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Editorial Note

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This Special Issue of the *New Zealand Journal of Employment Relations* is comprised of selected papers presented at the fifth Biennial Conference of the New Zealand Labour Law Society held on 15-16 November 2019 with the support of the Faculty of Law and the School of Accounting and Commercial Law at Victoria University of Wellington.

The purpose of the New Zealand Labour Law Society is to create a space for dialogue and dissemination of ideas as well as research relating to labour law broadly defined. As in previous years, a dynamic mix of international and local academics, judges, practitioners, trade union representatives, policy makers and students attended the conference. Participants enjoyed a stimulating range of contributions centred on the conference theme: "Labour Law in 2019 - continuity, change and emerging challenges".

The New Zealand Labour Law Society has always aimed to be inclusive and to give a platform to emerging as well as more established voices. This emphasis is reflected in the articles this Special Issue showcases, which includes contributions from eminent established academics as well as talented new voices. These contributions also reflect some of the themes that emerged most strongly in the conference.

There are six articles in this Special Issue and a summary of their content is provided hereunder.

Tonia Novitz's article discusses the causes of a global trend towards a decline in worker power and argues strongly that the movement toward "collective begging" rather than collective bargaining must be resisted. She provides a set of prescriptions broadly accepted by labour lawyers across the globe intended to shore up this resistance.

Renee Burns focusses on the implementation of freedom of association in Australia. She discusses the Australian Federal Government's attempt to amend the Fair Work (Registered Organisations) Act 2009 and argues that the effect of this amendment would be to restrict the human rights of the Australian workers entrenching deteriorating conditions of work.

The need for law enforcement and for laws designed to ensure that workers can access legal protections also emerged as a key concern at the conference. In this context, Joanna Howe's contribution explores this issue with respect to temporary migrant workers in the horticulture industry. Additionally, Kerry O'Brien discusses accessorial liability which is a tool for extending employer liability down the supply chain. He compares New Zealand's law to Australia's law and suggests that New Zealand law may require reform.

Martin Graham's article raises the increasing tension between environmental requirements and labour law standards. The article focusses on the need for "just transitions" for workers displaced by climate change within New Zealand.

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Finally, Quyn Vu's article addresses the problems of proving indirect discrimination in Australian federal law and provides some recommendations for improvement.

As well as being a place for dialogue and intellectual exchange, the biennial conferences are a focal point for community; a chance to make new connections and an opportunity to catch up with old friends. This human aspect was reflected in John Goddard's moving tribute to his father, Tom Goddard, who served as the Chief Judge of the New Zealand Employment Court (1991-2005) and who passed away 14 March 2019. In his tribute, John reflected on Chief Judge Goddard's approach to law with its emphasis on fairness and ensuring that the powerful are accountable.

We could not have known when we gathered for the conference that just a few short months later, all of New Zealand would be in lock down with the borders effectively closed due to the COVID 19 pandemic. Although in many ways the world we now inhabit is a different place to the world we lived in then, the overarching conference concerns are still resonant. Community, solidarity and empowerment seem more vital now than ever, as does the need for law responsive to the imperatives that all workers should be treated fairly and that the powerful should be held accountable.

The Perils of Collective Begging: the case for reforming collective labour law globally and locally too

TONIA NOVITZ*

Abstract

This article explores the consequences of "collective begging", that is the failure to provide meaningful legal protection and support for collective bargaining. The first part identifies the perils we are now facing, including increasing precarious work, growing economic inequality and diminished democratic engagement. The second part considers our journey here, namely how we took our (collective) eye off the ball and enabled "begging" rather than "bargaining". Finally, the third part considers potential legal solutions, including expanding the coverage of those at work legally entitled to trade union representation, facilitating sectoral bargaining and enlarging the scope for lawful industrial action.

There is a saying that, in the absence of effective collective bargaining, including recourse to strike action, workers' organisations engage merely in "collective begging". The origins of this term have been traced back, by Eric Tucker, to 1921.[1] It is now evident that there are certain dangers that arise if we are resigned to "collective begging". These are not mere projections for the "future of work" but are readily identifiable now in the global economy and labour markets across the world.

The first part of this article seeks to identify the perils we are now facing**,** which can be characterised by the normalisation of increasing precarious work, growing economic inequality and diminished democratic engagement. The second part considers our journey here, namely how we took our (collective) eye off the ball and enabled "begging" rather than "bargaining". This analysis deserves more than the short analysis that can be offered in this article, but my focus will be on tensions between social and economic forces at both national and international levels and how they have manifested in labour law regulation.

Finally, the third part considers potential solutions, identifying a set of prescriptions advocated across the globe, on which labour lawyers broadly agree. These include enlarging the coverage of those legally entitled to trade union representation at work and promoting access to that representation. Enhancing bargaining rather than "begging" can be fostered by greater solidarity, such that there is a powerful argument for facilitating sectoral bargaining within any given state and, indeed, for enabling industrial action to be taken in solidarity across enterprises and even national borders. Local strength of feeling also matters and is, indeed, vital to giving collective worker voice meaning. We need the space within national and international labour

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This article is an adaptation of a keynote address delivered at the New Zealand Labour Law Society conference hosted at Victoria University of Wellington in November 2019. I am grateful to the organisers and participants for comments; all errors are my own.

[1] Eric Tucker "Can Worker Voice Strike Back? Law and the Decline and Uncertain Future of Strikes" in Alan Bogg and Tonia Novitz (eds) *Voices at Work: Continuity and Change in the Common Law World* (Oxford University Press, Oxford, 2014) 458.

laws, as well as institutional provision by extant trade unions, to enable emergent voices to be heard on the matters that concern them. This may also entail not just preserving legal protection of a right to strike but enhancing its scope and the compass of its legitimate objectives.

The consensus emerging on the need for such reforms should not be so surprising. There are profound shared global links between industrial labour law systems. Countries are not independent in the ways that they once were, but linked through a network of trade, investment, subcontracting supply/value (or "poverty") chains and corporate interlinkages (whether through subsidiaries or franchising).[2] Workplaces, by way of contrast, are artificially separated or "fissured", despite the contractual and corporate links between the employers at each site.[3] Their implementation will, of course, have to be sensitive to the dynamics of each domestic industrial relations system, which is embedded into the political culture of any given country.[4] In this sense, the local will always need to be respected in the crafting of change. Additionally, while we might sensibly look to international institutions like the International Labour Organization (ILO) for guidance, it remains possible for any country to be proactive in the promotion of the reforms proposed here, so as to evade the current perils of "collective begging".

I. What Perils are we Facing?

In recent years, policy-makers have spent so much time thinking about and speculating on the more distant "future of work" (and the associated dangers of human replacement by artificial intelligence and robotics),[5] it is almost as if we have forgotten the perils facing us at the present time. We can and should focus on what is happening now in 2020, following the decline of collective bargaining. It is argued here that key trends include: the normalisation of precarity at work, increased inequalities in income and diminished democratic engagement. In the absence of some corrective, these trends will only continue.

A. Precarious work

As Judy Fudge and Deirdre McCann have observed, precarious work takes a myriad of forms and is multidimensional. They have analysed this emergent phenomenon in relation to the

[2] Charlotte Villiers "Collective Responsibility and the Limits of Disclosure in Regulating Global Supply Chains" (2018) 23 Deakin LR 143, citing Benjamin Selwyn "Global Value Chains or Global Poverty Chains? A New Research Agenda" (June 2016) Working Paper No 10, Centre for Global Political Economy, University of Sussex <www.sussex.ac.uk> at 2. See also Benjamin Selwyn "Social Upgrading and Labour in Global Production Networks: A Critique and an Alternative Conception" (2013) 17 Competition and Change 75.

[3] David Weil *The Fissured Workplace: Why work became so bad for so many and what can be done to improve it* (Harvard University Press, Cambridge (Mass), 2014).

[4] Otto Kahn-Freund "On Uses and Misuses of Comparative Law" (1974) 37 MLR 1, 26; although note the identification of greater possibilities for transnational transplantation of collective labour representation by Manfred Weiss "The Future of Comparative Labor Law as an Academic Discipline and as a Practical Tool" (2003) 25 Comp Lab L & Poly J 169 at 170 and 179–80; and Katherine Stone "A New Labor Law for a New World of Work: The Case for a Comparative-Transnational Approach" (2007) 28 Comp Lab L & Poly J 565 at 566 and 581, who also advocates comparison as a basis for "a cross-national agenda for progressive social action".

[5] International Labour Organization (ILO) Global Commission on the Future of Work *Work for a Brighter Future* (22 January 2019) <www.ilo.org>; and see *Report of the Director General: ILO Future of Work Centenary Initiative* ILC 104th session (ILO, Geneva, 2015) <www.ilo.org>.

International Labour Organization's conception of "unacceptable forms of work".[6] However, the interest here is rather in how precarity has become regarded as *acceptable* and has been normalised.[7]

Arguably, what is indicative of precarious work (drawing on a variety of literature)[8] is either the absence of – or uncertainty relating to:

(1) ongoing employment;
(2) income levels;
(3) entitlement to work;
(4) scope for dignity at work (including being subjected to discriminatory conduct); and
(5) coverage by established individual and collective statutory employment and labour law protections which would secure such social goods as, for example, health and safety protections and collective bargaining.

These various aspects of precarity are widely recognised as having become increasingly prevalent as trade union representation has declined.[9]

These marks of precarity are present in standard forms of employment in the contemporary labour market, as well as newer modes of hire. So-called "ordinary jobs", which have always been and are still characterised in terms of a "standard employment relationship",[10] have themselves changed. They are now often shorter term, low-waged, performance-managed, and made subject to surveillance and unreasonable targets.[11]

Then, there are jobs in what has been termed a "grey area" or "grey zone".[12] Are they "employees" or "workers", or is this even really work and not some one's own business? It can be observed readily that what has been termed "non-standard work" has increased. Many forms of work come within this categorisation and they are all very different. They can be fixed-term contracts, supply through a temporary work agency, zero hours or, more frequently, set minimum but uncertain hours.[13] Security of employment is often an issue here less *de facto* and more *de jure*. Such a situation is now frequent in what were professionalised sectors, such as United Kingdom universities, where it is estimated that approximately half the academic teaching staff are on casualised contracts (fixed-term and often hourly paid).[14]

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[6] Deirdre McCann and Judy Fudge "Unacceptable Forms of Work: A Multidimensional Model" (2017) 156 Intl Lab Rev 147.
[7] David Mangan "Deepening Precarity in the United Kingdom" in Jeff Kenner, Isabella Florczak and Marta Otto (eds) *Precarious Work. The Challenge for Labour Law in Europe* (Edward Elgar, Cheltenham, 2019).
[8] Nicola Kountouris "The Legal Determinants of Precariousness in Personal Work Relations: A European perspective" (2012) 34(1) Comp Lab L & Poly J 21.
[9] See, for example, the correlation discussed by Maarten Keune "Trade Unions, Precarious Work and Dualisation in Europe" in Werner Eichhorst and Paul Marx (eds) *Non-Standard Employment in Post-Industrial Labour Markets: An Occupational Perspective* (Edward Elgar, Cheltenham, 2015).
[10] As, for example, described in ILO *R198 Employment Relationship Recommendation 2006*.
[11] Arne L Kalleberg and Peter V Marsden "Transformation of the Employment Relationship" in *Emerging Trends in the Social and Behavioral Sciences: An interdisciplinary, searchable, and linkable resource* (Wiley, Hoboken (NJ), 2015); and Eurofound *Future of Manufacturing – New Tasks in Old Jobs: Drivers of change and implications for job quality* (Publications Office of the European Union, 2018).
[12] See Matthew Taylor *Good Work; The Taylor Review of Modern Working Practices* (Gov.uk, 2017); and OECD *Policy Responses to New Forms of Work* (OECD Publishing, 2019).
[13] See, in the UK, the practices of the chain, Sports Direct, discussed in UK Business, Innovation and Skills Committee *Employment Practices at Sports Direct* (19 July 2016).
[14] See survey evidence outlined in University and College Union *Counting the Costs of Casualisation in higher education* (June 2017) <www.ucu.org.uk>.

