information, and assistance needs to be available to the parties to those disputes.

Consistent with these objects, the Human Rights Commission (the Commission) receives complaints made under the HRA,<sup>37</sup> and is tasked with offering mediation and problem-solving assistance.<sup>38</sup> Mediation is confidential<sup>39</sup> and cannot be used as evidence in later proceedings.<sup>40</sup> The Commission must use best endeavours to assist the parties to achieve a settlement.<sup>41</sup> The Commission may take further action with a complaint,<sup>42</sup> including via information gathering.<sup>43</sup>

Following these attempts at resolution, the aggrieved party, complainant or Commission itself may proceed to the Human Rights Review Tribunal.<sup>44</sup> However, the Tribunal must refer the matter back to the Commission unless satisfied that additional attempts at resolution would not contribute constructively to resolving the complaint, would not be in the public interest, or would undermine the urgency of the proceedings.<sup>45</sup> The Tribunal may refer matters back to the Commission at any time.<sup>46</sup>

In 2015-16, the Human Rights Commission managed 1274 complaints of unlawful discrimination under the HRA, 84 per cent of which were successfully resolved.<sup>47</sup> Ten percent of complaints were not resolved and were referred to the Human Rights Review Tribunal.<sup>48</sup> Age was the fourth most common ground raised, relating to 136 complaints.<sup>49</sup> Forty of these complaints were against government, and 96 related to the private sector.<sup>50</sup>

The ERA creates a route for pursuing personal grievances<sup>51</sup> relating to employment, including those relating to discrimination<sup>52</sup> on the grounds of age.<sup>53</sup> The ERA adopts the exceptions to the prohibition of discrimination in the HRA, including those specifically relating to age.<sup>54</sup> The ERA creates a

---

<sup>36</sup> Section 75.

<sup>37</sup> Section 76.

<sup>38</sup> Sections 76, 77.

<sup>39</sup> Section 85.

<sup>40</sup> Section 86.

<sup>41</sup> Section 83(2).

<sup>42</sup> Section 80.

<sup>43</sup> Section 82.

<sup>44</sup> Section 92B.

<sup>45</sup> Section 92D(1)(b).

<sup>46</sup> Section 92D(2).

<sup>47</sup> NZ Human Rights Commission *Annual Report: Pūrongo ā Tau 2015/16* (November 2016) at 11, 18, 21.

<sup>48</sup> At 21.

<sup>49</sup> At 20.

<sup>50</sup> At 21.

<sup>51</sup> For a summary of the literature on personal grievances, see Department of Labour *Issues with the Personal Grievance System in New Zealand? A review of the literature* (February 2010).

<sup>52</sup> Sections 102, 103(1)(c). "Discrimination" is defined in s 104.

<sup>53</sup> Section 105(1)(i).

<sup>54</sup> Employment Relations Act 2000, s 106; Human Rights Act 1993, s 30.



rebuttable presumption of discrimination where an employee can establish that the employer took any action that falls within the definition of discrimination under the ERA.<sup>55</sup>

The objects of the ERA explicitly include building “productive employment relationships”, “promoting mediation as the primary problem-solving mechanism other than for enforcing employment standards”, and “reducing the need for judicial intervention”.<sup>56</sup> Similarly, the objects of Part 9 of the ERA, which establishes the personal grievance process, include recognising that: “in resolving employment relationship problems, access to both information and mediation services is more important than adherence to rigid formal procedures”; and “employment relationship problems are more likely to be resolved quickly and successfully if the problems are first raised and discussed directly between the parties to the relationship”.<sup>57</sup> Understandably, then, there is a particular focus on internal organisational dispute resolution under the ERA, with a secondary emphasis on mediation where internal resolution is unsuccessful. For example, claimants must raise a personal grievance with their employer within 90 days.<sup>58</sup> No similar provision exists in Australia. Concerns have been raised, however, that internal organisational processes may be ineffective in many cases,<sup>59</sup> disadvantaging claimants and undermining the personal grievance provisions.

After an employee has raised a personal grievance with their employer, they have three years to begin proceedings in the Employment Relations Authority (the Authority) or Employment Court.<sup>60</sup> The Authority is an investigative body, “that has the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities.”<sup>61</sup> The Authority has an ongoing duty to consider whether mediation of a matter is appropriate, and must direct mediation of matters unless it will not “contribute constructively to resolving the matter”,<sup>62</sup> is not in the public interest, will undermine the urgency of proceedings, or is otherwise impractical or inappropriate.<sup>63</sup> The Authority also has a duty to prioritise previously mediated matters.<sup>64</sup> Where the Authority directs mediation, parties must comply with that direction and “attempt in good faith to reach an agreed settlement of their differences”.<sup>65</sup> Proceedings are suspended until the parties have complied with the direction.<sup>66</sup> Thus, if parties wish to pursue a claim with the Authority, mediation can become, in effect, compulsory. Mediation is confidential<sup>67</sup> and can be binding with the parties’ agreement.<sup>68</sup>

Unsurprisingly, then, mediation has become the primary means of resolving disputes in New Zealand since the ERA was introduced.<sup>69</sup> Limited data is available regarding the operation of mediation, the Authority, and the Employment Court in New Zealand: while there has been some historical analysis

<sup>55</sup> Employment Relations Act 2000, s 119.

<sup>56</sup> Section 3(a).

<sup>57</sup> Section 101.

<sup>58</sup> Section 114.

<sup>59</sup> Bernard Walker and RT Hamilton “The Effectiveness of Grievance Processes in New Zealand: A Fair Way to Go?” (2011) 53 JIR 103.

<sup>60</sup> Employment Relations Act 2000, s 114(6).

<sup>61</sup> Section 157(1).

<sup>62</sup> Section 159(1)(b)(i).

<sup>63</sup> Section 159(1).

<sup>64</sup> Section 159A.

<sup>65</sup> Section 159(2).

<sup>66</sup> Section 159(2).

<sup>67</sup> Section 148.

<sup>68</sup> Section 150.

<sup>69</sup> Peter Franks “Employment mediation in New Zealand” (2003) 6 ADR Bulletin 1 at 1.

of personal grievance statistics,<sup>70</sup> there has been no large scale empirical analysis of mediation services and Authority data.<sup>71</sup> However, a Department of Labour report on the first two years of the ERA provides a statistical picture of mediation services under the ERA: over this period, the Department received 15,336 requests for mediation services, with personal grievances accounting for 61.7 per cent of mediation applications.<sup>72</sup> Mediators completed 14,357 applications over the two years: 68.2 per cent were settled, 12.8 per cent were not settled, and 19 per cent decided not to proceed or were withdrawn.<sup>73</sup> Thus, few matters will proceed beyond mediation to the Employment Court: across all areas, only 185 new cases were filed with the Employment Court in 2016.<sup>74</sup>

### *b. Statutory Frameworks in Australia*

In Australia, age discrimination is prohibited in employment by the FWA; the ADA at the Federal level; and equivalent state and territory equality legislation (such as the Equal Opportunity Act 2010 (Vic)). There is no bill of rights in Australia, and age equality is not embedded in any constitutional instruments.

The FWA prohibits adverse action on the grounds of age,<sup>75</sup> which includes dismissal, injuring an employee in employment, prejudicial altering of an employee's position, or discriminating between the employee and other employees.<sup>76</sup> The prohibition does not extend to discrimination which is not unlawful under an anti-discrimination law (such as the ADA); that taken because of the 'inherent requirements' of the position; or for staff members of religious institutions, where it is done in good faith "to avoid injury to the religious susceptibilities of adherents of that religion or creed."<sup>77</sup> Under s 361 of the FWA, the burden of proof is reversed in relation to adverse action claims: adverse action will be presumed to be action taken for a prohibited reason unless the employer proves otherwise.

The Fair Work Commission (FWC) is given powers to deal with disputes,<sup>78</sup> including via mediation or conciliation, or by expressing an opinion or making a recommendation,<sup>79</sup> and may direct a person to attend a conference.<sup>80</sup> For a non-dismissal dispute, those affected may apply to the FWC to deal with the dispute<sup>81</sup> and, if the parties agree, the FWC must conduct a conference.<sup>82</sup> For disputes relating to dismissal, those affected *must* apply to the FWC before proceeding to court.<sup>83</sup> If the FWC is "satisfied that all reasonable attempts to resolve the dispute"<sup>84</sup> have been, or will be, unsuccessful, then it must issue a certificate to that effect.<sup>85</sup> Once a certificate has been issued for dismissal-related

<sup>70</sup> Dianne Donald and Joanna Cullinane "An Analysis of Personal Grievance Statistics in New Zealand From 1984 to 1998" [1998] Labour, Employment and Work in New Zealand 184.

<sup>71</sup> Department of Labour, above n 51, at 14.

<sup>72</sup> Franks, above n 69, at 4.

<sup>73</sup> At 4.

<sup>74</sup> Courts of New Zealand "Annual statistics Specialist Courts and Tribunals December 2016" <<https://www.courtsofnz.govt.nz/publications/annual-statistics/latest-december-2016/specialist-courts-and-tribunals>>.

<sup>75</sup> Fair Work Act 2009 (Cth), s 351(1).

<sup>76</sup> Section 342.

<sup>77</sup> Section 351(2).

<sup>78</sup> Section 595(1). In relation to dismissal, see s 365; in relation to other forms of adverse action, see s 372.

<sup>79</sup> Section 595(2).

<sup>80</sup> Section 592.

<sup>81</sup> Section 372.

<sup>82</sup> Section 374.

<sup>83</sup> Section 370.

<sup>84</sup> Section 368(3).

<sup>85</sup> Section 368(3)(a).

disputes, a person affected by a contravention of the adverse action provisions may apply to the Federal Court or the Federal Circuit Court<sup>86</sup> for the making of “any order the court considers appropriate”.<sup>87</sup>

The ADA prohibits direct and indirect discrimination on the basis of age in employment, including in appointments, terms and conditions of employment, access to opportunities or benefits, dismissal, or any other detriment.<sup>88</sup> Exceptions are created for domestic duties, the inherent requirements of a position,<sup>89</sup> partnerships with less than six partners,<sup>90</sup> youth wages,<sup>91</sup> positive discrimination,<sup>92</sup> charities,<sup>93</sup> religious bodies,<sup>94</sup> superannuation and insurance,<sup>95</sup> direct compliance with laws,<sup>96</sup> and Commonwealth employment programs.<sup>97</sup>

Written complaints alleging a breach of the ADA may be lodged with the Australian Human Rights Commission (AHRC).<sup>98</sup> Complaints are referred to the President of the AHRC,<sup>99</sup> who may inquire into the complaint, terminate it or attempt to conciliate it,<sup>100</sup> including by holding a conference that the parties may be invited or required to attend.<sup>101</sup> The President must terminate a complaint if satisfied that there is no reasonable prospect of the matter being settled by conciliation.<sup>102</sup> If a complaint is terminated, the person affected may apply to the Federal Court or Federal Circuit Court for such orders as the court thinks fit.<sup>103</sup>

Age discrimination complaints may, therefore, be received by federal, state and territory equality commissions, as well as the FWC. The number of complaints received in 2015-16 by jurisdiction is depicted in Table 2. The FWC does not provide statistics broken down by ground in its annual report.