So-called "gig work" is also rife, entailing quasi-entrepreneurial hire of labour, which entails the worker logging into an "app" to provide human services on demand.[15] Often the price of those services is set in advance by the app provider, payment is made via the app, and the performance of services regulated by feedback transformed into an algorithm which determines ratings and also (whether directly or indirectly) further availability of work.[16] This mode of accessing paid work (with its accompanying high control-low cost model) has become common in transport, food delivery, cleaning services and care work, not only in the United States, Canada, the United Kingdom, Europe, Australia and New Zealand, but also in Africa and Asia.[17] It is often (although not invariably) characterised by cross-border contractual chains and franchises,[18] with international arbitration as remedial recourse, rather than access to domestic tribunals and courts.[19] Also increasing exponentially is online crowd-work, entailing competition for short-term contracts.[20] There are concerns that this type of work has indirectly discriminatory effects on women,[21] and can also be linked to age discrimination.[22] Notably, trade unions in all places and of various sizes and stages of establishment have made efforts to represent workers in the gig economy,[23] but some courts have been resistant to enabling them to do so, leaving those who do this work without access to legally recognised collective bargaining.[24]

Gig work is just one limb of a wider technological obsession in "future of work" debates. Linked to this development is the potential technological threat to the existence of work as we know it, although threats of redundancy are possibly overstated.[25] Arguably, the issue that is

[15] Jeremias Prassl *Humans as a Service: The promise and Perils of Work in the Gig Economy* (Oxford University Press, Oxford, 2018).
[16] Valerio De Stefano "The Rise of the 'Just-in-Time Workforce': On-Demand Work, Crowd Work and Labour Protection in the 'Gig-Economy'" (2016) 37 Comp Lab L & Poly J 471.
[17] Mark Graham, Isis Hjorth, and Vili Lehdonvirta "Digital Labour and Development: Impacts of global digital labour platforms and the gig economy on worker livelihoods" (2017) 23(2) Transfer: European Review of Labour and Research 135.
[18] For the Uber model, see Elizabeth and Mark Abell "Uber – A Fare Deal for Franchisees" (2016) 14 *Int JFL* 45; and, for arguments regarding franchise regulation, Martin Malin "Protecting Platform Workers in the Gig Economy: Look to the FTC" (2018) 51 Ind Law Rev 377.
[19] See Miriam A Cherry *Regulatory Options for Conflicts of Law and Jurisdictional Issues in the On-demand Economy* (8 July 2019) ILO Conditions of Work and Employment Series Working Paper No 106 <www.ilo.org> at 1 – 4 and 24–25; and Charlotte Garden, "Disrupting Work Law: Arbitration in the Gig Economy" (2017) U Chi Legal F 205.
[20] See Debra Howcroft and Birgitta Bergvall-Kåreborn "A Typology of Crowdwork Platforms" (2019) 33(1) Work, Employment and Society 21.
[21] Miriam Kullmann "Platform Work, Algorithmic Decision-making, and EU Gender Equality Law" (2018) 34(1) IJCCLIR 1.
[22] Miriam A Cherry, "Age Discrimination in the on-Demand Economy and Crowdwork" (2019) 40 Berkeley J Emp & Lab L 29.
[23] Valerio De Stefano "Non-standard Work and Limits on Freedom of Association: A human rights-based approach" (2016) 46(2) ILJ 185.
[24] See the *Independent Workers' Union of Great Britain (IWGB) v RooFoods Ltd (t/a Deliveroo)* CAC decision [2018] IRLR 84 and the unsuccessful judicial review: *R (on the application of IWGB) v CAC* [2018] EWHC 3342 (Admin), [2019] IRLR 249. Discussed in Michael Ford and Tonia Novitz "**Error! Main Document Only.**There is Power in a Union? Revisiting Trade Union Functions in 2019" in Alan Bogg, Jacob Rowbottom and Alison Young (eds) *The Constitution of Social Democracy* (Hart Publishing, Oxford, 2020).
[25] ILO *Inception Report for the Global Commission on the Future of Work* (2017) at 25 <www.ilo.org>. Different projections in that report varied from a risk to over 56 per cent of jobs (in ASEAN coming from an ILO study) to two-thirds of all jobs in developing countries. Estimates are more conservative from PricewaterhouseCoopers regarding jobs in the UK and Germany (30 per cent and 35 per cent of jobs respectively to go) with, at the opposite extreme, Roland Berger's view that the loss in industrial jobs will be more than compensated by a rise in jobs in services.

not being addressed is where the wealth generated by technology goes? To what extent does it benefit the society in which it is developed or the workers who design and use it? Without access to collective bargaining, the redistribution of profits from technological advancement seems unlikely.

Migrant work can also be precarious work. There is substantial evidence that long term migrants suffer systemic discrimination in terms of both access to jobs and treatment when in work.[26] Temporary migrant workers (often hired through temporary work agencies) form part of exploitative global labour chains. The terms of their hire may be subject to debt bondage,[27] or other significant sanctions for leaving.[28] They can be housed in isolated conditions, paid systematically less than local host state workers, and work without standard health and safety protections. At worst, control of temporary migrant workers is militarised – for which, see the use of guns against Bangladeshi strawberry pickers in Greece[29] – but also often control can be achieved simply through reminders of the insecurity of their immigration status.[30] There is genuine difficulty involved in organising migrant workers, whether by unions in the home or host states, although there have been some useful and positive experiments.[31] Without legal facilitation of collective bargaining, competition to access jobs emerges. The migrant is blamed and not the employer. The slogans of "British jobs for British workers" and "America First" are palpable reminders of the dangers here.[32]

Indeed, the overarching effect of the trend towards precarity outlined above is vulnerability of workers and potential competition between them, as opposed to solidarity which might secure improved terms and conditions. Moreover, as access to work becomes ever more uncertain, terms and conditions, including the income of those at work can decline.

B. Increasing economic inequality

Another facet of precarity and vulnerability in the modern labour market is determination of remuneration by reference to minimum standards (a statutory national minimum or, in the United Kingdom, ironically called a "living wage"),[33] rather than collectively bargained pay that ensures a share of profits. This has led to a significant increase in the disparity of income levels between the wealthy and the poor, but also between capital, managers and those dependent on working for a living.[34] In the United Kingdom, for example, work can no longer

[26] Steve Jefferys "The Context to Challenging Discrimination against Ethnic Minorities and Migrant Workers at Work" (2015) 21(1) Transfer: European Review of Labour and Research 9.
[27] Jennifer Gordon "Regulating the Human Supply Chain" (2017) 102 Iowa L Rev 445; Rutvica Andrijasevic and Devi Sacchetto "'Disappearing workers'": Foxconn in Europe and the changing role of temporary work agencies" (2017) 31(1) Work, Employment and Society 54.
[28] Rutvica Andrijasevic and Tonia Novitz "Supply Chains and Unfree Labor: Regulatory failure in the case of Samsung Electronics in Slovakia" (2020) Journal of Human Trafficking, forthcoming.
[29] Application No. 21884/15 *Chowdury v Greece* ECLI:CE:ECHR:2017:0330JUD002188415.
[30] Judy Fudge "Illegal Working, Migrants and Labour Exploitation in the UK" (2018) 38(3) OJLS 557; and Bridget Anderson, "Migration, Immigration Controls and the Fashioning of Precarious Workers" (2010) 24(2) Work, Employment and Society 300.
[31] Magdalena Bernaciek "Polish Trade Unions and Social Dumping Debates: Between a rock and a hard place". (2016) 22(4) Transfer 505–519; and Rebecca Zahn *New Labour Laws in Old Member States: Trade Union Responses to European Enlargement* (Cambridge University Press, Cambridge, 2017).
[32] Tonia Novitz " Freedom of Association: Its emergence and the case for prevention of its decline" in Janice Bellace and Beryl ter Haar (eds) *Research Handbook on Labour, Business and Human Rights Law* (Research Handbooks in Human Rights, Edward Elgar, Cheltenham, 2019) 231–252.
[33] See in the UK, "National Minimum Wage Rates" GOV.UK <www.gov.uk>.
[34] Thomas Piketty *Capital in the Twenty-First Century* (Harvard University Press, Cambridge (Mass), 2014).

be relied on to provide a living wage. A Joseph Rowntree Report published in 2013 found, for the first time, that a majority of families in poverty are also families in work.[35] In other words, being employed does not prevent destitution or severe economic hardship. Since the financial crisis, the social consequences of low wages include a doubling in the number of workers who need housing benefit and growing reliance on foodbanks.[36]

There is a strong empirical link drawn here to the decline in trade union density, discussed by economists at the International Monetary Fund (IMF), Florence Buitron and Carolina Osario.[37] The motivation for interest from the IMF would seem to be, not only the protection of workers as human beings, but that growing inequalities of income also affect consumer potential and, ironically, undermine capitalism as a whole. This is also arguably part of the fear inherent in World Bank and OECD Reports on *The Changing World of Work* and *New Forms of Work* (respectively). They are seeking to rebuild the idea of productive work which does not only enable profitability but also some disposable income on the part of the worker.[38]

C. The quality of democratic engagement

Finally, precarious work and inequalities of income arguably do not only have implications for the consumer base in global capitalism, but also for the quality of democratic engagement.[39] Precarity limits the scope to find energy for political activity and campaigning, which are becoming again a preserve of the elite. As capital gains in wealth, employers become ever more influential in political life.

Powerful vested interests can hijack political advertising, not just through conventional media (as was the case with the Rupert Murdoch press in the 1980s and 1990s which had to be wooed by political leaders), but through less tangible forms of communication (for example, the Google and Facebook scandals).[40] This hijack may also be linked to the attempt to blame other even more vulnerable workers for the conditions experienced in the workplace, rather than the employers prepared to exploit them.[41]

Workers' collective political organisation is under pressure in part due to lack of resources. As Keith Ewing predicted back in 1988, "[i]f the unions continue to decline in an unfriendly economic and legal environment, the income base of the Labour Party will also continue to decline".[42] Union dues have had to remain minimal in low income occupations and it can be difficult to unionise newer forms of work. There are also substantial controls in the United

[35] T MacInnes and others *Monitoring Poverty and Social Exclusion* (Joseph Rowntree Foundation and New Policy Institute, York, 2013) at 26. Confirmed again at 55 per cent in 2016, see <www.jrf.org.uk>.
[36] National Housing Federation *Home Truths:The Housing Market in England 2013/2014* (National Housing Federation, London, 2014).
[37] Florence Jaumotte and Carolina Buitron *Inequality and Labor Market Institutions* (IMF Staff Discussion Note 15/14, 1 July 2015) IMF <www.imf.org>.
[38] World Bank *World Development Report 2019: The Changing Nature of Work* [*World Development Report 2019*] (24 April 2019) World Bank Group <openknowledge.worldbank.org>; and OECD, above n 12.
[39] Buitron and Osario, above n 37, observe at 27 that: "Inequality could also hurt society by allowing top earners to manipulate the economic and political system."
[40] Daniel Kreiss and Shannon C McGregor "Technology Firms Shape Political Communication: The work of Microsoft, Facebook, Twitter, and Google with campaigns during the 2016 US presidential cycle" (2018) 35(2) Political Communication 155–177; and Carole Cadwalladr and Emma Graham-Harrison "Revealed: 50 million Facebook profiles harvested for Cambridge Analytica in major data breach" *The Guardian* (online ed, London, 17 March 2018).
[41] See Fudge, above n 30 above.
[42] Keith Ewing "The Death of Labour Law?" (1988) 8 OJLS 293, at 299.

Kingdom of unions' use of political funds.[43] In the United Kingdom, where elections are privately funded, there is less counterweight than there was to donations from the wealthy. The impacts are self-reinforcing. Precarity and diminishing worker income leads to a lack of democratic engagement, which diminishes active worker representation in government, and then has flow on effects for the regulation of collective bargaining.[44]

II. The Journey to Collective Begging

The obvious question is: how did we get here? One commonly identified culprit (and a convenient one) is "technology".[45] However, it seems curious that mere technology, without human intervention, can bring about such widespread extensive outcomes. Employers have long sought to blame technology for how they seek to effect change in the workplace (from the Luddites onwards).[46] While new technologies have potentially enhanced employer profit, workers and their organisations have responded by bargaining over what the impact of technology should be on them and how profits should be distributed.

My suggestion is that it may be more sensible to attribute the current state of affairs, the perils we face in the world of work, to a prevalent belief in two myths. The first is the myth of efficacy of market operations, namely that the labour market can and will self-regulate. This fiction ignores the ways in which markets are created, structured and changed by various legal remits. The second is the fiction of individual choice in the labour market**.** In other words, anyone at work chooses his or her fate, in a consensual contractual relationship with an "employer". These myths can be linked to the motivations for introduction of the New Zealand Employment Contracts Act 1991 and the deregulatory Thatcherite policies in the United Kingdom of the 1980s and 1990s.[47] They have been prompts for the removal or marginalisation of legal protection of collective bargaining.

Karl Polanyi's book, *The Great Transformation: The Political and Economic Origins of Our Time*, sought to understand the relationship between market and social forces.[48] Polanyi identified "fictitious commodities": land, labour and money, which were not "produced for sale" like other commodities. Labour, for example, is a human activity which cannot neatly be

[43] See the discussion in Michael Ford and Tonia Novitz "Legislating for Control: The Trade Union Act 2016" (2016) 45(3) ILJ 277, at 283 and 289–290.
[44] As discussed in an updated analysis in Keith Ewing "The Unfinished Paper – A Tribute to Gordon Anderson" (2019) 50(2) VUWLR 173 at 174–5 and 184.
[45] For example, *World Bank Development Report 2019*, above n 38, at 19: "technology is disrupting the demand for skills … technology has the potential to improve living standards … technology may prevent Africa and South Asia from industrializing in a manner that moves workers to the formal sector".
[46] See EP Thompson "Time, Work-Discipline, and Industrial Capitalism" (1967) 38 Past and Present 56.
[47] For analysis of the currency of these beliefs and the need for a riposte in the terms of economic theory and practice, see Simon Deakin "Thirty Years On: Labour Market Deregulation and its Aftermath in New Zealand and the UK" (2019) 50(2) VUWLR 193.
[48] Karl Polanyi *The Great Transformation: The Political and Economic Origins of our Time* (2nd ed, Beacon Press, Boston (Mass), 2001).

detached from the rest of life or be "stored".[49] That feature made, in Polanyi's eyes, labour an inappropriate subject for exposure to fluctuating market value:[50]

> To allow the market mechanism to be sole director of the fate of human beings and their natural environment, indeed, even of the amount and use of purchasing power, would result in the demolition of society.

Arguably, that demolition is now taking place through the normalisation of precarious work, alongside increased income inequalities and a decline in democratisation.

While others (like Frederich Hayek and Roger Douglas) argued that the market could self-correct so as to avoid this threat,[51] Polanyi considered that assumption flawed.[52] Instead, markets need regulation through a political process, or re-embedding in our complex society. Labour markets require special care; indeed, we might best understand collective bargaining as an effective and reflexive form of labour market regulation (adaptable to social and economic conditions),[53] which has the advantage of instantiating deeply held values in our constitution of democracy, freedom and dignity.[54]

Every period of market building which lacked social embedding would, according to Polanyi's analysis, induce a countermovement which would offer new systems of protection compatible with the changes.[55] To prevent the disruption of countermovement (which could take, for example, the form of what Polanyi identified as fascist, but today could be more kindly described as populist protest),[56] it would be necessary to take pre-emptive measures to embed the market in social realities, so that people were protected. John Ruggie considered this was instantiated on the world stage as a form of "embedded liberalism", a compromise consisting of "a combination of global currency regulations and domestic commitments to welfare capitalism".[57] More recently, it has been suggested that this compromise has (following a variety of reforms to international institutions) instead embedded "neo-liberalism", whereby transnational global markets have been able to prevail over domestic assertion of social values.[58] It has even been suggested that the conditions for global markets have been

[49] At 75.
[50] At 76.
[51] See Friedrich A Von Hayek "Economics and Knowledge" (1937) 4(13) Economica 33; and Frederich A Hayek *The Road to Serfdom* (Dymocks, Sydney, 1944), discussed in Damien Cahill "Polanyi, Hayek and Embedded Neoliberalism" (2018) 15(7) Globalizations 977, 985–991. See also Deakin, above n 47; and Roger Douglas and Louise Callan *Toward Prosperity* (David Bateman, Auckland, 1987).
[52] Polanyi, above n 48, at 3.
[53] Compare Ralf Rogowski *Reflexive Labour Law in the World Society* (Edward Elgar, Cheltenham, 2013); and Judy Fudge "Regulating for decent work in a global economy" (2018) 43(2) NZJER10.
[54] See Ewing, above n 44, at 178; and Ruth Dukes *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford University Press, Oxford, 2014) at 207.
[55] Judy Fudge "The New Discourse of Labor Rights: From Social to Fundamental Rights" (2007) 29 Comp Lab L & Poly J 29 at 32–33.
[56] Polanyi, above n 48, at 245; Alan Bogg and Mark Freedland "Labour Law in the Age of Populism: Towards Sustainable Democratic Engagement" in Julia López López (ed) *Collective Bargaining and Collective Action: Labour Agency and Governance in the 21st Century?* (Hart, Oxford, 2018).
[57] John Ruggie "International Regimes, Transactions and Change: Embedded liberalism in the post-war economic order" (1982) 36(2) Intl Org 385.
[58] Compare Joo-Cheong Tham and Keith Ewing "Labour Provisions in Trade Agreements: Neoliberal regulation at work?" IOLR (forthcoming); Bastiaan Van Apeldoorn "Transnationalization and the Restructuring of Europe's Socioeconomic Order" (1998) 28(1) International Journal of Political Economy 12; Philip G Cerny "Embedding Neoliberalism: The evolution of a hegemonic paradigm" (2008) 2(1) The Journal of International

entrenched by global constitutional structures, being a kind of "Geneva consensus" that enables (or even "encases") exploitative trade and supply chain operations in products and services.[59] There are sustainability consequences in terms of environmental degradation and the failure of economic systems (boom/bust capitalism, short-term investments, corruption), but also consequences under the "social pillar" of sustainability. I have argued elsewhere,[60] that it may be possible to map Polanyi's three fictitious commodities (land, labour, money) onto the environmental, social and economic pillars recognised by the UN in the Sustainable Development Goals and Agenda 2030.[61]

Arguably, a process of global marketisation, with all its profound consequences, has been compounded by the limitations of international, regional and domestic labour standards as they are currently legally framed. While it would, in my view, be wrong to tar the ILO with the "Geneva Consensus" brush,[62] there seems to be a significant problem across the world with the scope and content of collective labour laws. They do not seem to cover all those who actually work, reducing the scope for effective organisation and social solidarity. They do not enable those who wish to be represented by a trade union to do so, such that the notion of contractual "choice" becomes questionable. The ability to enhance strength by bargaining at a national sectoral level or across national borders is limited by labour laws. As we shall see, the right to strike has also come under threat, which is a prerequisite for trade unions to be effective in protecting the wider interests of those who are not only conventional employees but engaged in various forms of work. The scope of any right to strike also needs to reflect workers' growing concerns with transnational as well as national dimensions of the hire of labour, alongside broader social and environmental issues, which it does not do at present. Altogether, there are a number of crucial lacunae to be addressed.

III. Potential Solutions

Having identified how we arrived at a position of precarity, inequality and democratic deficit, it seems imperative that labour lawyers start to consider how to ensure that "collective begging" is replaced by meaningful "collective bargaining". There seems to be growing consensus internationally on the few solutions selected here as imperative,[63] with the proviso that this analysis is predominantly informed by a Commonwealth, common law perspective, and must

Trade and Diplomacy 1; and also Damien Cahill *The End of Laissez-Faire? On the Durability of Embedded Neoliberalism* (Edward Elgar, Cheltenham, 2014).

[59] Quinn Slobodian *Globalists: The end of empire and the birth of neo-liberalism* (Harvard, Cambridge (Mass), 2018).

[60] See Tonia Novitz "Past and Future Work at the International Labour Organization: Labour as a Fictitious Commodity, Countermovement and Sustainability" (2020) IOLR 10 on which this part of the article is partially based.

[61] *Transforming our world: the 2030 Agenda for Sustainable Development* GA/Res/70/1 (2015).

[62] Indeed, Slobodian, above n 59, makes no such suggestion at 266 and 281 juxtaposing ILO values with those of the international economic institutions; although a different view is taken by Guy Standing "The ILO: An Agency for Globalization" (2008) 39(3) Development and Change 355.

[63] See, for example, the proposals made by Gordon Anderson "A Proposal for Four Key Reforms in New Zealand's Labour Law" (6 November 2017) Social Science Research Network <www.ssrn.com>, discussed by Richard Mitchell "Forty Years of Labour Law Scholarship in New Zealand: A Reflection on the Contribution of Gordon Anderson" 50(2) VUWLR 159, at 168–9, and those of Kate Andreas and Brishen Rogers *Rebuilding Worker Voice in Today's Economy* (Roosevelt Institute, Washington, 2018). See also Alan Bogg and Tonia Novitz (eds) *Voices at Work: Continuity and Change in the Common Law World* (Oxford University Press, Oxford, 2014).

remain open to further scrutiny and proposals from other countries and legal systems.[64] Certainly, one agenda for change is as follows.

A. Removing "threshold exclusions" from access to collective bargaining

Threshold exclusions from collective bargaining are rife in almost every country, although their focus varies. The most common is the threshold question of who is an "employee" or a "worker", and even what is "work"? As observed above, this has been a way in which one of the United Kingdom gig employers, Roofoods (trading as "Deliveroo"), has successfully prevented an application for trade union recognition in the United Kingdom.[65] Another manifestation of the exercise of a "threshold" is the exclusion specifically of certain occupations from forms of employment law and collective labour law protections. An obvious example is the New Zealand "hobbit laws" which deem those engaged in the film sector not to be "employees" and only independent contractors.[66] It is also notable that recent proposals for reform would still exclude their access to industrial action.[67]

Often those who are excluded are among the most vulnerable in the labour market. This is one of Mark Freedland's paradoxes of precarity:[68] the more vulnerable you are the less likely you are to be included, and then able to claim collective bargaining rights which would ameliorate that situation. Examples include "domestic workers", who are explicitly excluded from seeking representation under the United States National Labour Relations Act.[69] The questionable nature of this exclusion was arguably highlighted by ILO Convention No 189, but its coverage was compromised by a tough negotiating stance taken by certain member states (especially those in Europe),[70] and more commitment is required to achieve its genuine implementation.[71] What is more promising is the wider coverage of the 2019 ILO Convention No 190 on Violence and Harassment, which applies under art 1 not only to "workers" but "other persons in the world of work" and requires each Member to "respect, promote and realize" (inter alia) "freedom of association and the effective recognition of the right to collective bargaining". This is the more sensible approach, since for freedom of association, collective bargaining and the right to strike, threshold constraints arguably make no sense at all. These are internationally recognised human rights under art 22 of the 1966 International Covenant on Civil and Political Rights and art 8 of the International Covenant on Economic, Social and Cultural Rights. To

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[64] Ronaldo Munck "The Precariat: A view from the South" (2013) 34(5) TWQ 747; see also Branko Milanovic *Global Inequality: A New Approach for the Age of Globalization* (Harvard University Press, Cambridge (Mass), 2016).

[65] See *Roofoods*, above n 24.

[66] See Employment Relations (Film Production Work) Amendment Act 2010, discussed in Bernard Walker and Rupert Tipples "The Hobbit Affair: A New Frontier for Unions?" (2013) 34 Adel L Rev 65. See also Pam Nuttall "'… Where the Shadows Lie': Confusion, misunderstanding, and misinformation about workplace status" (2011) 36(3) NZJER 73; and Margaret Wilson "Constitutional Implications of 'The Hobbit' Legislation" (2011) 36(3) NZJER 91.

[67] See Derek Cheng "Hobbit Law Stays: Minimum standards coming for film industry, but striking will be illegal" *The New Zealand Herald* (online ed, Auckland, 13 June 2019).

[68] Mark Freedland "The Contract of Employment and the Paradoxes of Precarity" (13 June 2016) Social Science Research Network <www.ssrn.com>.

[69] See 29 USC § 152(3); and James Lin "A Greedy Institution: Domestic Workers and a Legacy of Legislative Exclusion" (2013) 36(3) Fordham Intl LJ 706.

[70] Tonia Novitz and Phil Syrpis "The Place of Domestic Work in Europe: An analysis of current policy on the light of the Council Decision authorising Member States to ratify ILO Convention No. 189" (2015) 6(2) ELLJ 104.

[71] Adelle Blackett *Everyday Transgressions: Domestic workers' transnational challenges to international labor law* (ILR/Cornell University Press, Ithaca, 2019).

deprive people of their legal autonomy to act collectively with others for the protection of their interests is a violation of their fundamental civil liberties, political and socio-economic entitlements. So much has been recognised already by ILO supervisory bodies,[72] and we need to see this now translated into (or initiated) in the national context.

B. Addressing the representation gap

The representation gap is another manifestation of legal constraints on a worker's choice to act collectively. This is the "longstanding gap" between those who wish to be represented by a trade union and those who can be,[73] which has widened considerably in recent years. Sometimes this can be linked to stringent legal requirements as to who counts as a worker. These may be the threshold exclusions to which I have just referred, such as access to "worker" status in the United Kingdom for trade union recognition purposes,[74] or legislative exclusion in the New Zealand "hobbit laws".

In the United Kingdom and a number of other countries, the representation gap can also be attributed to the ways in which an employer's right to property can obstruct trade union access to the workplace (you can only have such access if formally "recognised" in the United Kingdom or are in the process of fighting a recognition ballot, in which case it is still limited).[75] Employers can even (in a United States context) require workers to attend employer organised anti-union meetings, but prevent comparable union meetings on the basis of their property rights and managerial prerogative.[76] This difficulty regarding access does not arise in the same way in other jurisdictions, but even then, mobilising trade union representation and support when an employer seems hostile to union membership can be obstructed, as much culturally as legally.

The case for a union membership default, rather than the other way around, has been made prominently by Mark Harcourt and Gregor Gall.[77] It is important in this context to note that negative freedom of association (the individual choice not to belong to a trade union) cannot neatly be equated with the positive right to belong. One is a bare personal preference, while the other has significant implications for not only one's own welfare, but the welfare of others. In this sense, if we see a right as constructed on the basis of interests sufficient to hold others to a duty (a view notably espoused by Joseph Raz),[78] then there is a strong case for enabling the default choice of representation rather than its opposite.[79]

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[72] See *Definitive Report - Report No 363, March 2012: Case 2888 (Poland) - Complaint date: 28-JUL-11* (2012) ILO <www.ilo.org>; and Committee of Experts on the Application of Conventions and Recommendations [CEACR] *Observation (CEACR) - adopted 2015, published 105th ILC session (2016)*, an observation on Poland 2015 regarding preparation of a draft Act which had not, as at that date, been adopted <www.ilo.org>. For discussion of this human rights approach, see De Stefano, above n 23.

[73] Brian Towers *The Representation Gap: Change and Reform in the British and American Workplace* (Oxford University Press, Oxford, 1997); and Edmund Heery "The Representation Gap and the Future of Worker Representation" (2009) 40(4) Industrial Relations Journal 324.

[74] See *Roofoods*, above n 24.

[75] Keith Ewing and John Hendy "New Perspectives on Collective Labour Law: Trade union recognition and collective bargaining" (2017) 46(1) ILJ 23.

[76] *Lechmere, Inc v NLRB* 502 US 527 (1992); discussed by Andreas and Rogers, above n 63.

[77] Mark Harcourt and others "A Union Default: A Policy to Raise Union Membership, Promote the Freedom to Associate, Protect the Freedom not to Associate and Progress Union Representation" (2018) 48 ILJ 66.

[78] Joseph Raz "On the Nature of Rights" (1984) 93.370 *Mind* 194; and "Liberating Duties" (1989) L & Phil 3.

[79] Tonia Novitz "Are Social Rights Necessarily Collective Rights? A critical analysis of the collective complaints protocol to the European Social Charter" (2002) EHRLR 50–66; and Tonia Novitz "*Gustafsson v Sweden*: Negative Freedom of Association" (1997) 26 ILJ 79–87.