**Table 2: Age discrimination complaints in Australia, 2015–16, by jurisdiction (Source: Annual reports of equality bodies) (\* = not reported)**

	AHRC	Vic	NSW	SA	Qld	NT	WA	Tas	ACT	Total
2015–16	161	123	77	*	24	45	26	23	2	481

### III. Recent Case Law Developments

Given mediation and alternative dispute resolution redirect most matters away from the courts in both jurisdictions, it is unsurprising that few age discrimination cases are heard and determined in any given year. Thus, doctrinal analysis of age discrimination laws is fraught in both countries. However, a few trends can be seen in the case law that has emerged.

<sup>86</sup> Sections 370, 539.

<sup>87</sup> Section 545.

<sup>88</sup> Age Discrimination Act 2004 (Cth), s 18.

<sup>89</sup> Section 18.

<sup>90</sup> Section 21.

<sup>91</sup> Section 25.

<sup>92</sup> Section 33.

<sup>93</sup> Section 34.

<sup>94</sup> Section 35.

<sup>95</sup> Section 37.

<sup>96</sup> Section 39.

<sup>97</sup> Section 41A. For further on exceptions, see Alysia Blackham “A Compromised Balance? A Comparative Examination of Exceptions to Age Discrimination Law in Australia and the UK” (2018) 41(3) Melbourne University Law Review 1085.

<sup>98</sup> Australian Human Rights Commission Act 1986 (Cth), s 46P.

<sup>99</sup> Section 46PD.

<sup>100</sup> Section 46PF.

<sup>101</sup> Section 46PJ.

<sup>102</sup> Section 46PH(1B)(b).

<sup>103</sup> Section 46PO.

In New Zealand, two cases were handed down in 2016 relating to age discrimination. The first, *New Zealand Basing Ltd v Brown (Brown)*<sup>104</sup> was a Court of Appeal decision relating to the compulsory retirement at age 55 of pilots working for Cathay Pacific. For the Court of Appeal, *Brown* was, at its core, about choice of jurisdiction to resolve a contractual issue: Mr Brown's employment contract specified that the law of Hong Kong should apply; Hong Kong law contains no prohibition of age discrimination. As the ERA was not seen as an 'overriding' statute, the question for the Court of Appeal, then, was whether it would be contrary to public policy to allow that choice of jurisdiction,<sup>105</sup> and whether Hong Kong law (in omitting any prohibition on age discrimination) would be unjust or unconscionable to apply. Thus, the issue was whether recognition of Hong Kong law by the New Zealand courts would "shock the conscience of a reasonable New Zealander".<sup>106</sup>

The Court of Appeal ultimately held that it would not be contrary to public policy to recognise Hong Kong law. The Court held that the right to be free from age discrimination in New Zealand was not "absolute",<sup>107</sup> particularly given the "flexibility of New Zealand's statutory recognition of the right to freedom from age discrimination."<sup>108</sup> Unlike other grounds of discrimination, age is not protected under international human rights law, which "is largely silent on age discrimination."<sup>109</sup> Thus, protection against forced retirement did not "reflect an absolute value that must trump transnational contracting."<sup>110</sup> Instead, "the treatment of ageing persons is linked to and reflects a range of fiscal, social and cultural factors,"<sup>111</sup> implying that protection from age discrimination is not an absolute or key value that must be upheld. In summary, then:<sup>112</sup>

The right to be free from age discrimination is not an absolute value, as is confirmed by New Zealand's statutory framework, but is a flexible concept linked to and reflecting a range of fiscal, social and cultural factors. And the absence of a protection under Hong Kong law against enforcement of a contractual obligation to retire at 55 years of age would not shock the conscience of a reasonable New Zealander or violate an essential principle of our justice or moral interests.

Thus, the Court of Appeal's decision was grounded in an assumption that protection from age discrimination is of lesser importance than protection from other types of discrimination. Prohibiting age discrimination is not an "absolute value",<sup>113</sup> but just a cultural decision. This stands in marked contrast to the decision of Corkill J in the Employment Court, who saw human rights law generally as "a fundamental law",<sup>114</sup> and the prohibition of age discrimination as reflecting "deeply held values that bear on the very essence of human identity."<sup>115</sup>

The Court of Appeal decision in *Brown* was appealed to the New Zealand Supreme Court.<sup>116</sup> Overruling the Court of Appeal, the Supreme Court held that the ERA applies to employees who work

<sup>104</sup> *New Zealand Basing Ltd v Brown* [2016] NZCA 525, [2017] 2 NZLR 93.

<sup>105</sup> At [64].

<sup>106</sup> At [67].

<sup>107</sup> At [71].

<sup>108</sup> At [73].

<sup>109</sup> At [74].

<sup>110</sup> At [74].

<sup>111</sup> At [74].

<sup>112</sup> At [83].

<sup>113</sup> At [83].

<sup>114</sup> *Brown v New Zealand Basing Ltd* [2014] NZEmpC 229, (2014) 10 NZELC 79-047 at [109].

<sup>115</sup> At [111].

<sup>116</sup> *Brown v New Zealand Basing Ltd* [2017] NZSC 12.

within the territorial limits of New Zealand, regardless of the choice of law in their employment contract.<sup>117</sup> This was based on a purposive interpretation of the ERA.<sup>118</sup> Unlike the Court of Appeal, the Supreme Court did not see rights to protection from discrimination under the ERA as being contractual in nature:<sup>119</sup> for William Young and Glazebrook JJ, the employment contract provided the context in which legislatively proscribed conduct occurred; however, it was not the origin of the rights themselves,<sup>120</sup> which are “free-standing”.<sup>121</sup> Employment is about relationships and status, and not just contract.<sup>122</sup> There was, therefore, no reason to confine the ERA to employment relationships governed by the law of New Zealand.<sup>123</sup> Further, William Young and Glazebrook JJ explicitly refused to distinguish age discrimination from other forms of discrimination.<sup>124</sup> Similarly, Elias CJ, O’Regan and Ellen France JJ held that the employment relationship was not just a matter of contract,<sup>125</sup> and that it would be “very odd” to construe the ERA in a way that allowed parties to discriminate via a choice of law.<sup>126</sup> The Supreme Court decision in *Brown* places discrimination rights on a more secure footing than the Court of Appeal decision, and implies that protection from age discrimination cannot be seen as inferior to other discrimination rights.

The second New Zealand case, *Wang v New World Market Ltd (Auckland)*,<sup>127</sup> was an Authority decision relating to the dismissal of a warehouse worker. The claimant proceeded on the basis of age and disability discrimination (having Asperger Syndrome) and unfair dismissal under the ERA. While Mr Wang was successful in his claim, this was likely due to the blatant evidence of the employer’s preferences for employees of particular ages. When Mr Wang’s job was advertised, the employer specifically sought a warehouse worker ‘50 years or below’.<sup>128</sup> As the Authority recognised, “This clearly indicates a discriminatory preference for recruitment based on an applicant’s age which is a prohibited ground of discrimination”.<sup>129</sup> Mr Wang gave evidence that, at a later meeting, he was told that the employer “wanted to employ a person in their 40s”.<sup>130</sup> This evidence was found to be credible, including on the basis that “the advertisement placed in December 2014 indicated an ignorance of age as a prohibited ground of discrimination.”<sup>131</sup> Thus, age discrimination was found to be a factor in the decision to dismiss Mr Wang.<sup>132</sup> Mr Wang was awarded lost wages and NZ\$5000 compensation for hurt and humiliation.

While it may seem unusual to have only two cases on age discrimination handed down in 2016 in New Zealand, this actually *exceeds* the number of substantive decisions in Australia in 2016. A survey of 2016 case law across all Australian jurisdictions indicates that the vast majority of decisions relating

<sup>117</sup> *Brown v New Zealand Basing Ltd* [2017] NZSC 139 at [8] per William Young and Glazebrook JJ.

<sup>118</sup> At [8] per William Young and Glazebrook JJ.

<sup>119</sup> At [68] per William Young and Glazebrook JJ.

<sup>120</sup> At [68], [69] per William Young and Glazebrook JJ.

<sup>121</sup> At [69] per William Young and Glazebrook JJ.

<sup>122</sup> At [56] per William Young and Glazebrook JJ.

<sup>123</sup> At [68] per William Young and Glazebrook JJ.

<sup>124</sup> At [69] per William Young and Glazebrook JJ.

<sup>125</sup> At [77] per Elias CJ, O’Regan and Ellen France JJ.

<sup>126</sup> At [91] per Elias CJ, O’Regan and Ellen France JJ.

<sup>127</sup> *Wang v New World Market Ltd (Auckland)* [2016] NZERA Auckland 124.

<sup>128</sup> At [92].

<sup>129</sup> At [93].

<sup>130</sup> At [94].

<sup>131</sup> At [95].

<sup>132</sup> At [96].

to age discrimination concerned procedural matters,<sup>133</sup> interlocutory applications to strike out claims and/or for summary dismissal,<sup>134</sup> and applications to bring matters out of time.<sup>135</sup>

The only substantive decision on age discrimination delivered in 2016 in Australia was in Victoria, in *Udugampala v Essential Services Commission*.<sup>136</sup> In that case, a job applicant argued that the requirement to respond to key selection criteria in writing when applying for a job was unfairly onerous for someone with bipolar disorder. The Victorian Civil and Administrative Tribunal held that no evidence had been provided of this.<sup>137</sup> The applicant also argued that he had been discriminated against on the basis of age, as the employer:<sup>138</sup>

...considered his age as a negative factor when assessing his application; that as a 48 year old man he was at a disadvantage as the [selection] panel would be drawn to applicants of lesser years; that the application process was not open and transparent; and that there may have been applicants earmarked for the positions.

Again, evidence was not produced to support any of these claims,<sup>139</sup> and the claim failed. The applicant was unrepresented in this matter, perhaps explaining why so little relevant evidence was produced.<sup>140</sup>

Beyond this one substantive decision, a number of the procedural cases involved an assessment of the merits of the claim; however, it was rare for the claims to be found to have sufficient substance to proceed further.<sup>141</sup> In *Sun v EP2 Management Pty Ltd*, the Federal Circuit Court doubted the merits of using summary dismissal applications in this way to effectively determine the rights of the parties and the merits of the claim:<sup>142</sup>

The respondent argued that the purpose of the powers of summary dismissal is to reduce costs and delay. That much may be accepted; however, it is often the case ... that an application for summary dismissal achieves precisely the opposite: increased costs and further delay. In this matter, for example, the matter could readily have been finally

---

<sup>133</sup> Under the ADA: *Cavar v Green Gate Pty Ltd* [2016] FCA 82. In NSW, *Vye v Secretary, Department of Finance, Services and Innovation* [2016] NSWCATAD 117; *Coady v Sutherland Shire Council* [2016] NSWCATAD 95; *Hayne v YMCA NSW* [2016] NSWCATAD 14.

<sup>134</sup> Under the ADA: *Cavar v Greengate Management Services Pty Ltd (No.2)* [2016] FCCA 3358; *Travers v State of New South Wales (Board of Studies Teaching and Educational Standards NSW)* [2016] FCCA 905. In Victoria, *Shore v Max Employment Solutions* [2016] VCAT 2200. Under the FWA, *Sun v EP2 Management Pty Ltd* [2016] FCCA 1381. In 2017, see also *Winters v Fogarty* [2017] FCA 51.