Questions then arise as to which union becomes the default for any putative member. Here, there has to be some caution, especially in contexts where large representative unions can operate with a degree of complacency, not sufficiently representing the most vulnerable. In the United Kingdom, there has been tension between larger and smaller unions – the Independent Workers Union of Great Britain (IWGB) being more effective at protecting the vulnerable gig workers than the larger unions like Unison and the GMB, although they have also sought to offer protection.[80] Another even more troubling example of a clash between the larger, more established, National Union of Mineworkers and a minority union, representing the more vulnerable rock drill operators, occurred in the context of the Marikana massacre in South Africa.[81] Ideally, trade unions can operate in tandem, for example, joint trade union recognition which gives bargaining power. However, the obligation to belong to *a* union may not be most sensibly translated as the obligation to belong to *the* union, if we want to keep bottom up worker voice alive. Michael Ford and I have, in a United Kingdom context, seen this as a trade-off of efficacy based on the greater power of larger trade unions and the strength of commitment and self-determination in newer, more spontaneous trade union activity.[82] This remains a tension that is unresolved in an ILO context, arguably deserving attention.[83] Both are vital to avoid collective begging and, therefore, any operationalisation of a default will have to respond and seek to reconcile both objectives.

C. Bargaining beyond the workplace nationally and transnationally

The shift from sectoral to enterprise-level bargaining is widely recognised to have led to a decline in effective collective bargaining and, with this, a reduction in worker share of income.[84] The reasons are perhaps self-evident. There can be a lack of knowledge and know-how at the level of the individual workplace, whereas sectoral bargaining enables support from a larger number of workers who may also have experience with negotiation and dispute. Andreas and Rogers have considered that the problems posed by bargaining in a progressively "fissured" workplace have become ever more acute as each bargaining unit becomes smaller and more vulnerable to employer control.[85] The solidarity and stronger bargaining power inherent in sectoral bargaining secures far superior minimum pay and terms and conditions in any given sector, which then can be improved upon by employers at the enterprise level which can afford to pay more to attract labour. Moreover, sectoral bargaining may also have beneficial

[80] Ford and Novitz, above n 25.
[81] See Temebka Ngcukaitobi "Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana" (2013) 34 ILJ 836; and Gavin Hartford "The Mining Industry Strike Wave: What are the Causes and What are the Solutions" (10 October 2012) GroundUp <groundup.org.za>. See also Bob Hepple, Rochelle Le Roux and Silvana Sciarra (eds), *Laws against Strikes: The South African experience in an international and comparative perspective* (Juta Jenwyn, Cape Town, 2016).
[82] Ford and Novitz, above n 25.
[83] ILO preference for "free" as opposed to powerful unions is, for example, criticised by Teri L Caraway "Freedom of association: Battering ram or Trojan horse?" (2006) 13(2) RIPE 210. For a more recent analysis, which advocates attention to bottom-up worker collective resistance, see Claire Mummé "Rights, Freedoms, Law, Labour, and Industrial Voluntarism: Some Comments" (2 November 2019) Legal Form <legalform.blog>.
[84] Andrea Garnero, Stephan Kampelmann and François Rycx "Minimum Wage Systems and Earnings Inequalities: Does institutional diversity matter?" (2015) 21(2) EJIR 115 found that higher collective bargaining (including sectoral bargaining) coverage was robustly correlated with lower income inequality. See also Lydia Hayes *8 Good Reasons Why Adult Social Care Needs Sectoral Collective Bargaining* (Institute of Employment Rights, Liverpool, 2017).
[85] Andreas and Rogers, above n 63, at 20.

effects on employer conduct, encouraging them to become more competitive, not by wage undercutting, but "through enhanced productivity and investment in skills or innovation".[86]

These factors seem to have led to the New Zealand settlement for care and support workers in 2017,[87] and, indeed, to proposals for re-introduction of sectoral bargaining in the United Kingdom in the Labour Party election manifestos of 2017 and 2019.[88] While there is no immediate prospect that these policies will now be implemented in the United Kingdom, it will be interesting to see how the current Coalition Government in New Zealand responds to the consultation process regarding sectoral fair pay agreements which closed on 27 November 2019.[89]

More than this, as global capital operates transnationally, effective collective bargaining may need to occur for workers across national borders, whether sectorally or with respect to a particular multinational enterprise (MNE). In response to the limitations of unilaterally adopted corporate codes of conduct, Global Union Federations (GUFs), which represent certain industrial and service sectors, have started to bargain directly with MNEs, leading to the adoption, from 1994 onwards, of International Framework Agreements (IFAs), now often termed Global Framework Agreements (GFAs).[90]

These agreements were, early on, described as "a key trade union tool for addressing the growth of corporate power".[91] It has been estimated that, of the 113 IFAs concluded by 2012, coverage extended to at least 65,000 MNEs with more than 850,000 subsidiaries.[92] The defining features of IFAs have been said to be their global reach (through MNE subsidiaries and sometimes also supply chains), the role of a GUF in negotiation and as a signatory, and reference to ILO core labour standards and other instruments, including protection of freedom of association and the right to strike.[93]

While usually not understood to be legally enforceable, IFAs (or GFAs) standardly include procedures for their implementation in each workplace and sometimes through works councils operating at a transnational level. In this sense, it has been argued that they operate in a manner akin to the extra-legal collective bargaining as it used to occur in post-World War II Britain (identified by Otto Kahn-Freund as "collective laissez-faire", having practical regulatory

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[86] Lydia Hayes and Tonia Novitz *Trade Unions and Economic Inequality* (CLASS/IER, London, 2014) at 18.
[87] *Care and Support Workers (Pay Equity) Settlement Agreement* (1 July 2017); and for media comment: Isaac Davidson and Claire Trevett "Government announces historic pay equity deal for care workers" *The New Zealand Herald* (online ed, Auckland, 18 April 2017).
[88] Labour Party election manifesto for 2017 *For the Many, Not the Few* (Labour Party, London, 2017) and for 2019 *It's Time for Real Change* (Labour Party, London, 2019) <labour.org.uk>.
[89] See Ministry of Business, Innovation and Employment "Fair Pay Agreements" (16 January 2020) MBIE <mbie.gov.nz>.
[90] The current database for all transnational company agreements (compiled by the ILO and European Commission) is available at: <https://ec.europa.eu/social/main.jsp?catId=978&langId=en>.
[91] This was a UK Trade Union Congress statement, cited by Keith Ewing "International Regulation of the Global Economy – The role of trade unions" in Brian Bercusson and Cynthia Estlund (eds) *Regulating Labour in the Wake of Globalisation: New challenges, new institutions* (Oxford, Hart, 2008) at 205.
[92] Hans-Wolfgang Platzer and Stefan Rüb *International Framework Agreements: An instrument for enforcing social human rights?* (2014) Friedrich Ebert Stiftung <library.fes.de> at 3–4.
[93] For a collation of these identifying characteristics, see Nikolaus Hammer "International Framework Agreements: Global industrial relations between rights and bargaining" (2005) 11(4) Transfer 511; Owen E Herrnstadt "Are International Framework Agreements a path to corporate social responsibility?" (2007) 10 U Pa J Bus & Emp L 187; and Lone Riisgaard "International Framework Agreements: A New Model for Securing Workers Rights?" (2005) 44(4) Indus Rel 707.

impact, the efficacy of which is still dependent on legal props recognising trade union freedoms).[94]

Reingard Zimmer has recently identified in her research the potential for these agreements to entail collaboration not only between GUFs and MNEs, but also between governments, national-level trade unions and employers and even interested civil society NGOs. She further identifies experiments with enforceable agreements, citing the Indonesian Freedom of Association Protocol and the Bangladesh Accord.[95] We have yet to see such wide-ranging signatories or enforcement clauses in agreements with genuinely global reach, but such regulatory experiments do suggest that this could be possible and it is likely that the outcomes of such transnational collective bargaining could be more efficacious as a result.

D. Providing meaningful protection of the right to strike

The right to strike is the most powerful and effective way of redressing the almost invariable imbalance of bargaining power between employer and employee, which otherwise makes a fiction of freedom of choice in the context of work.[96] The scope of legitimate industrial action has been progressively restricted in many domestic jurisdictions.[97] At the international level, the connection between a right to strike and collective bargaining, established by the ILO Committee of Experts by virtue of ILO Convention No 87, was powerfully opposed in 2012 by the ILO employers' group, which staged a dramatic walkout from the Conference Committee on the Application of Standards. Indeed, it was an excellent demonstration of the potent effect of a withdrawal of labour.[98] Since then, an apparent accommodation has been reached and ILO Director-General Guy Ryder has reported that the 2012 dispute over the source and content of the right to strike has been resolved.[99] Nevertheless, other sources within the ILO have expressed concern that employer representatives are still mounting a challenge through, for example, the new Standards Review Mechanism.[100]

This dispute over the very existence of a right to strike seems peculiar when one considers the explicit protection of this right under Art 8 of the International Covenant on Economic, Social and Cultural Rights 1966, which also states that it is understood to be compliant with ILO Convention No 87. It is also odd, given that the CFA (a tripartite supervisory entity which

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[94] Tonia Novitz "Exploring Multi-level Collective Bargaining: Transnational legal frameworks that promote worker agency" in Julia López López (ed) *Collective Bargaining and Collective Action: Labour Agency and Governance in the 21st Century?* (Hart Publishing, Oxford, 2019), at 140–142.

[95] Reingard Zimmer "International Framework Agreements: New Developments through better Implementation on the basis of an analysis of the Bangladesh Accord and the Indonesian Freedom of Association Protocol" IOLR (forthcoming).

[96] For a classic explanation of these dynamics, see Otto Kahn-Freund and Bob Hepple *Laws Against Strikes: International Comparisons In Social Policy* (Fabian Society, London, 1972); and for my own analysis, Tonia Novitz *International and European Protection of the Right to Strike* (Oxford University Press, Oxford, 2003), at ch 1–4. For the most recent treatment of this topic, see Jeffrey Vogt and others *The Right to Strike in International Law* (Hart, Oxford, 2020).

[97] See, for an overview, Bernd Waas (ed) *The Right to Strike: A Comparative View* (Kluwer Law International, Alphen aan den Rijn, 2014).

[98] See Report of the CCAS, ILC Record of Proceedings (2012) 19/Part I/13–19; also Claire La Hovary "Employers' Group 2012 Challenge to the Right to Strike" (2013) 42(4) ILJ 338; Janice Bellace "The ILO and the Right to Strike" (2014) Intl Lab Rev 29.

[99] See *Report of the Director General: ILO Future of Work Centenary Initiative*, above n 5, at [78].

[100] Claire La Hovary "The ILO's Employers' Group and the Right to Strike" (2016) 22(3) Transfer 401, at 404; and Paul van der Heijden "The ILO Stumbling towards Its Centenary Anniversary" (2018) 15(1) IOLR 203, at 219.

makes its decisions unanimously) has also found that the right to strike is "an intrinsic corollary to the right to organise protected by Convention No 87",[101] a view to which the employers' group must be understood to have been committed previously.

The employers' argument has little obvious legal merit, but instead follows from the (considerable) political pressure that the employers' group can bring to bear under the tripartite structure of the ILO in a post-Cold War era.[102] What is probably most worrying is that this unmeritorious claim, hovering in the background, places the workers' group and government representatives on the defensive, such that they are not making the obvious case for further enhancement of the scope of a right to strike under modern conditions. Instead, the ILO could be considering how to adjust international labour standards to take account of contemporary concerns, whether these be concerned with climate change or global supply chains.

For example, the "golden formula" in s 244 of the United Kingdom Trade Union and Labour Relations (Consolidation) Act 1992 does not allow for engagement in any industrial action, other than for certain specific listed purposes in a dispute with one's immediate employer. Secondary action taken in sympathy with workers of a related employer, or in relation to concerns regarding one's employer's treatment of other workers in a supply chain, whether at home or abroad are also not permitted. Given the fissured nature of the contemporary workplace, this causes particular difficulties in practice.[103] Moreover, this legal framework places a significant constraint on sectoral and transnational collective bargaining, as unions are left without recourse to their most obvious source of bargaining power.

Moreover, under United Kingdom legislation, lawful industrial action cannot be ideologically motivated, such that opposition to privatisation was not regarded as sufficiently correlated to workers' immediate interests as specified in the statutory provision, even though, in fact, this process did have an impact on the availability of jobs to the workers affected.[104] This means that only environmental issues affecting workers immediately in the workplace could, on health and safety grounds, be a legitimate basis for industrial action; there is no scope to challenge employers' environmental conduct due to its flow-on effects for the local community, or in broader climate change terms. This issue has been brought to life by the climate change strikes taken by schoolchildren, which workers all over the world were called to join in September 2019.[105] In the United Kingdom, the legal regime meant that unions could not officially call their workers out on these grounds, and attending a protest would mean the risk of dismissal unless consent was given by the employer. At the University of Bristol, workers were told they could attend for half an hour.[106] This was hardly effective industrial action. It is an example of

[101] ILO Governing Body Committee on Freedom of Association *Compilation of Decisions on Freedom of Association* [*CFA Compilation*] (ILO, 2018) at [754].

[102] See Janice Bellace "The ILO and Tripartism: The Challenge of Balancing the Three-legged Stool" in George P Politakis, Tomi Kohiyama and Thomas Lieby (eds) *ILO100 Law for Social Justice* (ILO, 2019) at 300 and 305–309; and Claire La Hovary "A Challenging Ménage à Trois? Tripartism in the International Labour Organization" (2015) 12 IOLR 204.