<sup>135</sup> *Sternberg v Gables Reception Pty Ltd* [2016] FWC 7892; *Robb v Bond University Ltd* [2016] FWC 1552; *Armstrong v Police Citizens Youth Clubs* [2016] FWC 766.

<sup>136</sup> *Udugampala v Essential Services Commission* [2016] VCAT 2130.

<sup>137</sup> At [107].

<sup>138</sup> At [108].

<sup>139</sup> At [108].

<sup>140</sup> Had this claim been brought under NSW law, it is unlikely that leave to be heard before the Tribunal would have been granted: see *Vye v Secretary, Department of Finance, Services and Innovation* [2016] NSWCATAD 117; *Coady v Sutherland Shire Council* [2016] NSWCATAD 95; *Hayne v YMCA NSW* [2016] NSWCATAD 14, which all related to applications for leave to proceed. Victoria is the only state in which claims can proceed directly to the Tribunal: Equal Opportunity Act 2010 (Vic), s 122.

<sup>141</sup> See *Vye v Secretary, Department of Finance, Services and Innovation* [2016] NSWCATAD 117; *Coady v Sutherland Shire Council* [2016] NSWCATAD 95; *Hayne v YMCA NSW* [2016] NSWCATAD 14; *Cavar v Greengate Management Services Pty Ltd (No. 2)* [2016] FCCA 3358; *Travers v State of New South Wales (Board of Studies Teaching and Educational Standards NSW)* [2016] FCCA 905; *Shore v Max Employment Solutions* [2016] VCAT 2200; *Sun v EP2 Management Pty Ltd* [2016] FCCA 1381; *Robb v Bond University Limited* [2016] FWC 1552; *Armstrong v Police Citizens Youth Clubs* [2016] FWC 766.

<sup>142</sup> *Sun v EP2 Management Pty Ltd* [2016] FCCA 1381 at [10].

determined in the same amount of time and with the same amount of effort as this application. That said, the application has been made and must be determined.

Only one decision on an application for summary dismissal provided a detailed examination of the case in question as it related to age discrimination. In *Travers v State of New South Wales (Board of Studies Teaching and Educational Standards NSW)*,<sup>143</sup> Ms Travers argued that she was discriminated against on the basis of age when working as a casual exam supervisor. Ms Travers alleged that she was told she was “too old to work”, “forgetful”, and told to “f\*\*\* off and don’t come back”.<sup>144</sup> In an application for summary dismissal, the Federal Circuit Court was asked to consider whether Ms Travers had a reasonable prospect of success under the ADA.

Drawing on the decision of the High Court of Australia in *Purvis v State of New South Wales (Department of Education & Training)*,<sup>145</sup> the Court held that the relevant comparator in this case<sup>146</sup> would likely be a general exam supervisor who did not have Ms Travers’s disabilities or was a different age.<sup>147</sup> With that comparator, Ms Travers had “no reasonable prospects of establishing that, in circumstances not materially different ... [the comparator] would have been treated more favourably”.<sup>148</sup> The “only reasonable construction”<sup>149</sup> for the Board’s decision not to re-engage Ms Travers, and for the “sharp rebuke”<sup>150</sup> regarding her age, was because the Board considered that Ms Travers had “failed in her task of properly supervising the examinations.”<sup>151</sup> The detriment Ms Travers suffered could only reasonably be inferred to have arisen due to the Board’s dissatisfaction with how Ms Travers supervised the examination.<sup>152</sup> A comparator in similar circumstances would not have been treated any better.

Two additional trends can be identified in the Australian case law. First, most cases have been brought by those who claimed (or could have claimed) multiple grounds of discrimination; most commonly, sex, age, disability and/or ethnicity. This is depicted in Table 3. This flags the importance of recognising intersectionality in equality law – that is, where discrimination is experienced on the basis of more than one protected characteristic, but is so interwoven that it cannot be broken down into its constituent parts:<sup>153</sup> a new form of discrimination occurs at the intersection of two or more protected characteristics.<sup>154</sup> As Chen notes, in cases of intersectionality a claimant’s experiences “will be misrepresented by discrimination conceived along a single axis line”, such as gender or age.<sup>155</sup>

Second, the vast majority of claimants were unrepresented at hearing (again, depicted in Table 3). In one case, the court’s decision noted that the claimant had tried (but failed) to obtain pro bono legal

<sup>143</sup> *Travers v State of New South Wales (Board of Studies Teaching and Educational Standards NSW)* [2016] FCCA 905.

<sup>144</sup> At [16].

<sup>145</sup> *Purvis v State of New South Wales (Department of Education & Training)* [2003] HCA 62, (2003) 217 CLR 92.

<sup>146</sup> The need for a comparator is imported by s 14 of the ADA, which defines direct discrimination as treating or proposing to treat someone ‘less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of a different age’ (emphasis added) and doing so because of age.

<sup>147</sup> *Travers v New South Wales (Board of Studies Teaching and Educational Standards NSW)* [2016] FCCA 905 at [47].

<sup>148</sup> At [49].

<sup>149</sup> At [49].

<sup>150</sup> At [49].

<sup>151</sup> At [49].

<sup>152</sup> At [51].

<sup>153</sup> Mai Chen “Multiple ground discrimination” (2016) 902 LawTalk.

<sup>154</sup> Beth Goldblatt, “Intersectionality in International Anti-Discrimination Law: Addressing Poverty in its Complexity” (2015) 21(1) Australian Journal of Human Rights 47.

<sup>155</sup> Mai Chen “Multiple ground discrimination” (2016) 902 LawTalk.

assistance.<sup>156</sup> It appears that a more sophisticated drafting of the claim, or assistance with identifying relevant information, might have led to a different outcome in some cases.<sup>157</sup> Thus, a lack of representation may have significant consequences for the outcome of claims in practice: indeed, in *Sun v EP2 Management Pty Ltd*, the Court noted that “The applicant is unrepresented in the proceedings and has not expressed his claims with the greatest clarity.”<sup>158</sup>

**Table 3: Australian age discrimination case law by grounds and representation, 2016**

Case	Age	Sex	Ethnicity	Disability	Represented?
<i>Cavar v Greengate Management Services Pty Ltd (No. 2)</i> <sup>159</sup>	X		X (nationality)		No
<i>Travers v State of New South Wales (Board of Studies Teaching and Educational Standards NSW)</i> <sup>160</sup>	X			X (diabetic)	No
<i>Udugampala v Essential Services Commission</i> <sup>161</sup>	X (48)		X	X (bipolar disorder)	No
<i>Shore v Max Employment Solutions</i> <sup>162</sup>	X (42)				No
<i>Vye v Secretary, Department of Finance, Services and Innovation</i> <sup>163</sup>	X (60)				Yes
<i>Coady v Sutherland Shire Council</i> <sup>164</sup>	X (over 50)	X (male)		X (lower back problem)	No
<i>Hayne v YMCA NSW</i> <sup>165</sup>	X (mid-50s)	X (male)			No
<i>Sun v EP2 Management Pty Ltd</i> <sup>166</sup>	X (nearly 60)		X (Chinese ethnicity)	X (high blood pressure)	No
<i>Sternberg v Gables Reception Pty Ltd</i> <sup>167</sup>	X				No
<i>Robb v Bond University Ltd</i> <sup>168</sup>	X				No
<i>Armstrong v Police Citizens Youth Clubs</i> <sup>169</sup>	X				No

## IV. Discussion

Recent developments in age discrimination law in Australia and New Zealand reveal problematic tensions in the prohibition of age discrimination that are likely to recur in years to come. First, the Court of Appeal decision in *Brown* offers a telling case study of how one New Zealand court regards

<sup>156</sup> *Travers v State of New South Wales (Board of Studies Teaching and Educational Standards NSW)* [2016] FCCA 905 at [23].

<sup>157</sup> See, for example, *Cavar v Greengate Management Services Pty Ltd (No. 2)* [2016] FCCA 3358. In 2017, see also *Winters v Fogarty* [2017] FCA 51.

<sup>158</sup> *Sun v EP2 Management Pty Ltd* [2016] FCCA 1381 at [11].

<sup>159</sup> *Cavar v Greengate Management Services Pty Ltd (No. 2)* [2016] FCCA 3358.

<sup>160</sup> *Travers v State of New South Wales (Board of Studies Teaching and Educational Standards NSW)* [2016] FCCA 905.

<sup>161</sup> *Udugampala v Essential Services Commission* [2016] VCAT 2130.

<sup>162</sup> *Shore v Max Employment Solutions* [2016] VCAT 2200.

<sup>163</sup> *Vye v Secretary, Department of Finance, Services and Innovation* [2016] NSWCATAD 117.

<sup>164</sup> *Coady v Sutherland Shire Council* [2016] NSWCATAD 95.

<sup>165</sup> *Hayne v YMCA NSW* [2016] NSWCATAD 14.

<sup>166</sup> *Sun v EP2 Management Pty Ltd* [2016] FCCA 1381.

<sup>167</sup> *Sternberg v Gables Reception Pty Ltd* [2016] FWC 7892.

<sup>168</sup> *Robb v Bond University Ltd* [2016] FWC 1552.

<sup>169</sup> *Armstrong v Police Citizens Youth Clubs* [2016] FWC 766.



age discrimination: age discrimination was seen as a less serious form of discrimination, which was less morally repugnant than discrimination on other grounds. While the Supreme Court rejected this approach, the decision reveals problematic attitudes towards age discrimination held by some members of the judiciary. This is similarly seen in the Australian case of *Travers*, where Ms Travers allegedly being told she was “too old to work”, “forgetful”, and to “f\*\*\* off and [not] come back”<sup>170</sup> was not even contemplated as a potential form of age-based harassment.<sup>171</sup> Categorising these comments as a “sharp rebuke”,<sup>172</sup> which was impliedly justified due to Ms Travers’s failure to supervise an exam, does not appear to place a particularly high priority on protecting older workers from age-based harassment or age discrimination. This, then, appears to place a similar (limited) value on age equality to that in the Court of Appeal decision in *Brown*.

The limited value placed on age equality by some judges and courts may reflect the economic rationale that underlies the prohibition of age discrimination in many jurisdictions: if age discrimination is prohibited largely in order to promote the workforce participation of older workers, then it is less problematic to undermine age equality than if the prohibition is based primarily on recognising the inherent dignity and worth of workers of all ages. As argued elsewhere,<sup>173</sup> the enduring ambivalence towards age and ageing evident in most age discrimination law reflects a different social value placed on age equality: age equality is arguably less socially valuable than other types of equality. The limited valuing of age equality by legislatures and courts may perpetuate and reinforce negative social norms towards ageing, undermining both the instrumental and intrinsic aims of age discrimination law.

Second, the general absence of case law in both jurisdictions reinforces the success of alternative dispute resolution as a means of redirecting claims away from the court system. Alternative dispute resolution offers the possibility of a more efficient, less costly and less adversarial system for resolving complaints of discrimination. However, it also risks undermining legal development, as few cases proceed beyond conciliation and mediation. Indeed, the cases emerging in Australia appear to suggest that strong discrimination claims are settled well before court proceedings are commenced, meaning weaker claims are more likely to be the basis for the development of legal jurisprudence. This may not offer the best opportunity for courts to develop the statutory framework through legal interpretation.

Third, the Australian cases in particular demonstrate the legal and procedural hurdles in place for discrimination claimants. Procedural rules in Australia appear to be manifesting in multiple hearings on procedural issues in some cases; in several instances, these procedural hearings effectively operated to resolve the substantive issues at hand. It is debatable whether this is an efficient approach to the resolution of disputes, particularly where the hearing of an application for summary dismissal is as involved as a full hearing of the matter.

Relatedly, the decision in *Travers* illustrates the legal complexity of the comparator requirement under the ADA – that is, that the treatment occurs “in circumstances that are the same or are not materially different”<sup>174</sup> – at least as it has been interpreted by the Australian High Court in *Purvis*.<sup>175</sup> In *Travers*,

---

<sup>170</sup> At [16].

<sup>171</sup> This is discussed further in Alysia Blackham “Defining ‘Discrimination’ in UK and Australian Age Discrimination Law” (2017) 43(3) Monash University Law Review 760.

<sup>172</sup> At [49].

<sup>173</sup> Alysia Blackham *Extending Working Life for Older Workers* (Hart Publishing, Oxford, 2016) at ch 9.

<sup>174</sup> Age Discrimination Act 2004 (Cth), s 14(a).

<sup>175</sup> *Purvis v New South Wales (Department of Education and Training)* [2003] HCA 62, (2003) 217 CLR 92. This decision has been extensively criticised: see Colin D Campbell “A Hard Case Making Bad Law: *Purvis v New South Wales* and the Role of the Comparator Under the Disability Discrimination Act 1992 (Cth)” (2007) 35 FL Rev 111; Kate Rattigan “*Purvis v New South Wales (Department of Education and Training)*: A case for amending the Disability Discrimination Act 1992 (Cth)” (2004) 28 MULR 532.

Ms Travers's difficulties (in needing to eat and go to the toilet due to her diabetes) were directly related to her disability; despite this, her comparator would be someone who had also "failed in her task of properly supervising the examinations."<sup>176</sup> This is an extraordinarily narrow interpretation of discrimination laws and the comparator requirement, which likely undermines their purposive intent.<sup>177</sup>

The decision in *Travers* (and, indeed, *Purvis*) can be compared with that in the New Zealand Supreme Court case of *McAlister v Air New Zealand Ltd.*<sup>178</sup> In that case, the airline demoted pilots after the age of 60, in keeping with age-based rules in place in some airspaces like the USA. The question for the Supreme Court was whether the comparator in this case should be a pilot under the age of 60; or a pilot under the age of 60 who was unable to fly to destinations like the USA (due to visa requirements or other conditions). The Court held that the latter comparator was "too much",<sup>179</sup> as it would mean that the occupational requirements exception in the ERA would have no work to do; for the joint judgment, adopting such a comparator would "appear to lead to an obvious result"<sup>180</sup> in this case (and, indeed, in most other discrimination cases), moving the balance of the inquiry too far away from a finding of discrimination.<sup>181</sup> Tipping J similarly held that a comparator requirement that artificially ruled out discrimination at an early stage of the inquiry would be inappropriate.<sup>182</sup> The latter comparator was artificial in this case, as it failed to reflect the policy of the statute, which was to take a purposive and non-technical approach to discrimination, then allow discrimination to be justified if an exception applied.<sup>183</sup> For Tipping J, the comparator was likely to be a person in exactly the same circumstances as the complainant, but without the feature that was the prohibited ground (here, age).<sup>184</sup> It would be contrary to the purposes of the statute to add additional restrictions to the comparator (i.e. the holding or not holding of a US visa).<sup>185</sup> Thus, New Zealand courts adopt a dramatically different approach to Australian courts in the selection of a comparator in age discrimination claims. This may mean that claims are more likely to succeed in New Zealand.

Fourth, the Australian cases in particular reinforce the importance of intersectionality in discrimination complaints, and the potential overlap between age, sex, disability and ethnicity discrimination. Neither the Australian nor New Zealand statutes explicitly provide for instances of intersectional or dual discrimination in their terms. It is debatable whether this would undermine discrimination complaints in practice<sup>186</sup> and intersectionality was not mentioned in any of the cases studied. However, this is an issue that is likely to recur in future proceedings.

Fifth, and finally, the cases flag the importance of pilots and airlines in the ongoing development of age discrimination law in both jurisdictions. Pilots have featured prominently in case law in New

<sup>176</sup> At [49].

<sup>177</sup> See further Belinda M Smith "From Wardley to Purvis — How Far has Australian Anti-Discrimination Law Come in 30 Years?" (2008) 21 AJLL 3.

<sup>178</sup> [2009] NZSC 78, [2010] 1 NZLR 153.

<sup>179</sup> At [37] per Elias CJ, Blanchard and Wilson JJ.

<sup>180</sup> At [37] per Elias CJ, Blanchard and Wilson JJ.

<sup>181</sup> At [37] per Elias CJ, Blanchard and Wilson JJ.

<sup>182</sup> At [51] per Tipping J.

<sup>183</sup> At [51] per Tipping J.

<sup>184</sup> At [52] per Tipping J.

<sup>185</sup> At [54] per Tipping J. Compare McGrath J in dissent, who held that while the comparator must exclude age, they must have any other features which are necessary to establish if an employer's actions are discriminatory on account of age or some other (justifiable) basis: at [133]. In this case, that included not meeting the requirements to fly into US airspace: at [135] per McGrath J.

<sup>186</sup> In New Zealand, see Mai Chen "Multiple ground discrimination" (2016) 902 LawTalk.

Zealand (despite or perhaps because of the fact that pilots were exempt from the HRA until 1999)<sup>187</sup> and Australia,<sup>188</sup> and even further afield, as in the EU.<sup>189</sup> This may reflect the strength of collective representation in the airline industry, with strong unions representing the interests of pilots and other aircrew, and the enduring presence of age-based criteria in international air standards.<sup>190</sup> Key Australian and EU cases relate to the interpretation of occupational or inherent requirements exceptions, as does the earlier New Zealand case of *McAlister*. Thus, *Brown* differs from the existing Australian case law in considering whether domestic discrimination law can be excluded entirely from the employment relationship via a choice of jurisdiction.<sup>191</sup> As many people are now employed in New Zealand on foreign terms and conditions,<sup>192</sup> this is likely to be an issue of practical importance, with significance for a growing proportion of the workforce and implications for the efficacy of discrimination law as a whole.

## V. Conclusion

Demographic ageing in Australia and New Zealand is going to require renewed attention to the efficacy of age discrimination law in facilitating older workers' participation in the labour market. Ageism remains a serious challenge facing older workers in both jurisdictions, and comparative legal analysis reveals problematic tensions in the prohibition of age discrimination in each country. These tensions are likely to recur in years to come; thus, courts and legislatures should be particularly attuned to any tendency to treat age equality as less important, and age discrimination as less serious, than other forms of discrimination; the risk that alternative dispute resolution may impair legal development of age discrimination law; the burden that legal procedural rules and the comparator requirement place on complainants; and the importance of intersectionality. Addressing these issues effectively is likely to require legislative reform: judicial interpretation alone cannot resolve these tensions. That said, the comparative analysis in this article demonstrates that courts could adopt a more sympathetic and less restrictive interpretation of existing laws, providing a potential path to improve the effectiveness of age discrimination law.

<sup>187</sup> *McAlister v Air New Zealand Ltd* [2009] NZSC 78, [2010] 1 NZLR 153 at [20]–[21] per Elias CJ, Blanchard and Wilson JJ; *New Zealand Basing Ltd v Brown* [2016] NZCA 525, [2017] 2 NZLR 93.

<sup>188</sup> *Qantas Airways Ltd v Christie* [1998] HCA 18, (1998) 193 CLR 280, which related to the “inherent requirements” exception.

<sup>189</sup> Case C-447/09 *Prigge v Deutsche Lufthansa AG* [2011] Eq LR 1175, which related to the ‘genuine occupational requirement’ exception.

<sup>190</sup> See, for example, International Civil Aviation Organization, *Safety — Frequently Asked Questions* <[https://www.icao.int/safety/aviation-medicine/Pages/medFAQ\\_en.aspx#age](https://www.icao.int/safety/aviation-medicine/Pages/medFAQ_en.aspx#age)>.

<sup>191</sup> In the UK, see similarly *Lawson v Serco Ltd* [2006] UKHL 3, [2006] 1 All ER 823 (referred to extensively in *Brown*); *R (Hottak) v Secretary of State for Foreign and Commonwealth Affairs* [2015] EWHC 1953 (Admin), [2015] IRLR 827. In the EU, see similarly C-168/16 *Nogueira v Crewlink Ireland Ltd* [2017] WLR(D) 599.

<sup>192</sup> *New Zealand Basing Ltd v Brown* [2016] NZCA 525, [2017] 2 NZLR 93 at [69].

## Addressing Modern Slavery in New Zealand Law

ASHLEIGH DALE\*

### I. Introduction

New Zealand, like many other developed, wealthy countries, is a destination for modern slavery and human trafficking. As New Zealand becomes a more popular, international travel destination, the dark underbelly of exploitation and trafficking becomes more prevalent. This paper aims to show that the behaviours commonly associated with modern slavery are inadequately addressed in New Zealand law to deter and prevent these behaviours.

The definition and scope of modern slavery is important in determining the behaviours that exist in the present day that the law should be addressing. For the purposes of this paper, the scope and definition of modern slavery will be as per Crane in *Modern Slavery as a Management Practice: Exploring the Conditions and Capabilities for Human Exploitation*. This includes:

People [who] are forced to work under threat; controlled or owned by an employer, typically through mental, physical or threatened abuse; dehumanized and treated as a commodity; ... physically constrained or restricted in freedom of movement ... and as being subject to economic exploitation through underpayment...<sup>1</sup>

This definition does not include forced marriage or other aspects that do not relate to labour law.

Within New Zealand, there has been little literature on modern slavery behaviours and law. Christina Stringer has been on the forefront of identifying cases of the exploitation of workers in New Zealand. Her report *Not in New Zealand Waters, Surely? (Not in New Zealand Waters)* on the exploitation of migrants on fishing ships in New Zealand provided the beginning of the cases, stories and exposés on modern slavery in the New Zealand media.<sup>2</sup> More recently, she published *Worker Exploitation in New Zealand, a Troubling Landscape*, but her focus was on the conditions and forms which slavery and worker exploitation takes.<sup>3</sup> Heesterman's *Protection against Slavery in New Zealand* focusses on the obligations of New Zealand to improve their actions against slavery,<sup>4</sup> rather than on the scope of the law addressing the behaviours. The majority of the information about modern slavery and exploitative behaviours have come through the media, which have highlighted reports by non-profit organisations, cases and reports to illustrate the problem to the general public.

---

\* University of Victoria in Wellington, accounting/commercial and taxation law graduate.

<sup>1</sup> Andrew Crane "Modern Slavery as a Management Practice: Exploring the Conditions and Capabilities for Human Exploitation." (2012) 38 (1) Academy of Management Review, at 49-69.

<sup>2</sup> Christina Stringer and Greg Simmons "Not in New Zealand Waters, Surely" (2013) July (65). Forced into Slavery. Samudra Report.