[103] For an outline of the problem see Alan Bogg and KD Ewing "The Implications of the RMT Case" (2014) 43 ILJ 238.

[104] *Mercury Communications v Scott-Garner* [1984] ICR 37.

[105] Ruwan Subasinghe and Jeffrey Vogt "Unions must join the Global Climate Strike to avert a climate catastrophe" (5 September 2019) Equal Times <www.equaltimes.org>.

[106] As reported in the student newspaper: Maggie Sawant "Extinction Rebellion have said they value the University's leadership in the sector and welcome their 'positive intent'" (19 September 2019) Epigram <epigram.org.uk>.

the ways in which, on issues that have contemporary relevance, workers are being deprived of voice.

The ILO could act on these issues by revisiting its standards on freedom of association and collective bargaining, as well as supervisory jurisprudence on secondary action. At present, the CFA regards, as lawful, secondary or sympathy strike, but only when the primary action taken is lawful.[107] However, it seems deeply problematic for the legality of strike action to be defeated by what may be the technical peculiarities of any given national legal system (such as the technical notice and balloting requirements in the United Kingdom) and not determined by the legitimacy or otherwise of its aims.[108] Moreover, while the ILO has stressed in its "Just Transitions" of Guidelines 2015, the importance of social dialogue, including active participation by workers and their organisations in shaping environmental policies,[109] it would be helpful to have confirmation that this includes effective collective bargaining supported by access to industrial action.

IV. Conclusion

In the words of the preamble to the Treaty of Versailles 1919 signed 100 years ago, "peace can be established only if it is based on social justice". This is the basis on which international labour law has encouraged states to promote collective bargaining and elaborated on the legitimate scope of a right to strike. Further, the first ILO Constitution also stated that "the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries". This is why what happens in individual countries, like New Zealand, is significant for the rest of the world. If New Zealand, in its film industry, creates "workers" who are unable to strike, this sets an example which threatens the entitlements of labour everywhere.

While, as labour lawyers, we are embedded in the structures of our own domestic systems, so much of the dynamics of labour relations and systems of work is global. In order *not* to be merely engaged in "collective begging" – in order to access power and effect change – there needs to be scope for communication and coordination between those representing workers. I have argued, here, that trends towards precarious work, a decline in income equality and impoverishment of the democratic process extend beyond national boundaries. Indeed, what have emerged as the contemporary perils of working life are often generated by transnational commercial activities and have been regarded as being maintained through the operations of international institutions. Enabling connections between workers that challenge these national and transnational dynamics is the role of law, which needs to facilitate simultaneously global and domestic collective voice.

By definition, the voice of those "at work"/ "doing work" is *local* – whether it is in New Zealand or elsewhere. Workers' concerns have to be voiced from the bottom up. There needs to be space for nascent associations, spontaneous protest and courageous opposition. It is interesting that, in the threats to the world at work posed in the gig economy, that is precisely

[107] *CFA Compilation*, above n 101, at [770].
[108] De Stefano, above n 23, at 203; and Paul Germanotta and Tonia Novitz "Globalisation and the right to strike: the case for European level protection of secondary action" (2002) 18 IJCCLIR 67.
[109] ILO *Guidelines for a Just Transition Towards Environmentally Sustainable Economies and Societies* (ILO, 2015) at [17] and [18].

what is happening by new forms of unions who represent the notionally self-employed.[110] Arguably, that deference to local worker voice is what the ILO seeks to achieve by enabling each individual state to craft its own labour laws and solutions to its domestic concerns, with reference to overarching values and principles. The ILO also does this by supporting the principle of free and voluntary negotiation, while placing an onus on states to facilitate the collective bargaining process and protect a right to strike.[111]

That said, the ILO also has more work to do, which is arguably now beginning. Collective labour laws need to be inclusive of everyone at work, so that local action can take place and shape agendas and norms. This means that there is a strong case for the precedent of inclusiveness regarding "persons in the world of work", set by ILO Convention No 190, to be more broadly applied. It also entails ensuring genuine access to membership of workers' organisations spontaneously generated by the needs and demands of contemporary work. Simultaneously, legal provisions need to enable overarching protective union structures which can achieve meaningful sectoral bargaining, setting minimum standards on which enterprise bargaining (sensitive to specific local needs) can build. There is a clear argument for legal facilitation of cross-border bargaining to address the reality of transnational employers, which means that more attention needs to be paid to legal protection of secondary or solidarity action. Indeed, more generally, effective worker voice entails access to a right to strike to make that voice heard on all the issues of contemporary concern and relevance to the conditions in which we now work. That said, no country, neither New Zealand nor the United Kingdom, needs to wait for the ILO to take action on these issues. There is scope for any domestic labour law system to resist the trends identified here and to put an end to "collective begging" and its effects. Indeed, that need is now urgent.

[110] An example in the UK setting is the Independent Workers Union of Great Britain (IWGB) <iwgb.org.uk>.
[111] *CFA Compilation*, above n 101, at [1313] onwards.

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Freedom of Association and Collectivity in Australia

RENEE BURNS*

Abstract

Freedom of association is an internationally recognised human right, ILO fundamental principle and an essential ingredient for democracy. Despite international labour and human rights obligations and boasting a labour law system build around a "heart" of collective bargaining, Australia has been consistently subject to international criticism for failing to uphold the principles of free association.

This paper explores the extent to which Australian labour law is in violation of these principles. It concludes that, although appropriate and necessary, changes to affect full freedom of association are unlikely given the current legislative agenda, in particular the Fair Work (Registered Organisations) Amendment (Ensuring Integrity No.2) Bill 2019.

I. Introduction

The freedom of workers to act collectively in defending and furthering their social, political and economic interests is an internationally recognised human right. Serving to counter the inherent power imbalance between worker and employer, collective action through free association provides the necessary leverage for workers to defend, realise and further their rights as citizen workers. Freedom of association is a broad right consisting of three primary principles: the right to form and join independent organisations; the right of workers to negotiate the terms and conditions of work through a process of collective bargaining; and the right of workers to strike in support of social and economic interests.

This paper argues that the Australian workplace relations system fails to comply with Australia's obligations with regard to freedom of association at international law. This failing has contributed to record low wage growth; a dramatic decline in the instance of bargained enterprise agreements; increasing insecure work, and a significant number of employers engaged in the deliberate and systematic violation of minimum terms and conditions. Part II of this paper identifies the international instruments that articulate the right to freedom of association and explores Australia's obligations in terms of those instruments. Part II asserts that, in terms of freedom of association, the principles set out by the International Labour Organization (ILO) are an appropriate benchmark for Australian law and practice. In Part III, this paper will go on to assess free association at Australian law against accepted principles with reference to ILO and United Nations (UN) supervisory bodies. The conclusion is drawn here that Australian law does not comply with international labour and human rights obligations. Examining the Fair Work (Registered Organisations) Act (Ensuring Integrity Bill) 2019, Part IV of this paper goes on to argue that, whilst changes to Australian labour law are appropriate and necessary, the current

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legislative agenda of the Federal Government would suggest that full freedom of association is unlikely to be supported in the near future, to the detriment of working conditions.

II. Freedom of Association: International law and Australia

A. The International Labour Organization

Freedom of association forms the foundation of the ILO tripartite structure, has been described as the "heart of democracy" and is essential to achieving the objectives of the organisation.[1]

The 1998 Declaration on Fundamental Principles and Rights at Work committed member states,[2] through the fact of membership, to "promote and realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights",[3] including "freedom of association and the effective recognition of the right to collectively bargain".[4] Freedom of association was again highlighted in the 2008 Declaration on Social Justice for a Fair Globalisation and,[5] most recently, the 2019 Centenary Declaration for the Future of Work,[6] which stated the ILO must direct its efforts to "promoting workers' rights … with a focus on freedom of association and the effective recognition of the right to collective bargaining as enabling rights".[7]

The principle components of freedom of association are understood primarily by reference to the Freedom of Association and Protection of the Right to Organise Convention 1948 (Convention 87) and the Right to Organise and Collective Bargaining Convention 1949 (Convention 98). Creighton observes Conventions 87 and 98 are uniquely authoritative,[8] owing to their high levels of ratification – 155 and 167 ratifications respectively – and the special supervisory mechanisms they are afforded. In addition to the reporting requirements set out by the ILO Constitution and the Declaration on the Fundamental Principles and Rights at Work, freedom of association is subject also to a unique complaints mechanism comprised of the tripartite Committee on Freedom of Association (CFA), and the Fact-Finding and Conciliation Commission (FFCC), comprised of independent persons.

B. The United Nations

The United Nations (UN) recognises freedom of association as an international human right.[9] The International Covenant on Civil and Political Rights[10] (ICCPR) provides that "everyone shall have the right to freedom of association with others, including the right to form and join trade unions

[1] International Labour Office *Report III(1B): Giving globalization a human face (General Survey on the fundamental Conventions)* [*General Survey 2012*] (2 March 2012) [49].
[2] International Labour Organization [ILO] "Declaration on Fundamental Principles and Rights at Work" (adopted by the International Labour Conference, 86th Session, Geneva, 1998).
[3] Article 2.
[4] Article 2(a).
[5] ILO "Declaration on Social Justice for a Fair Globalization" (adopted by International Labour Conference, 97th Session, Geneva, 2008).
[6] ILO "Centenary Declaration for the Future of Work*"* (adopted by International Labour Conference, 108th Session, Geneva, 2019).
[7] Article II A(vi).
[8] Breen Creighton "Freedom of Association" in Roger Blanpain (ed) *Comparative Labour Law and Industrial Relations in Industrialised Market Economies* (11th ed, Wolters Kluwer, Alphen aan den Rijn, 2014) 315 [3].
[9] *Universal Declaration of Human Rights* GA Res 217A (III) (1948).
[10] International Covenant on Civil and Political Rights [ICCPR] 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

for the protection of his [sic] interests".[11] The International Covenant on Economic, Social and Cultural Rights[12] (ICESCR) reaffirms the right to join trade unions[13] and, additionally, provides an explicit right to strike.[14] Whilst the rights prescribed by the ICCPR and the ICESCR are expressed subject to the law of the land,[15] this limitation is qualified in both instruments such that:[16]

> Nothing in this article shall authorize States Parties to the International Labour Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

This incorporation of Convention 87 in both instruments indicates that the international principles of freedom of association as set out in Convention 87, and the related commentary of the ILO supervisory bodies, provide a "touchstone" for the interpretation and application of the ICCPR and the ICESCR.[17]

C. Australian Recognition of International Obligations

As an ILO member state, Australia is obliged to respect, promote and realise the principles of free association,[18] and has recommitted itself to those principles by way of ratifying both Conventions 87 and 98. In addition, Australia is signatory to both the ICCPR and ICESCR and has thus undertaken to guarantee the rights provided by those Covenants. Absent a constitutionally enshrined bill of rights, the recognition and protection of human rights in Australia relies almost exclusively on legislation or administrative action.[19] International human rights standards to which Australia has subscribed should be recognised as the benchmark for rights domestically. However, at Australian law, international obligations conferred by way of covenant or treaty are not automatically binding and must be implemented by an Act of Parliament. The Fair Work Act 2009 (Cth) (FW Act) fails to incorporate Australia's international obligations with regard to freedom of association, providing instead the "freedom to choose whether *or not* to join and be represented by a union or participate in collective activities" and "collective bargaining at the *enterprise* level".[20]

Despite Australian domestic law failing to implement international standards, Australia's international obligations have been formally recommitted by the Federal Government in various trade agreements which affirm Australia's obligations as an ILO member state, and commit explicitly to the principles of freedom of association and collective bargaining.[21] Whatever the

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[11] Article 22.

[12] International Covenant on Economic, Social and Cultural Rights [ICESCR] 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976).

[13] Article 8 1(a).

[14] Article 8 1(d).

[15] Article 8 1(c), 1(d).

[16] ICCPR art 22 (3); and ICESCR art 8 (3).

[17] Colin Fenwick "Minimum Obligations with Respect to Article 8 of the International Covenant on Economic, Social and Cultural Rights" in Audrey Chapman and Sage Russell (eds) *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia, Cambridge, 2002) 53, at 61–62.

[18] ILO, above n 1, art 2.

[19] Colin Fenwick "Workers' Human Rights in Australia" (August 2006) Social Science Research Network <www.ssrn.com> at 2.

[20] Fair Work Act 2009 (Cth) [FW Act], s 30B 9(a)(ii)–(iii) (emphasis added).

[21] See Australia – United States Free Trade Agreement [2005] ATS 1 (signed 18 May 2004, entered into force 1 January 2005), ch 18; and Comprehensive and Progressive Agreement for Trans-Pacific Partnership [2018] ATNIF 1 (signed 8 March 2018, entered into force 30 December 2018), s 51(h).

efficacy of these clauses in practice,[22] at face value, they serve to legitimise Australia's international obligations. These obligations are further acknowledged by the Federal Government and monitored through the processes of the Parliamentary Joint Committee on Human Rights (PJCHR), whose role it is to scrutinise legislative instruments and report on their compatibility with Australia's human rights obligations. Among the instruments that form the PJCHR terms of reference are the ICCPR and the ICESCR. Thus, the PJCHR is required to report on potential violations to the right of freedom of association as protected by the ICCPR and ICESCR and informed by ILO Convention 87.

Given Australia's voluntary international obligations to uphold the principles of freedom of association as set out in Conventions 87 and 98, it is entirely appropriate that Australian law protects the right to freedom of association as understood in terms of the ILO Conventions and the jurisprudence of the CFA. This paper will now move to assess the current state of Australian federal labour law against the internationally accepted principles of freedom of association.