<sup>3</sup> Christina Stringer, *Worker Exploitation in New Zealand, a Troubling Landscape* (2016) Prepared for The Human Trafficking Research Coalition.

<sup>4</sup> Katja Heesterman "Protection Against Slavery in New Zealand" (LLB Honours Dissertation, Victoria University of Wellington, 2014.)

Within New Zealand, the behaviours associated with modern slavery cover a range of range activities, including dehumanising behaviour, control over workers and restriction of movement. Broadly, victims of modern slavery in New Zealand are migrants who have come from the Pacific Islands, India and Asia looking for a better life.<sup>5</sup> In recent years, the number of migrant victims has increased, due to the relaxation of the language requirements for entry into New Zealand,<sup>6</sup> creating an environment that lends itself to the exploitation of migrant workers. The Filipino migrants in the Christchurch rebuild and the Masala restaurant chains in Auckland have gained national attention as examples of migrant exploitation.<sup>7</sup> Most recently, the focus has been on the international education sector and the processes of overseas recruitment agencies, in which individuals pay for jobs and permanent visas in New Zealand, only to find themselves in poorly paid jobs, exploited and with debt to those that organised it.<sup>8</sup> A common behaviour is the non-payment and underpayment of holiday pay and wages to staff, reported in all sectors, but commonly found in the hospitality industry.<sup>9</sup> In addition, the many reports of the poor conditions to which fruit pickers in the Hawkes Bay are subjected are behaviours associated with modern slavery that is apparent in New Zealand.<sup>10</sup>

In general, New Zealand's law on behaviours surrounding modern slavery is reactive not proactive, the laws change to react to major developments and revelations. Many of the major law changes tend to be one or two years after a major modern slavery development. For example, the Immigration Act 2009 was amended<sup>11</sup> after *Not in New Zealand Waters* was released and highly publicised in the media.<sup>12</sup> In addition, the Immigration Act 2009 was amended further<sup>13</sup> after the migrant worker exploitation in the Christchurch rebuild was revealed.<sup>14</sup> Many of the relevant legislative provisions reflect New Zealand's obligations under international law, for example, the Employment Relations Act 2000 was introduced two years after the International Labour Organisation (ILO)'s Declaration of Fundamental Principles in 1998. Given this, the scope of New Zealand's law on addressing modern slavery comes from the interaction of many different areas of law, including the Crimes Act 1961, Immigration Act 2009, Employment Relations Act 2000, Wages Protection Act 1983, Minimum Wage Act 1983, Health and Safety at Work Act 2015, and the Income Tax Act 2007. It is through these different pieces of legislation that the relevant cases and amendments that New Zealand addresses modern slavery.

This paper is divided into two parts to examine how modern slavery is addressed in New Zealand law. Firstly, a discussion of a few of the identified behaviours and the New Zealand law that addresses them, illustrating that the current law does not deter the behaviours from continuing. The behaviours focussed on will be dealing in slaves, the exploitation of migrant workers, the manipulation and underpayment of wages and tax, and accommodation provided as part of employment. Finally, changes are recommended to the way that New Zealand addresses modern slavery in its law.

---

<sup>5</sup> Above n 3; Department of Labour *Plan of Action to Prevent People Trafficking* (July 2009)

<sup>6</sup> Above n 3.

<sup>7</sup> Olivia Carville "Uncovered: Exploitation of migrant workers rife in NZ" *New Zealand Herald* (Online ed, New Zealand, 14 December 2016).

<sup>8</sup> Above n 3.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Immigration Amendment Act 2013

<sup>12</sup> Above n2.

<sup>13</sup> Above n 11.

<sup>14</sup> Above n7.

## II. Dealing in Slaves

The earliest New Zealand law addressing slavery was inherited from the Slavery Abolition Act 1833 (UK). This Act was the first piece of legislation in New Zealand law to make slavery illegal, at the same time as England and all colonies under English rule.<sup>15</sup>

Within modern slavery law internationally, the law relating to the dealing in slaves is historic, relating to the original prohibition of the slave trade. The primary usage of slavery, and slaves, in New Zealand law is the dealing in slaves provision in the Crimes Act 1961.<sup>16</sup> This states that dealing in slaves is illegal, and defines dealing in slaves as a range of behaviours including the sale and purchase of a slave, using or permitting a person to be enslaved, sale of a child into slavery, or agree or offer to do any of the behaviours listed in the section.<sup>17</sup> This offence applies to acts inside and outside of New Zealand. The wording of this section is based on English law, derived from the Slave Trade Act 1824 and 1843.<sup>18</sup> In addition, it is designed to meet New Zealand international obligations under the ILO's Worst Forms of Child Labour Convention 1999 and the United Nations (UN) Supplementary Convention 1956 on the abolition of slavery.<sup>19</sup>

New Zealand law defines a slave in the Crimes Act 1961 as including "...without limitation, a person subject to debt-bondage or serfdom."<sup>20</sup> With debt-bondage defined as:<sup>21</sup>

...the status or condition arising from a pledge by a debtor of his or her personal services, or of the personal services of any person under his or her control, as security for a debt, if the value of those services, as reasonably assessed, is not applied towards the liquidation of the debt or if the length and nature of those services are not limited and defined...

While serfdom is defined as:<sup>22</sup>

...the status or condition of a tenant who is by any law, custom, or agreement bound to live and labour on land belonging to another person and to render some determinate service to that other person, whether for reward or not, and who is not free to change that status or condition.

The primary case in New Zealand under dealing in slaves involved a Thai woman who was sold as a slave to an undercover police officer.<sup>23</sup> In deciding the case, the Court of Appeal focussed on the definition of a slave under the Crimes Act 1961. The definition used was from the Chambers English Dictionary, where, specifically, slave was defined as "a person held in property." This definition reflects the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, which refers to slavery as "the status of a person over whom powers attached to the rights of ownership are exercised."<sup>24</sup>

---

<sup>15</sup> Bruce Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Westlaw) at [CA98.02]

<sup>16</sup> Crimes Act 1961, s 98.

<sup>17</sup> Ibid, s 98 (1).

<sup>18</sup> Slave Trade Act 1824 (UK); Slave Trade Act 1843 (UK).

<sup>19</sup> Above n 15.

<sup>20</sup> Above n 16, s 98 (2)

<sup>21</sup> Ibid, s 98 (2)

<sup>22</sup> Ibid, s 98 (2)

<sup>23</sup> *R v Decha-Iamsakun* [1993] 1 NZLR 141.

<sup>24</sup> *Ibid*.

Within New Zealand, the dealing in slaves provision provides limited scope to the behaviours associated with modern slavery. Given this, the majority of other modern slavery behaviours are addressed through other areas of law.

### III. Exploitation of Migrant Workers

Recently within New Zealand, the exploitation of migrant workers is gaining focus as a behaviour that New Zealand law should be preventing. It is the current focus of the New Zealand government<sup>25</sup> and examples of modern slavery in migrant workers have been reported extensively in newspapers.<sup>26</sup> The exploitation of migrant workers manifests itself in two broad forms of behaviour. The first is the hiring temporary and illegal workers who have entered New Zealand looking for work. The second is the recruitment of workers overseas, transporting them to New Zealand and then exploiting them once they arrive. Both are prohibited in New Zealand law through the trafficking provisions in the Crimes Act 1961 and Immigration Act 2009.

In *R v Ali and Kurisai (R v Ali)*, Heath J stated:<sup>27</sup>

People trafficking is an abhorrent crime. It is a crime against human dignity. It undermines the respect that all of us should have for the human rights and the autonomy of individual people. Such conduct degrades human life. It is a crime that should be condemned in the strongest possible terms.

Those who are exploited also lose dignity. By exploiting people brought to New Zealand under false pretences you have demonstrated that you are prepared to ignore standards of pay and conditions generally expected of New Zealand society.

In examining how the exploitation of migrant workers is addressed in New Zealand law, and to determine whether the law is adequate in deterring the behaviour, the Crimes Act 1961 and the Immigration Act 2009 will be examined. In addition, the landmark case of *R v Ali* will be examined as the first case to be tried under the current trafficking provisions introduced in 2015,<sup>28</sup> and has been reported as the “tip of the iceberg” in regards to the extent of trafficking and exploitation of migrant workers in New Zealand.<sup>29</sup>

#### a. Crimes Act 1961

The exploitation of migrant workers is addressed in the Crimes Act 1961 through the smuggling and trafficking in people provisions.<sup>30</sup> The trafficking provision of the Act provides the harshest penalties available in the New Zealand law addressing modern slavery, comparable

---

<sup>25</sup> George Mason “Role of the Labour Inspectorate in enforcing minimum standards” [2017] ELB 53

<sup>26</sup> Jess Pullar “Man jailed for false refugee claims in landmark human trafficking trial” *Nelson Mail* (online ed, New Zealand, 29 January 2016); “Restaurant boss fights deportation after mistreating workers” *Radio New Zealand* (online ed, 5 November 2016); “Abuse of young and migrant workers uncovered” *Radio New Zealand* (online ed, 21 December 2015); and Edward Gay “Chef paid \$40 for two months' work” *Radio New Zealand* (online ed, 8 September 2015).

<sup>27</sup> *R v Ali & Kurisi* [2016] NZHC 3077.

<sup>28</sup> *Ibid.*

<sup>29</sup> Olivia Carville “Guilty: First human trafficking convictions in New Zealand” *New Zealand Herald* (Online ed, New Zealand, 15 September 2016).

<sup>30</sup> Above n 16, s 98B; s 98C; s 98D; s 98E; s 98F.

to those for homicide and rape. Thus, the scope of these provisions are an important tool for addressing modern slavery in New Zealand, the more that can be included within the scope the more behaviours will be deterred.

Specifically, the Crimes Act 1961 prohibits trafficking<sup>31</sup> and smuggling<sup>32</sup> in or out of New Zealand or any other state. Under this section, New Zealand courts have jurisdiction<sup>33</sup> over offences when the conduct occurs wholly outside of the country, but the Attorney-General's consent is required for prosecution.<sup>34</sup> Generally, smuggling requires illegal documentation, either through forgery or using a document for a purpose other than its lawful use, usually for the benefit of the person moving. Trafficking is the more serious offence and the most related to modern slavery and migrant worker exploitative behaviours in New Zealand.

The trafficking provision makes it an offence to be involved in the process of moving a person over country lines, either through coercion and deception, or for the purposes of exploitation. It makes it an offence to arrange, organise or procure a person into or out of New Zealand or any other state,<sup>35</sup> in addition to the reception, recruitment, transport, transfer, concealment or harbouring of a person.<sup>36</sup> This makes all the steps of the process included within the offence, including the arranging and organising, and smaller roles, including the recruiting and the reception of potential workers.

It is a trafficking offence to arrange entry when it is done for the facilitation or purpose of exploitation.<sup>37</sup> The exploitation of a person includes slavery and practices similar to slavery, for example servitude, forced labour and other forced services. The inclusion of forced labour into the list of practices distinguishes this section from the dealing in slaves provision.<sup>38</sup> Iain Lees-Galloway MP stated, when debating the Organised Crime and Anti-Corruption Bill: <sup>39</sup>

[b]y including forced labour as something that is explicitly defined as exploitation for the purposes of this section, we might actually have a better opportunity to prosecute some of those offences under this Act. I would think, and I would hope, that the penalties... are a far greater disincentive to conducting the type of exploitation than the penalties that are available under our employment legislation.

The addition of forced labour into the definition of exploitation and, subsequently the offence of trafficking, widens the scope to have a greater effect on modern slavery in New Zealand law.

In addition to the purpose of exploitation, an individual is liable to the offence by knowing that the action or process involves coercion or deception.<sup>40</sup> This requires the knowledge that the person has been coerced or deceived on at least one occasion during the movement process.<sup>41</sup> An act of coercion includes abduction, use of force, harm, or threatening, either

---

<sup>31</sup> Ibid, s 98D.

<sup>32</sup> Ibid, s 98C.

<sup>33</sup> Ibid, s 7A.

<sup>34</sup> Above n 15 at [CA98D.01].

<sup>35</sup> Above n 16, s 98D (1) (a).

<sup>36</sup> Ibid, s 98D (1) (b).

<sup>37</sup> Ibid, s 98D (1) (a) (i) and (b) (i).

<sup>38</sup> Ibid, s 98.

<sup>39</sup> (21 October 2015) 709 NZPD 7446.

<sup>40</sup> Above n 16, s 98D (1) (a) (ii) and (b) (ii).

<sup>41</sup> Above n 15 at [CA98D.03]



expressly or implied, to the person or some other person.<sup>42</sup> On the other hand, an act of deception includes fraudulent actions.<sup>43</sup> These definitions provide a wide range of prohibited behaviours, which enables the offence of trafficking to capture a wide range of practices associated with modern slavery. The wide range reflects the seriousness of taking someone away from their home, whether through force or manipulation. The inclusion of deception allows for the manipulation of circumstances and future promises to be behaviours included within the trafficking offence.

The amendment to the Act in 2015 resulted in the trafficking in persons provision to be replaced to ensure that New Zealand met its obligations under the United Nations (UN) Convention against Transnational Organised Crime and the UN Convention against Corruption.<sup>44</sup> Jacinda Ardern, MP, said in the Organised Crime and Anti-Corruption Bill debate that:<sup>45</sup>

[t]here are two areas we are meant to ensure that our legislation covers. Our legislation needs to clearly and precisely define the constituent elements... of the offence... to allow the identification of trafficking victims, and we need to ensure that the... offence reflects the three constitution elements of actions, mean and exploitative purpose.

This amendment provides an extension to the forms of exploitation previously included, and explicitly removed the transnational requirement of trafficking. This allows cases of victims who have come to New Zealand legally and subsequently exploited to be covered. These amendments provide an extension of liability, resulting in more modern slavery behaviours being treated as an offence and subject to the most serious penalties in modern slavery law in New Zealand.

### ***b. Immigration Act 2009***

The Immigration Act 2009 prohibits behaviours associated with the exploitation of migrant workers and modern slavery. Specifically, aspects of trafficking and immigration under false pretences, including violations relating to entering New Zealand, breach of visa and exploitation of unlawful and temporary workers.<sup>46</sup>

Section 341 of the Immigration Act 2009 makes it an offence to act in a way that helps a person enter New Zealand unlawfully or breach their visa. This includes aiding and abetting a person to be in New Zealand or to breach their visa conditions, whether for material benefit or not.<sup>47</sup> Specifically within modern slavery related behaviour, it makes it an offence to ensure that workers remain in New Zealand past the end of their visa or to force them to work when their visa restricts it.<sup>48</sup> Further, it is an offence under this act to aid, abet or encourage a person to complete a document required for a visa or other required documentation that they know is false or misleading.<sup>49</sup> For example, completing a visitor's visa with the intention to come to New Zealand to work.

Section 351 of the Immigration Act 2009 is the primary provision to prevent the exploitation of unlawful and temporary workers. This section is the most similar to the Crimes Act 1961

---

<sup>42</sup> Above n 16, s 98B.

<sup>43</sup> Ibid, s 98B.

<sup>44</sup> Above n 15 at [CA98D.03]

<sup>45</sup> Above n 39.

<sup>46</sup> Immigration Act 2009.

<sup>47</sup> Ibid, s 343 (1) (a) and (d).

<sup>48</sup> Ibid, s 343 (1) (a) and (d).

<sup>49</sup> Ibid, s 343 (1) (c).

trafficking provisions, but has more detail on what can be considered exploitation, and encompasses a broader scope of behaviour. Firstly, it is an offence under this provision, when an employer is responsible for a serious failure, to pay the minimum standards required under the Holidays Act 2003, Minimum Wage Act 1983 and the Wages Protection Act 1983.<sup>50</sup> The seriousness is determined through considering the amount of money, the number of instances, the period during which they occurred and the intentionality of the act.<sup>51</sup> Secondly, an employer commits an offence when they prevent or hinder a worker from leaving their service or New Zealand, seeking their entitlements under New Zealand law or preventing them from discussing the circumstances of their work.<sup>52</sup> Examples of this behaviour include taking and retaining a passport and other travel documentation, preventing the person from using a telephone or leaving the premises, or hindering a labour inspector from entering the premises.<sup>53</sup> What distinguishes these provisions from the Crimes Act 1961 is the explicit mention of the minimum statutory labour rights to which all workers are entitled. Further, the intentions of the employer and the examples of behaviour that are listed in the Immigration Act 2009 signify the concept of control over the worker rather than the concept of ownership used in the dealing in slaves provision.<sup>54</sup> The Crimes Act 1961 refers to exploitation in terms of forced labour, which, although may include violations of minimum standards and the concept of control over workers, it is not explicitly included.

The 2015 amendment to the Immigration Act 2009 provided temporary workers with the same protection under the Act as unlawful workers, and provided immigration officials with warrantless entry if they believe that migrants were working there unlawfully or being exploited.<sup>55</sup> Specifically, this amendment included adding temporary workers in every place there was unlawful workers and changing the title of the provision. As a response to the exploitation of migrant workers in the Christchurch rebuild,<sup>56</sup> the changes to the Immigration Act 2009, through this amendment, improved the previous law in identifying the areas, behaviours and the workers that need targeting for protection. Changing the title of the section indicates a change from targeting those that are not legally entitled to work in New Zealand to protecting them from exploitation. The addition of temporary workers to the Act addressed the gap in the law which allowed vulnerable migrant workers with the right to work in New Zealand no protection from exploitation under the Immigration Act 2009. Prior to the amendment, protection and redress came from the Employment Relations Act 2000, which required knowledge of rights and going to court to receive their entitlements.

### *c. R v Ali and Kurisai*

Many of the modern slavery behaviours that commonly exist among the exploitation of migrant workers were exhibited in *R v Ali*. There are no other reported court cases that have relied on the trafficking provisions of the Crimes Act 1961 and Immigration Act 2009 as heavily as in the prosecution of Ali. Specifically, he was charged with 15 counts trafficking human beings by deception,<sup>57</sup> aiding and abetting, and the exploitation of temporary workers under the Immigration Act 2009.<sup>58</sup>

---

<sup>50</sup> Ibid, s 351

<sup>51</sup> Ibid, s 351

<sup>52</sup> Ibid, s 351

<sup>53</sup> Ibid, s 351

<sup>54</sup> Above n 16, s 98.

<sup>55</sup> Immigration Amendment Bill (No 2) 2013 (select committee report).

<sup>56</sup> Ibid.

<sup>57</sup> Above n 16, s 98D (1) (a).

<sup>58</sup> Above n 46, s 343 (1) (a) and (b); s 351 (1) (a) (i) and (ii); *R v Ali & Kurisi* [2016] NZHC 3077 at [5] and [6].

The victims of Ali were predominately vulnerable workers from Fiji, who responded to local newspapers advertising work in New Zealand. Advertisements were placed by travel agencies in Fiji that were affiliated with Ali and required those interested to pay extra ordinate fees at every step in the process. Many of those that applied were forced to borrow from family and their community to afford the fees demanded by Ali and his colleagues. When they entered New Zealand, they were met by Ali who took them to work either as fruit pickers in the Bay of Plenty or for Ali in his construction business in Auckland.<sup>59</sup> In evaluating the facts during sentencing, Heath J noted that it was a “joint criminal enterprise designed to extract money.”<sup>60</sup> They were induced to travel to New Zealand through deception where Ali was to receive them, making him liable for the deception in Fiji. Specifically, the deception was “on the basis of false representations as to their working conditions, pay and ability to work lawfully”<sup>61</sup> Heath J noted that:<sup>62</sup>

...they relied on representations to the effect that work permits or visas would be arranged... I am satisfied that [Ali] knew representations of that type were being made... and that they were false.”

Ali “was to receive them in New Zealand so that they could be put to work in exploitative circumstances.”<sup>63</sup>

These actions make Ali liable under the trafficking human beings by deception provision in the Crimes Act 1961.<sup>64</sup> Under the Immigration Act 2009, Ali was liable for aiding and abetting by inciting his victims to breach the terms of their visitors’ visa by working.<sup>65</sup> More than once he “took a victim to a solicitor in Auckland to ensure documentation was prepared to extend their visitor visa.”<sup>66</sup> Ali’s incitement by ensuring that his victims breached their visa requirements was done for the purpose of exploiting them, which resulted in a material benefit to him<sup>67</sup> and was done knowing it was unlawful through deception.<sup>68</sup> In addition, Ali exploited the victims by failing to pay them what they were entitled to under the Holidays Act 2003 and Minimum Wage Act 1983. Heath J stated that “[w]ithout any official record of the victims working in New Zealand, there was no impediment to your exploitation of them.”<sup>69</sup>

When considering the aggravating factors during the sentencing of Ali, the court treated the trafficking by means of deception and the exploitation suffered as one offence, as many of the behaviours exhibited related to both charges. Especially the organised nature of the offending, the extent which victims were subjected to inhumane or degrading treatment, the number of victims, and the extent that material benefit was derived from offending.<sup>70</sup> Heath J also referred to “the scale of the offending, the commercial motivation, the premeditation, the actual exploitation and the harm caused both financial and emotionally”<sup>71</sup> Heath J/His Honour broke down the considerations into the 18 aggravated factors that were relevant, including the nature

---

<sup>59</sup> *R v Ali & Kurisi* [2016] NZHC 3077.

<sup>60</sup> *Ibid*, at [16]

<sup>61</sup> *Ibid*, at [16]

<sup>62</sup> *Ibid*, at [18]

<sup>63</sup> *Ibid*.

<sup>64</sup> Above n 16, s 98D.

<sup>65</sup> Above n 46, s 343 (1) (a) and (d).

<sup>66</sup> Above n 59, at [23].

<sup>67</sup> Above n 46, s 343 (1) (a).

<sup>68</sup> *Ibid*, s 343 (1) (b).

<sup>69</sup> Above n 59, at [23].

<sup>70</sup> *Ibid*.

<sup>71</sup> *Ibid*, at [49]

and degree of deception, the degree of manipulation, the psychological and financial harm caused to the victims, and the motive of financial nature that led to the offending. Heath J acknowledged that the relative seriousness of the offending by Ali, in comparison to potential future cases, noting that:<sup>72</sup>

This is a serious case of its type but it is possible to envisage much worse. In my view, your offending sits around the middle of the range for offending of this type.

Many of the examples of modern slavery in migrant workers do not contain as extensive deception, visa manipulation and coordinated efforts for financial gain as *R v Ali*.