III. Freedom of Association at Australian Law

A. The Right to Form and Join Autonomous, Independent Organisations

The primary object of Convention 87 is to protect the autonomy and independence of worker and employer organisations from public authority with regard to their establishment, activity and dissolution.[23] This is achieved by Member States undertaking to give effect to prescribed principles,[24] and "to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise".[25] While Australian labour law has been primarily drafted to protect an individual negative right *not* to associate, these provisions have been effectively utilised by trade unions for protecting the interests of their members.[26] Creighton observes that whilst this negative right is not an aspect of Convention 87, its inclusion at law is not necessarily contrary to ILO principles.[27] Convention 87 provides that all:[28]

> … [w]orkers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their choosing without previous authorisation.

The term "worker" is to be understood expansively to include all workers across sectors, industries and contractual status.[29] Australian labour law fails to reflect the broad application of this right; anchored in contract, labour rights in Australia are typically only extended to those workers engaged as employees under a common law contract of service. The effect of this distinction is that an increasing number of workers classified as independent contractors or engaged through third-party entities such as labour hire providers or indirectly via complex supply

[22] Tham and Ewing argue such clauses are cynically enacted and will likely result in a deterioration of labour standards for non-United States parties, see Joo-Cheong Tham and Keith Ewing "Labour Clauses in the TPP and TTIP: A Comparison without a Difference" (2016) 17 Melbourne Journal of International Law 1.
[23] *General Survey 2012*, above n 1, at [55].
[24] *Freedom of Association and Protection of the Right to Organise* (1948) ILO Convention No 87 [Convention 87], art 1.
[25] Article 11.
[26] See 1998 Waterfront dispute: *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1.
[27] Breen Creighton "The ILO and the Protection of Fundamental Human Rights" (1998) 22 MULR 239, at 247.
[28] Convention 87, art 2.
[29] *General Survey 2012*, above n 1, at [53].

chains are denied minimum conditions and rights at work.[30] The consequence of this for freedom of association is that growing numbers of workers engaged as independent contractors have no recourse to collective bargaining or the coercive power of industrial action. McCrystal identifies that,[31] while collective bargaining is possible for independent contractors within the confines of the *Competitions and Consumer Act 2010* (Cth) (*CC Act*), where a public benefit is demonstrated, this approach is severely limited in that it does not allow the exercise of collective or market power and bargained outcomes must be voluntary and, as such, cannot be enforced.

Australian labour law further limits effective freedom of association through "casual" or hourly work contracts. Approximately 25 per cent of the Australian workforce[32] is engaged on a casual or hourly basis. Given the insecurity that attaches to hourly engagements, casual employees are unlikely to command the power to affect their working conditions directly and, as such, are particularly dependent on collectively bargained outcomes. However, casual employees are unlikely to be effectively represented in collective bargaining processes, with financial insecurity posing a significant barrier to union participation. Figures indicate only 4.8 per cent of casual employees are union members, compared to 19.2 per cent for permanent employees.[33]

Protection from anti-union discrimination is essential for free association;[34] the right of workers to join trade unions and participate in industrial activity free from the consequences of anti-union discrimination is an essential element to effective freedom of association. Where workers cannot be confident of adequate protection from dismissal or other means of reprisal resulting from their undertaking union activity, they cannot freely associate or act in their own interests. The CFA describes the act of anti-union discrimination as "one of the most serious violations of freedom of association, as it may jeopardize the very existence of trade unions".[35]

Workers are protected from anti-union discrimination under the FW Act adverse action provisions.[36] Notably, these provisions were enacted utilising the Federal Government external affairs power,[37] with the Fair Work Act Explanatory Memorandum citing several ILO conventions dealing with discrimination and equal employment rights.[38] The omission of Convention 98 from this list indicates both an acknowledgment that Australian labour law operates in contravention of Conventions 87 and 98, and a lack of political will to bring Australia into conformity with international labour standards.[39]

[30] For discussion, see Tess Hardy "Watch this Space: Mapping the Actors Involved in the Implementation of Labour Standards Regulation in Australia" in John Howe, Anna Chapman and Ingrid Landau (eds) *The Evolving Project of Labour Law: Foundations, Development and Future Research Directions* (Federation Press, Alexandria (NSW), 2017) 145.

[31] Shae McCrystal "Organising Independent Contractors: The Impact of Competition Law" in Judy Fudge, Shae McCrystal and Kamala Sankaran (eds) *Challenging the Legal Boundaries of Work Regulation* (Hart Publishing, Oxford, 2012) 139, at 151–4.

[32] Sushi Das, with David Campbell "Fact check: Has the rate of casualisation in the workforce remained steady for the last 20 years?" (12 July 2018) ABC News <www.abc.net.au>.

[33] Iain Campbell *On-call and related forms of causal work in New Zealand and Australia* (ILO, Conditions of Work and Employment Series No 102, 2018) at 26.

[34] See Convention 98, art 1.

[35] ILO "Compilation of decisions of the Committee on Freedom of Association" [CFA Compilation] (6th ed, 2018) at [1072].

[36] FW Act, pt 3-1.

[37] Australian Constitution, s 51(xxix).

[38] Explanatory Memorandum, Fair Work Bill 2009 (Cth), at [2251].

[39] Part IV of this paper will discuss moves to distance Australian law further still from international standards and human rights law.

The FW Act sets out to protect freedom of association by ensuring persons are free to become – or not become – members of industrial associations; have their interests represented – or not – by industrial associations; and are free to participate – or not – in lawful industrial activities.[40] Protection is afforded against a range of actions including dismissal, injuring a person in their employment, detrimentally altering their position or discriminating between them and other employees,[41] and extends beyond the common law contract of employment, covering prospective employees, and contractors alike. At face value, these protections appear comprehensive, however, they have been interpreted by the High Court of Australia such that extraordinary weight is afforded to employer evidence as to the reason behind the action in question. In *Barclay*,[42] Mr Barclay, an employee who acted also as President of the union sub-branch, was dismissed after emailing general advice to union members at the site. The email was composed in response to concerns raised by four members claiming to have been asked to falsify documents as part of an audit process. Fearing reprisal, the members requested not to be identified. The High Court acknowledged that Mr Barclay was "bound to respect confidences",[43] but accepted the employer explanation that the decision to dismiss was not made because Mr Barclay had sent the email in an industrial capacity, but because his actions in sending the email, rather than reporting the allegations to management and his subsequent refusal to name the complaining members, breached workplace policy. This approach was reaffirmed in *BHP Coal*,[44] wherein the High Court held the dismissal of an employee for holding a sign reading "No Principles SCABS No Guts" during a union-organised protest was valid. In this case, it was accepted that his actions were misconduct, in that the sign was offensive and in violation of the organisation's code of conduct and expected behaviour policies.

The refusal of the High Court to afford protection in *Barclay* and *BHP Coal*, despite recognising the industrial nature of the activities in which the employees were engaged, suggests that the FW Act adverse action provisions are inadequate and may only serve to protect against the most obvious and explicit forms of direct action taken by an employer. The seeming requirement to have the decision-maker name industrial activity as the reason for their taking adverse action, and their corresponding ability to defend a claim simply by offering alternate reasons, severely undermines the intentions of these provisions.[45]

B. The Promotion of Free and Voluntary Collective Bargaining

Collective bargaining is:[46]

> … a fundamental right recognised by member States from the very fact of their membership in the ILO, and which they have an obligation to respect, promote and to realise in good faith.

Article 4 of Convention 98 sets out two critical elements: firstly, that appropriate measures be implemented by public authorities to encourage and promote collective bargaining; and, secondly, that negotiation for collective instruments be conducted voluntarily.

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[40] FW Act, s 336(1)(a).
[41] FW Act, s 342.
[42] *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500.
[43] At [30].
[44] *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2014) 253 CLR 243.
[45] See Joellen Riley "General Protections: Industrial Activities and Collective Bargaining" in Shae McCrystal, Breen Creighton and Anthony Forsyth (eds) *Collective Bargaining Under the Fair Work Act* (Federation Press, Alexandria (NSW), 2018) 162.
[46] ILO, above n 2, art 2.

In 2009, the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) noted with "interest" and "satisfaction" that collective bargaining at the enterprise level was at the "heart" of the newly enacted FW Act.[47] The objects of the FW Act include "achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action".[48] This was a clear departure from the previous Workplace Relations Amendment (Work Choices) Act 2005 (Cth), which promoted individual Australian Workplace Agreements (AWAs) over collectively negotiated instruments in clear violation of ILO principles. AWAs were given legal priority over collective agreements and could be offered as a condition of employment.[49] The following discussion demonstrates that, apart from removing individual statutory agreements, the FW Act has done little to improve the ILO conformity of Australian labour law in terms of collective bargaining.

Critically, in accordance with Convention 98, voluntary negotiation should occur "between employers or employers' organisations and *workers' organisations*".[50] Collective bargaining under the auspices of the FW Act is internationally unique, in that it occurs between employers and their employees. Unions have been stripped of their status as parties to agreements at Australian law and may act only in the capacity of a bargaining representative for their members. Having done so, unions might seek to be "covered" by a negotiated agreement and thus be afforded limited rights in seeking to have its terms enforced on behalf of its membership. The FW Act affords unions status as the default bargaining representative for members;[51] however, employers are not required to notify relevant unions of negotiations and members are not formally advised of the need to alert their union. The 2012 post-implementation review of the FW Act identified that this combination of circumstances was failing the policy intention of the scheme, with negotiations commencing and, in some cases concluding, with neither the knowledge nor involvement of relevant unions. In response, the recommendation was made that bargaining notices be lodged with the FWC and published on the Commission's website;[52] this recommendation was not taken up.[53] This is a critical failing of the FW Act in promoting collective bargaining in accordance with Australia's international obligations, with the effect of undermining the power and purpose of what is and must be interpreted as a collective right.

The level at which collective agreements are negotiated should be determined by the parties to the negotiation, the CFA has said:[54]

> According to the principle of free and voluntary collective bargaining embodied in Article 4 of Convention No. 98, the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and, consequently the level of negotiation should

[47] CEACR *Observation concerning Convention No 98 (Australia)* (International Labour Office, 2009).
[48] FW Act, s 3(f).
[49] Colin Fenwick "Workers' Human Rights in Australia" in Colin Fenwick and Tonia Novitz (eds) *Human Rights at Work* (Hart Publishing, 2010) 41, at 68; and for further discussion of the inconsistencies of AWAs and ILO Convention No 98, see Colin Fenwick and Ingrid Landau "Work Choices in International perspective" (2006) 19 AJLL 127.
[50] Convention 98, art 4 (emphasis added).
[51] FW Act, s 174(3).
[52] Ron McCallum, Michael Moore and John Edwards *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation* (Attorney-General's Department, Australian Government, 2012) at 145.
[53] Rosalind Read "The Role of Trade Unions and individual Bargaining Representatives" in Shae McCrystal, Breen Creighton and Anthony Forsyth (eds) *Collective Bargaining Under the Fair Work Act* (Federation Press, Alexandria (NSW), 2018) 69, at 75.
[54] ILO *Case No 1887 (Argentina)* (1998), at [103].

> not be imposed by law, by decision of the administrative authority or by the case-law of the administrative labour authority.

Collective bargaining under the FW Act is focussed at an enterprise level. While agreement-making beyond this level is not prohibited, industrial action in support of agreements other than those for a single enterprise is. Absent the coercive lever of industrial action, workers are stripped of the power to compel employers to negotiate beyond the enterprise. The FW Act does provide a mechanism through the low-wage bargaining stream[55] whereby employers in enterprises with no history of agreements may be compelled to engage in bargaining for a multi-employer agreement;[56] however, no recourse to industrial action is available in support of employee claims, and no agreements have been made under this stream. Increasingly decentralised business models, coupled with the enterprise focus of the FW Act, works to prevent unions entering negotiations with those entities ultimately responsible for determining price and production variables. For example, where the government sets pricing for disability and aged care services, private providers are limited in their ability to negotiate wages and conditions for employees.

One consequence of single enterprise bargaining has been record-low wage growth.[57] The OECD recently observed "bargaining systems that coordinate wages across sectors tend to be linked with lower wage inequality".[58] Additionally, research undertaken by the Centre for Future Work indicates a statistical link between reduced strike activity and the deceleration of wage growth.[59] In order to address the issue of rising inequality and stagnating wages, Australia must embrace the full principles of freedom of association and implement mechanisms to facilitate industry-level bargaining and, where necessary, industrial action to support claims at this level.

In accordance with ILO principles, free and voluntary collective bargaining extends to the content of agreements, where agreements may be made to address broadly defined conditions of work.[60] In this sense:[61]

> … "conditions of work" covers not only traditional working conditions (the working day, additional hours, rest periods, wages, etc.), but also subjects that the parties decide freely to address, including those that are not normally included in the field of terms and conditions of employment in the strict sense (promotion, transfer, dismissal without notice, etc).