In many ways, this case is consistent with the experience of other migrant workers who have been promised work in New Zealand, especially the fees charged and the promise of better pay.<sup>73</sup> But in *Ali*, the specific combination of the modern slavery behaviours made this a case that fits easily within the examined provisions of the Crimes Act 1961 and the Immigration Act 2009,<sup>74</sup> especially the number of victims and the exploitation for financial gain, part of which remained in Fiji. In addition, a key difference is the high level of deception that was practised by Ali, and the coordinate efforts by Ali and his associates to deceive the victims. This includes the advertisements to the vulnerable in Fiji, the photos taken of them working to send home, the lies told to officials, and the manipulation of visas.<sup>75</sup> This provided a clear case of deception and manipulation of the entry into New Zealand. It is implied by Heath J that the matter of most importance was the deception, not the “validity of travel documents.”<sup>76</sup> In cases of other migrant workers, both those recruited overseas and those finding work in New Zealand, there is likely not to be as clear a case of deception as in *R v Ali*. Many migrant workers have legitimate documentation to enter and work in New Zealand; it is the manipulative promises made about their potential jobs which are the common modern slavery behaviour. Provided the deceptive recruitment practices involve the movement of workers, the provisions in the Crimes Act 1961 and the Immigration Act 2009 have the ability to sentence those responsible. But, the penalties and likelihood of the punishment must be enough to deter the behaviour.

#### IV. Manipulation and Underpayment of Wages and Tax

Within behaviours associated with modern slavery, withholding and manipulating wages is a prominent method of controlling and coercing victims to remain within control of an employer.<sup>77</sup> There have been reports of non-payment and underpayment of wages and holiday pay, and other manipulation of wages to withhold the full payment to workers. In many cases, this behaviour is followed by manipulation of tax requirements, including not paying or underpaying Pay-As-You-Earn (PAYE) taxes, using the same Inland Revenue Department (IRD) identification numbers for different employees, or the tax records being different from payslips given to workers.<sup>78</sup>

---

<sup>72</sup> *Ibid.*

<sup>73</sup> Above n 3.

<sup>74</sup> Above n 16, s 98D and s 98F; Above n 46, s 343 and s 351.

<sup>75</sup> As compared to *Commissioner of Police v Investments Ltd* [2015] NZHC 3139; Above n 59.

<sup>76</sup> Above n 59, at [10].

<sup>77</sup> International Labour Organisation *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage* (International Labour Organisation, Report, September 2017).

<sup>78</sup> Above n 3.

An important method in New Zealand law to address these behaviours is through the New Zealand tax regime. Specifically, the record keeping requirements in the PAYE system and the provisions related to the manipulation of tax payments. The relevant tax law in New Zealand, overseen and controlled by the IRD, is governed by the Tax Administration Act 1994 and the Income Tax Act 2007. The Tax Administration Act 1994 governs the administrative related provisions in New Zealand's tax law, while the Income Tax Act 2007 includes a detailed set of provisions relating to how income tax is calculated, including PAYE and company income tax. Generally, the focus of the tax regime in New Zealand is the collection of tax, given this, there are few excessive requirements imposed on companies. Many of those that commit offences under the tax scheme are also likely to commit behaviours associated with modern slavery. The procedures used by the IRD, in the process of identifying those committing offences under the tax scheme, can lead to the identification of those committing behaviours associated with modern slavery.

#### *a. Record Keeping Requirements*

The New Zealand tax regime, particularly the PAYE system, imposes record keeping requirements on employers. These include specifying the form and information that needs to be recorded, and the possibility of an audit of the records to ensure compliance. It is within this regime that the discrepancies between wages paid to workers and the wages declared to the IRD can be detected. The PAYE system provides detailed rules and guidelines on how to calculate the rates and amounts for employees, and when they should be paid. Generally PAYE is paid by the employer on behalf of the employee. Liability operates by way of deeming provisions, when employees are paid wages, employers are deemed to have withheld the PAYE from their wages which the employers pass on to the Government. It is a legal requirement for the employers to pay the PAYE for all employees.<sup>79</sup>

Record keeping under the PAYE regime requires employers to keep copies of pay sheets given to employees, PAYE payment receipts and other wage records for at least seven years. These records must be kept in English, though, there is an option to use computer systems to keep track of payroll or to use an intermediary.<sup>80</sup> As part of these records and PAYE payment receipts especially, the name of the employee, their IRD number, and the amount of tax paid are required to be recorded. In doing this, the IRD can notice duplicate IRD numbers and non-payment of taxes. Further, the requirement to keep pay sheets and PAYE payment slips means the IRD will also notice the difference between pay sheets and tax payments in their audits. In performing the audit, the officers will spend most of their time checking records, including ledgers, journals, invoices, personal and business bank accounts and other records that are associated with ensuring the correct tax has been paid. As part of the audit, the IRD may contact third parties to gather information, which can include suppliers and contractors. Obstructing an audit, through refusing access to the premise, destroying files and records, lying or falsifying records or causing a deliberate delay in the investigation, may make the employer liable for penalties.<sup>81</sup>

In *R v Dhillon (Dhillon)*, in addition to not paying PAYE, he did not pay goods and services tax (GST) on invoices. These regimes propose similar obligations and requirements on employers as, in both cases, they are a middle man for tax between the government and the person paying.<sup>82</sup> In *Dhillon*, the tax was not passed and Dhillon was subsequently charged.

<sup>79</sup> Inland Revenue Department *Employer's guide (IR335)* (April 2017), at 6 -7.

<sup>80</sup> *Ibid*, at 20.

<sup>81</sup> Inland Revenue Department *Audits: How we will work with you* (August 2006).

<sup>82</sup> *R v Dhillon* [2009] NZCA 597.

Through the PAYE system and the similar mechanisms in GST, the Government identified issues and subsequently investigated. Through using this method on companies practising wage and PAYE manipulation, the IRD will be able to investigate issues and identify companies that are also practicing modern slavery behaviours.

### ***b. Income Tax Procedures***

For many employers who follow the minimum standard required by law, the income tax regulations will deter behaviours associated with the economic exploitation of workers. The Income Tax Act 2007 provides the standards for employers to follow and the IRD has established systems that enable the identifying of inconsistent behaviours. Those that are not following the tax law are likely to be pursued by the IRD for tax evasion. In investigating the tax evasion, many of the behaviours associated with the economic exploitation of workers and other behaviours associated with modern slavery will be discovered. The *Commissioner of Police v Investments Ltd (Masala)*<sup>83</sup> was an instance where wide spread exploitation of workers was discovered by the IRD during their investigation of the Masala restaurant chain in Auckland, illustrating the importance of income tax law in deterring modern slavery behaviours.

The overall structure of the tax scheme encourages the payment of wages, especially through the Income Tax Act 2007. The more that an employer pays in wages, the less tax that needs to be paid as wages are deducted from total taxable income. Those that underpay their workers will not declare their actual wages, to ensure they can deduct more from their taxable income. It is more likely that deductions for wages will be over declared, which will alert the IRD to the behaviour and cause them to investigate. The record keeping requirements make deductions for wages traceable, discouraging from under paying wages or taking deductions for amounts larger than the payment. The risk of being caught and punished will likely deter some employers from carrying out modern slavery behaviours. The structure of the tax scheme encourages those employers to spend at least the minimum wage to maximise the deductions available. Those that operate in the borderline areas of tax law may be deterred through the general anti-avoidance rule in the Income Tax Act 2007, which captures manipulative behaviours that are not covered by other areas of the Act but result in the avoidance of tax.<sup>84</sup> The Tax Administration Act 1994 governs the provisions surrounding tax avoidance and other requirements on the administration of tax which do not fall within the other tax legislation. Through this provision, those committing tax fraud and tax evasion offences through the manipulation of income tax will be uncovered and penalised.

The case of *Masala* is one of the highest profile cases of modern slavery in New Zealand. The Masala restaurant chain and its owners engaged in substantial tax evasion, in addition to the widespread worker exploitation and modern slavery behaviours. In this case, the parties and companies involved evaded assessment and payment of tax by systematically stripping cash from restaurants and neither declared the cash sales in GST nor returned the cash income.<sup>85</sup> Involved in the process were a large number of companies, individuals and properties, which allowed for the ease of movement of cash and people to minimise the tax paid and their exposure to being caught. In addition, the employers' under-reported salaries and wages paid to employees and failure to declare employees in monthly schedules to IRD. The PAYE was underpaid in respect of salaries and wages paid to employees and was not deducted from

<sup>83</sup> *Commissioner of Police v Investments Ltd* [2015] NZHC 3139.

<sup>84</sup> Income Tax Act 2007, s BG1.

<sup>85</sup> Above n 83.

payments and benefits.<sup>86</sup> This resulted in Masala underreporting substantial earnings and evaded payment of over \$7.4 million of tax owed, including interest and penalties.<sup>87</sup>

## **V. Accommodation provided as part of employment**

It is common practice in industries in rural New Zealand to provide accommodation as part of the employment agreement. The practice of providing accommodation is used in some industries and regions of New Zealand to facilitate modern slavery. Within the horticulture and viticulture industries, there have been reports of those staying there, especially migrant workers, being subject to restricted movement, taken passports, and verbal and physical abuse from locals.<sup>88</sup> Further, the standard of accommodation is not always acceptable; for example, a case of a male and two females sharing one basement room, with one mattress on the floor to share between them.<sup>89</sup> Despite the potential poor standards, it is common practice for an employer to deduct the cost of accommodation from wages.

In dealing with provided accommodation in New Zealand law, the relevant areas of legislation are the Minimum Wage Act 1983, the Wages Protection Act 1983 and the Health and Safety at Work Act 2015, each of which impacts the deductions employers may take and the standard of accommodation provided.

### ***a. Minimum Wage Act 1983***

Low payment of wages is a common behaviour related to modern slavery, it enables employers to exercise control over their workers through economic exploitation. The Minimum Wage Act 1983 states the work that is entitled to receive the minimum wage.<sup>90</sup> This work is subject to deductions that are detailed in the Act,<sup>91</sup> including deductions for board and lodging in s 7. Section 7 reads:<sup>92</sup>

In any case where a worker is provided with board or lodging by his employer, the deduction in respect thereof by the employer shall not exceed such amount as will reduce the worker's wage calculated at the appropriate minimum rate by more than the cash value thereof as fixed by or under any Act, determination, or agreement relating to the worker's employment, or, if it is not so fixed, the deduction in respect thereof by the employer shall not exceed such amount as will reduce the worker's wages (as so calculated) by more than 15% for board or by more than 5% for lodging.

The wording of this section is long and confusing. It is unclear what the section means and the amount that can be taken from wages. The section is not going to deter modern slavery if the requirements behaviours for deductions from wages are not clear.

The Employment New Zealand website provides guidance for the interpretation of this passage.<sup>93</sup> The employer and employee can agree that the accommodation will be deducted

---

<sup>86</sup> Ibid.

<sup>87</sup> Ibid

<sup>88</sup> Above n 3.

<sup>89</sup> Above n 59.

<sup>90</sup> Minimum Wage Act 1983, s 6.

<sup>91</sup> Ibid, s 7 and 8.

<sup>92</sup> Ibid, s 7.