The FW Act limits the allowable content of enterprise agreements to those matters "pertaining to the employment relationship".[62] This limitation is problematic in that it is confusing, nuanced and difficult to apply in any practical sense. For example:[63]

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[55] FW Act, s 243.
[56] FW Act, ss 262–263.
[57] See generally, Andrew Stewart, Jim Stanford and Tess Hardy (eds) *The Wages Crisis in Australia: What it is and what to do about it* (University of Adelaide Press, Adelaide, 2018).
[58] Workplace Express *Industry-wide Bargaining a Cure for Wage Stagnation: OECD* (6 July 2018) <www.workplaceexpress.com.au>.
[59] Jim Stanford "Historical Data on the Decline in Australian Industrial Disputes" (The Australia Institute Centre for Future Work, Briefing Note, 30 January 2018) <www.futurework.org.au>.
[60] B Gernigon, A Odero, and H Guido "ILO Principles Concerning Collective Bargaining" (International Labour Office, Geneva, 2000) at 33.
[61] *General Survey 2012,* above n 1, at [215].
[62] FW Act, ss 172 and 186.
[63] Renee Burns "Australia: free to associate" (2019) 26(2) ICTUR International Union Rights 21, citing "*Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union", known as the Australian Manufacturing Workers' Union (AMWU) v Visy Board Pty Ltd* [2018] FWFB 8.

> … casual conversion terms have been rejected for restricting the employer's right to engage independent contractors, but distinguished from permitted clauses limiting the use of labour hire, held to encourage the engagement of permanent employees.

Since the commencement of the FW Act, the CEACR have twice noted the difficulties around the notion of matters pertaining,[64] and requested the provisions be reviewed in consultation with the social partners to expand the scope of bargaining.

The CEACR have also been critical of the prohibition of "unlawful" content.[65] Under the FW Act, unlawful content includes extending unfair dismissal protections or right of entry provisions beyond those provided by the Act, and clauses allowing for strike pay or union bargaining fees.[66] The CEACR has repeatedly noted:[67]

> … legislation or measures taken unilaterally by the authorities to restrict the scope of negotiable issues are often incompatible with the Convention, and that tripartite discussions for the preparation, on a voluntary basis, of guidelines for collective bargaining are a particularly appropriate method of resolving these difficulties.

In the building and construction industry, the permissible scope of agreements is further limited. The Code for the Tendering and Performance of Building Work 2016 (Cth) provides general restrictions on the content of agreements for enterprises tendering for Commonwealth projects. These restrictions include clauses that impose limits on the right of the enterprise to manage its business or improve productivity, discriminate against classes of employees or subcontractors, or are inconsistent with the "freedom of association" provisions of the code. These restrictions are broadly defined and are in direct violation of Australia's international obligations with regard to upholding the right to freedom of association. [68]

One disturbing trend in collective bargaining under the FW Act has been the willingness of employers to apply for the termination of enterprise agreements after their nominal expiry date.[69] The termination of "expired" agreements in this sense forces the workforce back onto the conditions of the relevant award, consequently diminishing the bargaining position they previously enjoyed. McCrystal argues that, as the majority of applications under this section are presented as an opportunity to break a deadlock in bargaining, this provision is facilitating a form of compulsory arbitration in direct violation of the right to freedom of association.[70]

[64] CEACR *Direct Request concerning Convention No. 98 (Australia)* (International Labour Office, 2011); and CEACR *Direct Request concerning Convention No. 98 (Australia)* (International Labour Office, 2013).
[65] CEACR *Observation concerning Convention No. 98 (Australia)* (International Labour Office, 2016); and CEACR *Observation concerning Convention No. 98 (Australia)* (International Labour Office, 2019).
[66] FW Act, ss 186(4), 194, 353 and 470–475.
[67] CEACR *Observation concerning Convention No. 98 (Australia)* (International Labour Office, 2016); and CEACR *Observation concerning Convention No. 98 (Australia)* (International Labour Office, 2019).
[68] For further discussion, see Parliamentary Joint Committee on Human Rights *Report 2 of 2018* (Parliament of Australia, 2018).
[69] FW Act, s 225.
[70] Shae McCrystal "Termination of Enterprise Agreements under the Fair Work Act 2009 (Cth) and Final Offer Arbitration" (2018) 31 AJLL 131.

C. Right to Strike

Whilst not explicitly provided by Conventions 87 and 98, the right to strike has always been regarded by the Committee on Freedom of Association as a "fundamental right of workers and their organizations … in so far as it is utilized as a means of defending their economic interests".[71] The right to strike is said to be implied in the right of workers and their organisations to "organise their administration and activities and to formulate their programmes",[72] and the understanding that the objective of workers' organisations is to further and defend the interests of workers.[73] It should be noted that ILO principles support the right to strike only where such action remains peaceful. The acceptance of the right to strike is evidenced by its inclusion in the ICESCR.[74] For the purposes of this discussion, the term "strike" should be understood to refer to various forms of industrial action.

Industrial action is inherently unlawful at Australian common law and may give rise to actions in contract or tort. Typically, industrial action will give rise to a legal basis for termination on the grounds of a repudiatory breach of contract, in this context it is also possible, although not common, for an employee to be sued for damages for loss resulting from the breach.[75] The act of organising industrial action may also invite actions in tort, particularly by way of contractual interference, conspiracy by illegal means or intimidation. These actions are significant in that they facilitate damages against not just individuals responsible for industrial campaigns, but also the trade unions for which they are acting.[76] The CFA has noted that the "cumulative effect of such provisions could be to deprive workers of the capacity lawfully to take strike action to promote and defend their economic and social interests".[77]

Right to strike provisions were first introduced into Australian workplace relations law by the Industrial Relations Reform Act 1993 (Cth); shielding industrial action from common law actions when taken in support of enterprise level collective agreements. These provisions were enacted by virtue of the Federal Government external affairs powers,[78] and relied specifically on the ICESCR, the ILO Constitution and Conventions 87 and 98.[79] Protected industrial action under the FW Act is unacceptably limited. Under the FW Act, protected industrial action may only be taken where parties are engaged in bargaining for a collective enterprise-level agreement. This approach limits a range of legitimate actions under ILO standards and is at the heart of Australia's ILO compliance issue.[80]

Freedom of association principles regarding the right to strike stop short of protecting industrial action that is "purely political",[81] but do recognise that workers' occupational and economic interests are not limited to:[82]

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[71] CFA Compilation, above n 35, at [751].
[72] Convention 87, art 3.
[73] Article 10.
[74] ICESCR, art 8 1(d).
[75] Andrew Stewart *Stewart's Guide to Employment Law* (6th ed, Federation Press, Alexandria (NSW), 2018) at [18.6].
[76] At [18.7].
[77] *Report of the Committee on Freedom of Association (277th Report):Case No 1511 (Australia)* (Official Bulletin of the International Labour Office LXXIV B(2), 1991) at [236].
[78] Australian Constitution, s 51(xxix).
[79] In *Victoria v The Commonwealth* (1996) 187 CLR 416, the High Court upheld these provisions on the basis of art 8(d) of the ICESCR, stating that, as no explicit right to strike was prescribed by ILO Conventions, they could not be used as the basis of the provisions.
[80] Shae McCrystal *The Right to Strike in Australia* (Federation Press, Alexandria (NSW), 2010) at 241.
[81] CFA Compilation, above n 35, at [761].
[82] At [758].

> … better working conditions or collective claims of an occupational nature, but also [extend to] the seeking of solutions to economic and social policy questions and problems…which are of direct concern to the workers.

Under the FW Act, protected action may only be taken in support of negotiating enterprise level agreements — no action may be taken in support of the broader economic and social issues. This limitation is not consistent with ILO standards. The CFA has said:[83]

> The right to strike should not be limited solely to industrial disputes that are likely to be resolved through the signing of a collective agreement; workers and their organizations should be able to express in a broader context, if necessary, their dissatisfaction as regards economic and social matters affecting their members' interests.

Further, the FW Act prohibits industrial action during the life of an enterprise agreement. This prohibition stands irrespective of whether the issue in dispute is addressed within the agreement or not. This unduly restricts the ability of workers to defend their interests and is not compliant with ILO standards. The CFA provides that, where strikes are prohibited while an agreement is in force, the restriction:[84]

> … must be compensated for by the right to have recourse to impartial and rapid mechanisms, within which individual or collective complaints about the interpretation or application of collective agreements can be examined.

Contrary to this requirement, the FW Act contains no mechanism for compulsory arbitration, nor does it require parties to agree to the arbitration of disputes.[85]

Under international principles, sympathy strikes and secondary boycotts are a valid exercise of workers' collective power. The CFA have noted "[a] general prohibition of sympathy strikes could lead to abuse and workers should be able to take such action provided the initial strike they are supporting is itself lawful".[86] Sympathy strikes are prohibited at Australian law by the FW Act and the secondary boycott provisions of *the CC Act*.[87] In 2019, the CEACR observed that it had previously asked the Australian Government to review the provisions 'with a view to bringing them into full conformity with the Convention' and requested, "once again":[88]

> …the Government, in light of its comments above and in consultation with the social partners, to review the above-mentioned provisions so as to ensure that they are not applied in a manner contrary to the right of workers' organizations to organize their activities and carry out their programmes in full freedom

As discussed in Part II B of this paper, the FW Act prohibits industrial action taken in support of multi-enterprise agreements or to pursue common terms in different agreements across different

[83] At [766].
[84] At [768].
[85] McCrystal, above n 80, at 245, citing *Woolworths Ltd t/a Produce and Recycling Centre v SDA* [2010] FWAFB 1464.
[86] CFA Compilation, above n 35, at [770].
[87] Competition and Consumer Act 2010 (Cth), ss 45D, 45DA and 45DB. Similar provisions in the previous Trade Practices Act 1974 (Cth) were also subject to CEACR and CFA criticism.
[88] CEACR *Observation concerning Convention No. 87 (Australia)* (International Labour Office, 2019).

employers – known as pattern bargaining.[89] This denial of industrial action as a tool to facilitate bargaining at the industry level is in direct violation of freedom of association principles. In its closing observations of 2009, the UN Committee on Economic, Social and Cultural Rights (CESCR) expressed concern with Australian non-compliance, recommending Australia "should lift the restrictions on 'pattern barging' [sic] [and] the pursuit of multi-employer agreements".[90]

In addition to limiting the circumstances in which protected industrial action may be taken, Australian labour law undermines the utility of industrial action by setting a low threshold for the termination or suspension of such action. The CEACR has been critical of the ability to suspend or terminate industrial action under the FW Act in response to economic concerns.[91,92] In accordance with ILO principles, the termination or suspension of industrial action is only permitted in relation to essential services – strictly defined – or in situations endangering life, personal safety or health of the whole or part of the population; the impact of industrial action on trade and commerce should not be grounds for the termination of agreements. The Australian Council of Trade Unions (ACTU) has argued that these provisions can be used by employers to have industrial action terminated rather than to make bargaining concessions.[93] Repeatedly, the CEACR has requested these provisions be reviewed so as to bring the FW Act provisions into conformity with Australia's international obligations.[94]

Further restrictions to industrial action are imposed by the Crimes Act 1914 (Cth), in circumstances where industrial action is held to prejudice or threaten trade or commerce with other countries or among the States;[95] or where boycotts or the threat of boycotts result in the obstruction or hinderance of the transport of goods or the conveyance of passengers in trade or commerce with other countries or among the States.[96] These provisions have been subject to consistent criticism by the CEACR since 1993.[97] In its 2016 observation, the CEACR, noting the conclusions and recommendations of the CFA in Case No. 2698, recalled that these provisions do not conform to international standards, whereby:[98]

> … the right to strike may be restricted or prohibited only when it is related to essential services in the strict sense of the term, that is where the interruption would endanger the life, personal safety or health of the whole or part of the population; in the public service only for servants exercising authority in the name of the State; or in situations of acute national or local crisis …

The committee noted that the operation of these provisions could impede a "broad range of legitimate strike action … by linking restrictions on strike action to interference with trade and commerce",[99] and requested "once again":[100]

[89] McCrystal, above n 80, at 246; and FW Act, ss 408–413.
[90] *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia* UN Doc E/C.12/AUS/CO/4 (22 May 2009) at [19].
[91] CEACR *Observation concerning Convention No. 87 (Australia)* (International Labour Office, 2016); and CEACR *Observation concerning Convention No. 87 (Australia)* (International Labour Office, 2019).
[92] FW Act, ss 423, 424(1)(d), 431, 426 and 419.
[93] CEACR *Observation concerning Convention No. 87 (Australia)* (International Labour Office, 2016);
[94] CEACR, above n 92.
[95] Crimes Act 1914 (Cth), s 30J(1).
[96] Section 30K (d).
[97] CEACR *Direct Request concerning Convention No. 87 (Australia)* (International Labour Office, 1993).
[98] CEACR, above n 92.
[99] CEACR, above n 92.
[100] CEACR, above n 92.

> … the Government … take all appropriate measures, in the light of its previous comments and in consultations with the social partners, to review the abovementioned provisions of the Fair Work Act, the Competition and Consumer Act and the Crimes Act with a view to bringing them into full conformity with the Convention.

IV. The Future for Freedom of Association in Australia

Speaking on the ILO *Work for a Brighter Future* report, ILO Deputy Director-General for Management & Reform, Greg Vines, expressed optimism that, following the 2019 federal election, the Australian government – be it either Liberal Coalition or Labor – would move to bring Australian law into closer conformity with ILO standards on freedom of association.[101] It would seem, however, such optimism was misplaced; shortly following its return to power, the Coalition Government reintroduced the previously defeated Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 (Cth) (EI Bill).[102] Following a shock defeat in the Senate,[103] the amended Fair Work (Registered Organisations) Amendment (Ensuring Integrity No.2) Bill 2019 (Cth) (EI2 Bill) was pushed through the lower house in late 2019,[104] and is expected to go before the Senate in early 2020.