<sup>93</sup> Ministry of Business, Innovation and Employment "Deductions" Employment NZ

<[www.employment.govt.nz/hours-and-wages/pay/deductions](http://www.employment.govt.nz/hours-and-wages/pay/deductions)>

from wages, but the cost to the employee must be detailed and reasonable. The tenancy or accommodation agreement should be separate, or be able to be separated, from the employment agreement. Further wage records should show wages before the accommodation was deducted, this amount is used to calculate the minimum wage. If there is no agreement, then 15 per cent or five per cent can be deducted at the appropriate wage rate, depending on the type of accommodation provided.

This section appears to give employers the ability to take all of their workers' take home pay. If the board and lodging deduction specified in the employment agreement is for the total minimum wage required to be paid to the worker, then the employer has met the requirements under the Minimum Wage Act 1983. The power imbalance between an employer and workers, and the high number of migrant, vulnerable workers that are common in this industry, it is easy for the employer to insert the provision into the contract. Out of fear or under threat of losing their job or being deported, the workers have little choice but to agree to the terms laid out by their employer. But, when considering this provision alongside an unreasonable deduction provision in the Wages Protection Act 1983, this behaviour may be deterred.<sup>94</sup>

### ***b. Wages Protection Act 1983***

The ability for employers to make deductions from wages is the easiest method to underpay workers and facilitate modern slavery through economic exploitation. The Wages Protection Act 1983 provides the basis for the allowable deductions from a workers wages, which include a variety of different behaviours and circumstances. Section 4 states that the entirety of the wages, without deduction but subject to s 5 (1) and 6 (2), shall be paid to the worker.<sup>95</sup> Section 5 allows employers to take deductions from workers' wages for a lawful purpose with the written consent of the worker or at the workers' request through a general deduction clause in an employment agreement.<sup>96</sup> This increases the power of employers by giving the ability to take deductions from workers' take home pay, with potentially arbitrary and unjustified rationales. An amendment in the Employment Relations Amendment Act 2015 introduced the concept of an unreasonable deduction to wages.<sup>97</sup> Section 5A, Wages Protection Act 1983, qualifies s 5, stating "...an employer must not make a deduction under section 5 from wages payable to a worker if the deduction is unreasonable."<sup>98</sup>

This is an improvement on the previous versions which did not have this unreasonable requirement, as it requires some justification and rationale for the deduction from wages. The provision was designed to cover employers deducting from wages for events outside of the employees' control and not contributed to through negligence, for example thefts by customers.<sup>99</sup> Prior to the amendment, there was no reasonableness test in the Act, nor was there a requirement for the employer to notify the worker of the impending deduction from their wages. The concept has been applied by government authorities to deductions for board and lodging.<sup>100</sup> It is not clear if s 5A applies to a deduction for accommodation, the unreasonable deduction provision was designed for general deductions clauses in employment agreements not for other deductions found in the Minimum Wage Act 1983 or specified in the employment agreement.

---

<sup>94</sup> Wages Protection Act 1983, s 5A.

<sup>95</sup> Ibid, s 4.

<sup>96</sup> Ibid, s 5.

<sup>97</sup> Wages Protection Amendment Act 2016, s 7

<sup>98</sup> Above n 94, s 5A.

<sup>99</sup> *Wages Protection Act 1983 Commentary* (looseleaf ed, Westlaw) at [s7].

<sup>100</sup> Above n 93.



There is little case law and guidance on how reasonableness will be interpreted in the wider scope of potential deductions. There are a range of factors which a deduction can be based on, all of which can result in a reasonable deduction but a different value. For example, the value could be based on common rental values in the area, which could vary across the country. Further, the differences between furnished and unfurnished rentals may vary what is a reasonable deduction. Each of these could change depending on the time of the year and developments in the area, and each are arguably a reasonable method to base a deduction on. In addition, it is unclear if the reasonableness of the deductions are to be taken as a total of all the deductions in an agreement or if each deduction is considered individually. The basis of a reasonable deduction remains unclear, specifically what makes a deduction reasonable or unreasonable. The scope of the reasonableness of deductions remains largely untested. More case law is required to determine the extent which this will deterring modern slavery behaviours in New Zealand.

### *c. Health and Safety at Work Act*

The Health and Safety at Work Act 2015 provides the minimum health and safety requirements that an employer must maintain. It is under this Act that the standard of the accommodation is set. The duty of care for accommodation held by the person conducting a business or undertaking (PCBU)<sup>101</sup> is stated in s 36. Under this section, the PCBU must, as far as reasonably practicable, maintain the accommodation so that the worker is not exposed to risks to their health and safety from the accommodation. Provided the worker occupies accommodation owned, managed or controlled by the PCBU, and the occupancy is necessary for employment or engagement because other accommodation is not reasonably available, the PCBU is responsible for the accommodation.<sup>102</sup>

The Work Safe New Zealand website provides a fact sheet with guidelines for those supplying accommodation. It includes the availability of beds, toilets and showers, kitchen facilities and other amenities. Further, it states that all new buildings have to comply with the Buildings Act 2004. But, the fact sheet is a set of guidelines that are not enforceable in law.<sup>103</sup> The employers are held to the standard that accommodation must not be a risk to health and safety. This does not provide the guarantee that those living in the accommodation provided by employers will be protected from indignities or degrading conditions or treatment, like women having to share a room with men. Further, if accommodation is reasonably available outside of that supplied by the employer, then the employer may not be held to the minimum standard in the Health and Safety Act 2015, allowing their behaviour to be risky to the health and safety of workers. The standard of accommodation that employers are required to provide is inadequately addressed in New Zealand law. The Health and Safety at Work Act 2015 requires that the accommodation be kept to a standard which does not pose a health and safety risk, but the section gives no guidance as to what a health and safety risk in terms of accommodation requires.<sup>104</sup> Regardless, this standard will not include requirements to protect the mental health and dignity of workers. The dignity of workers should be an important consideration for employers, especially those which provide accommodation.

<sup>101</sup> Health and Safety at Work Act 2015, s 17.

<sup>102</sup> Ibid, s 36.

<sup>103</sup> Work Safe New Zealand *Fact Sheet: Worker Accommodation* (October 2016).

<sup>104</sup> Above n 101, s 36.

The only guidance provided to employers is the fact sheet published by Work Safe New Zealand,<sup>105</sup> which includes a set of guidelines with no indication as to what must be included to meet the standard of not posing a health and safety risk. Although industry groups have adopted this fact sheet,<sup>106</sup> it remains inadequate in ensuring that all workers, especially vulnerable ones, are entitled to a standard of accommodation that is not dehumanising, or provide employers with the ability to exercise significant control over workers. A minimum standard of accommodation should be required by the Health and Safety at Work Act 2015 and included in the board and lodging deduction section in the Wages Protection Act 1983.<sup>107</sup> This minimum standard should have many of the components of the Work Safe New Zealand factsheet,<sup>108</sup> especially requirements for room dimensions and furnishing accommodations with suitable beds and mattresses, washing facilities, safe drinking water, heating and smoke alarms. Although many of these would likely be included already as posing a health and safety risk, having a detailed list of requirements that are widely available would aid in the understanding and the enforceability of the minimum standard of accommodation.

## VI. Recommendations

New Zealand must improve the law that addresses modern slavery in order to deter behaviour and prevent behaviours commonly associated with modern slavery. To do this, New Zealand needs to adequately enforce the law it already has, clarify confusing provisions and make adjustments and additions to areas of law that are not addressing common behaviours.

Currently, New Zealand labour inspectors are understaffed and are performing a large number of important functions in the New Zealand labour environment. More labour inspectors are needed to aid and ensure that perpetrators can be caught in order to deter future behaviours. In addition, larger penalties for serious breaches under the Employment Relations Act 2000 need to be awarded by courts to deter behaviour. Small penalties, like that in *Peter Reynolds Mechanical Ltd Trading as The Italian Job Service Centre v James Denyer, Labour Inspector*,<sup>109</sup> will not deter behaviour, as it will be seen as a cost of doing business. To prevent this, a minimum penalty should be imposed as a guideline for the Courts, in addition to the possibility of larger penalties for widespread or recurring instances of modern slavery behaviours.

The identification of victims needs improvement. It is well-known that migrant workers are the most likely to be exploited.<sup>110</sup> More needs to be done to protect them before they become victims, and identify those that are. A change in immigration practices which ensures that all migrant workers become aware of the minimum labour law rights in New Zealand will help to reduce the number of migrant workers that become victims of modern slavery in New Zealand. An alternative method needs to be developed to encourage those who believe they are not receiving their minimum entitlements, rather than having to call the Ministry of Business,

---

<sup>105</sup> Above n 103.

<sup>106</sup> New Zealand Dairy Workers Union “Managing Health and Safety: A Guide for Farmers” (June 2014), at 26.

<sup>107</sup> Above n 94, s 7.

<sup>108</sup> Above n 103.

<sup>109</sup> *Peter Reynolds Mechanical Ltd Trading as The Italian Job Service Centre v James Denyer, Labour Inspector* [2016] NZCA 464

<sup>110</sup> (21 October 2015) 709 NZPD 7419; International Labour Organisation *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage* (International Labour Organisation, Report, September 2017); Department of Labour *Plan of Action to Prevent People Trafficking* (July 2009)

Innovation and Employment (MBIE) office to report the behaviour. This will help identify instances of modern slavery, especially against migrant workers.

The provisions surrounding deductions from wages need to be reworked to prevent a gap in New Zealand law. Particularly, guidelines for what an unreasonable deduction is will aid in the application of the deduction provisions.<sup>111</sup> Currently, it is not clear what the unreasonable provision applies to, clarifying this will help to deter modern slavery behaviours. In addition, the board and lodging provision needs to be reworded, it is unclear and lengthy without additional support to interpret. Clarifying the provision will enable workers and employers to be aware of their right and responsibilities. This will prevent the employers who aim to do the minimum legally required standard from carrying out modern slavery behaviours.

Finally, a minimum standard of accommodation provided to workers should be included in the law. In particular, requirements that prevent dehumanising conditions for those living there. Although many would already pose a health and safety risk, having a detailed list of requirements that are widely available will aid in the understanding and the enforceability of the minimum standard of accommodation.

## VII. Conclusion

The enforcement and penalties of the New Zealand law do not deter behaviours associated with modern slavery. The current law needs to be improved to clarify provisions in order to increase the understanding of the rights and responsibility by workers and employers. Importantly, the number of labour inspectors needs to be increased in order to identify and prosecute cases of modern slavery, as currently, perpetrators are unlikely to be caught. If perpetrators believe they are unlikely to be caught, then their behaviour will not be deterred. In addition, the penalties that are imposed on minimum employment standard breaches need to be higher to deter behaviour. High profile cases, such as *R v Ali*<sup>112</sup> and *Masala*,<sup>113</sup> and reports on migrant worker exploitation in the media<sup>114</sup> have drawn attention to behaviours associated with modern slavery to the wider public. As a result, legislation has changed and new precedence has been set which has improved New Zealand's modern slavery law. More improvement is needed to ensure that the New Zealand law deters behaviours that are commonly associated with modern slavery in New Zealand.

---

<sup>111</sup> Above n 94, s 5A.

<sup>112</sup> Above n 59.

<sup>113</sup> Above n 83.

<sup>114</sup> Above n 3; Above n 2.