In accordance with ILO principles:[105]

> The right of workers' organizations to elect their own representatives freely is an indispensable condition for them to be able to act in full freedom and to promote effectively the interests of their members. For this right to be fully acknowledged, it is essential that the public authorities refrain from any intervention which might impair the exercise of this right, whether it be in determining the conditions of eligibility of leaders or in the conduct of the elections themselves.

In direct violation of these principles, the EI2 Bill expands the grounds by which persons may be disqualified from holding office in a registered organisation to include "designated findings". Designated findings include convictions or pecuniary penalty orders for contraventions of workplace law.[106] The result of this new ground is such that disqualification may be triggered by breaches such as violating workplace health and safety right of entry provisions; the late filing of financial reports; or unprotected industrial action. This circumstance is in clear violation of freedom of association principles, the CFA having stated:[107]

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[101] Greg Vines "Work for a brighter future: A view from the ILO" (Presentation, Monash University, Australia, 5 March 2019).
[102] See Renee Burns, Anthony Forsyth and Mark Perica "Submission of the Australian Institute of Employment Rights to the Senate Education and Employment Legislation Committee Inquiry into the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019".
[103] Brett Worthington and Amy Greenbank "Federal Government's crackdown on unions rejected by Senate after One Nations sides with Opposition" (29 November 2019) ABC News <www.abc.net.au/news>.
[104] Workplace Express "Integrity Bill #3 reaches Senate after passing House" (5 December 2019) <www.workplaceexpress.com.au>.
[105] CFA Compilation, above n 35, at [589].
[106] Designated laws would include: Fair Work Act 2009, Fair Work (Registered Organisations) Act 2009, Building and Construction Industry (Improving Productivity) Act 2016, as well as federal and state work health and safety laws.
[107] CFA Compilation, above n 35, at [627].

> The loss of fundamental rights, such as the ban on standing for election to any trade union office and any political or public office, could be justified only with reference to criminal charges unconnected with trade union activities, and are [sic] serious enough to impugn the personal integrity of the individual concerned.

That "designated findings" include the contravention of civil penalty provisions is particularly concerning, given Australian labour law, as discussed above, already does not comply with freedom of association principles. Thus, the EI2 Bill has the effect of creating a regime of additional sanctions for union officials engaging in conduct, such as unprotected industrial action, that is otherwise allowable under international law. The CFA have stated that the imposition of sanctions on unions for leading a legitimate strike constitutes a "grave violation of the principles of freedom of association".[108]

Further, the EI Bill conflates the actions of individuals and organisations, such that an official may be disqualified for "multiple failures to prevent contraventions etc by the organisation" in circumstances where they may not have been involved in or had knowledge of the offending conduct, unless they could show they took "reasonable steps to prevent the conduct".[109]

The proposed amendments also introduce designated findings as a ground for the deregistration of a union. The CFA have stated that:[110]

> … to deprive many workers of their trade union organizations because of a judgement that illegal activities have been carried out by some leaders or members constitutes a clear violation of the principles of freedom of association.

The EI2 Bill empowers the Federal Court to order trade unions to be put into administration in circumstances where the organisation or part of the organisation has ceased to "function effectively".[111] Circumstances in which an organisation (or part) will be taken to have ceased to function effectively include where the Court is satisfied that its officers have, on multiple occasions, breached designated laws.[112] Should an administrator be appointed, they will have power to "perform *any* function, and exercise *any* power that the organisation or part, or any officers could perform or exercise if it were not under administration".[113] These provisions amount to a direct violation of the right of unions to organise their internal administration and activities and to formulate their own programs without interference. The CFA has stated that:[114]

> The placing of trade union organizations under control involves a serious danger of restricting the rights of workers' organizations to elect their representatives in full freedom and to organize their administration and activities.

The amendments proposed by the EI2 Bill represent an unacceptable assault on Australian workers' right to freedom of association and are in direct violation of Australia's labour and human rights obligations under international law. The effect of these amendments, if passed, would be to tie up union resources in court actions and distract and prevent trade unions from

[108] At [951].
[109] Proposed s 223(3)(c).
[110] CFA Compilation, above n 35, at [995].
[111] Fair Work (Registered Organisations) Amendment (Ensuring Integrity No.2) Bill 2019 (Cth), sch 3.
[112] Proposed s 323(4)(a).
[113] Proposed s 323F(1) (emphasis added).
[114] CFA Compilation, above n 35, at [662].

effectively representing the interests of their members. Australian labour law is a "no-cost jurisdiction", as such, unions finding themselves subject to actions under these amendments – even in circumstances where those actions were vexatious or lacking merit – would be left to foot the bill.

V. Conclusion

Given Australia's various voluntarily-accepted obligations at international law to uphold the principles of freedom of association, it is entirely appropriate that Australian law protects the right to free association as understood in terms of the ILO Conventions and the jurisprudence of the tripartite CFA. Current Australian law has been the subject of repeated criticism by ILO and UN supervisory bodies for failing to uphold these principles.

Given the imperfect state of worker rights at Australian law, it has been increasingly difficult over time for unions to organise and work for their members: union right of entry laws have become increasingly restrictive; rising insecurity and casualisation of work have increased the number of workers for which joining their union may be out of reach; the decentralisation of business structures has insulated lead firms and price-setters from collective bargaining efforts; collective power is completely dismantled where Australian workers are very often not represented at all in agreement making; and restrictive strike law has neutered the coercive power of labour.

A genuine recommitment to freedom of association principles is necessary to rebalance workplace relations, improve the quality of work and address the issue of stagnate wage growth in Australia. Federal Government proposals contained in the EI2 Bill fail to address the issue of declining worker power, and the subsequent deteriorating conditions of work. Instead, the EI2 Bill threatens to further restrict the human rights of the Australian workers, dismantle their collective voice, and entrench deteriorating conditions of work.

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How Effective Are Legal Interventions for Addressing Precarious Work? The case of Temporary Migrants in the Australian Horticulture Industry

JOANNA HOWE*

Abstract

A significant body of academic literature and popular media has explored the vulnerability of temporary migrant workers working in the Australian horticulture industry and abroad. This vulnerability is largely attributed to the low skilled nature of harvest work, which is often physically demanding, occurs in remote locations, requires long hours and characterised by a low level of trade union oversight and representation. In Australia, the majority of low-skilled horticultural workers are visa holders, either Working Holiday Makers or Pacific workers. In this context, this article considers the role of legal and institutional frameworks in both creating and responding to vulnerability to labour exploitation in the horticulture industry. The article draws upon a review and analysis of novel regulatory approaches in overseas industries comparable to the Australian horticulture industry to understand the potential of regulation to alleviate worker vulnerability. This comparative analysis provides insights into the regulatory potential of atypical types of regulation to consider the extent to which these regulations are effectively enforced and have a real impact on the protection of migrant workers' rights. The article concludes by examining whether regulation can be used more effectively in the Australian context to address the vulnerability of Working Holiday Makers and Pacific workers in the horticulture industry and to minimise the incidence of labour exploitation.

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I. Introduction

There is now considerable evidence of the precarity of temporary migrant workers employed in the Australian horticulture industry.[1] This is largely attributed to the low-skilled nature of farm work, which is often physically demanding, occurs in remote locations, requires long hours and is characterised by a low level of trade union oversight and representation. These factors, which combine to produce labour market vulnerability for farm workers, are exacerbated by the fact that the horticulture industry is heavily reliant on different types of temporary visa holders,[2] through visa programs which are poorly regulated and managed.[3] In this context, this paper addresses the following research question: whilst legal and institutional frameworks play a significant role in creating vulnerability to labour exploitation in certain industries such as the Australian horticulture industry, what role can and do legal interventions perform in meaningfully counteracting or addressing precarious work?[4]

The first part of the paper briefly reviews the literature to identify why the Australian horticulture industry faces a persistent challenge of exploitative work and the extent to which this is created by weak or absent regulation. This section concludes by suggesting that there are a number of factors causing poor compliance with labour standards in the Australian horticulture industry, including labour market segmentation through reliance on different sources of visa workers, poorly designed and enforced visa programs, the absence of regulation of labour hire and accommodation providers and poor enforcement of labour standards and, in particular, provisions on the payment of piece rates.

The second section of the paper undertakes a comparative analysis between regulatory interventions in industries based overseas and the Australian horticulture industry. In this section, we examine two cases: first, the introduction of an employer permit scheme in the Irish fishing industry and second, the introduction of a new visa scheme for Pacific workers in the New Zealand horticulture industry. Each of these regulatory interventions was designed to regulate, at least in part, seemingly intractable problems of temporary migrant worker vulnerability in these industries.

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[1] See, generally, Caro Meldrum-Hanna and Kerry O'Brien "Slaving Away: The Dirty Secrets behind Australia's Fresh Food" (4 May 2015) Four Corners <www.abc.net.au>; Fair Work Ombudsman *Harvest Trail Inquiry: A Report on Workplace Arrangements along the Harvest Trail* [*Harvest Trail Inquiry*] (November 2018); Ben Doherty "Hungry, Poor, Exploited: Alarm over Australia's Import of Farm Workers" *The Guardian (Australia)* (online ed, Sydney, 3 August 2017); Nick McKenzie and Richard Baker "Fruits of their Labour: Investigation into Exploitation of Migrant Fruit Picking Workers in Australia" (November 2016) *The Sydney Morning Herald* (online edition, Sydney, November 2016); Elsa Underhill and Malcolm Rimmer "Layered Vulnerability: Temporary Migrants in Australian Horticulture" (2015) 58 JIR 608; Senate Education and Employment References Committee, Parliament of Australia *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (17 March 2016); Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia *Hidden in Plain Sight: An Inquiry into Establishing a Modern Slavery Act in Australia* (December 2017); and Fair Work Ombudsman *Inquiry into the Wages and Conditions of People Working under the 417 Working Holiday Visa Program* [*Inquiry into Wages and Conditions*] (October 2016).

[2] Joanna Howe and others *Sustainable Solutions: The Future of Labour Supply in the Australian Vegetable Industry* (Horticulture Innovation Australia, 2017). Similarly, a 2016 study conducted by the Australian Bureau of Agricultural and Resource Economics and Sciences found that close to 70 per cent of seasonal horticulture workers were visa holders: Hayden Valle, Niki Millist and David Galeano *Labour Force Survey* (Department of Agriculture and Water Services, Australia, May 2017) at 6.

[3] Joanna Howe and others "Towards a durable future: Tackling labour challenges in the Australian horticulture industry" (January 2019) The University of Sydney <sydney.edu.au>.

[4] For more on precarious work, see Judy Fudge and Rosemary Owens *Precarious Work, Women and the New Economy: The Challenge to Legal Norms* (Hart Publishing, Oxford, 2006); See also Nicola Kountouris "The Legal Determinants of Precariousness in Personal Work Relations: A European Perspective" (2012) 34 CLLPJ 21; and Laurie Berg *Migrant Rights at Work: Law's Precariousness at the Intersection of Immigration and Labour* (Routledge, Abingdon, 2016).

Undertaking such a comparative analysis provides insights into the regulatory potential of different forms of regulation to address the challenge of worker vulnerability which in some industries, like the Australian horticulture industry, appears widespread and systematic. The article concludes by considering whether the types of regulatory interventions explored in the second section can be appropriated in the Australian context to address the vulnerability of temporary migrant workers in the horticulture industry.

II. The Australian Horticulture Industry and the Persistent Problem of Migrant Worker Exploitation

A significant and growing body of evidence suggests that non-compliance is widespread in the Australian horticulture industry. Growers and labour hire contractors acting in their individual, short-term interests have been found to underpay wages and otherwise mistreat workers. The media has been a source of much information on non-compliance.[5]

The Australian horticulture industry is increasingly reliant on a temporary migrant workforce. There are a number of different types of temporary visa holders employed in low-skilled work as pickers, packers and graders. These are: Working Holiday Makers (WHMs), Seasonal Workers from the Pacific in the Seasonal Worker Program (SWP), annual workers from the Pacific in the Pacific Labour Scheme (PLS) and international students. Of these four types of temporary migrants, WHMs are by far the most common source of harvest labour used in Australia; however, their engagement varies regionally. In 2017–18, 36,617 WHMs were granted a second-year extension on their visa, with a likely 90 per cent of these earning this extension through working for 88 days in the horticulture industry. In contrast, in that same year, only 8,459 workers from the Pacific on the SWP were employed in horticulture. The PLS only came into effect on 1 July 2018 and there is only one PLS employer approved to sponsor Pacific workers in horticulture. The number of international students working in horticulture is unknown. Undocumented workers are also prevalent in the horticulture industry, although it is impossible to determine the extent and nature of their involvement. Evidence from a recent report suggests that the numbers of undocumented workers also vary from region to region, with virtually no presence in some regions, and in others, amounting to almost all the harvest workforce.[6]

The competition between visa classes contributes to non-compliance with labour standards because of the different regulatory architecture of different visas, and whether a worker has a documented or undocumented status, makes some groups of visa workers more likely to accept wages and conditions which do not comply with the law. Although there is a universal dimension to the challenge of addressing the exploitation of temporary migrant workers in developed countries' horticulture labour markets, in neither Canada,[7] New Zealand,[8] the United

[5] Ben Doherty, above n 1; ABC, above n 1; and McKenzie and Baker, above n 1.

[6] Howe and others, above n 3.

[7] Employment and Social Development Canada "Hire a Temporary Worker through the Seasonal Agricultural Worker Program: Overview" (18 September 2018) Government of Canada <www.canada.ca>; See also Marie-Hélène Budworth, Andrew Rose and Sara Mann *Report on the Seasonal Agricultural Worker Program* (Inter-American Institute for Cooperation on Agriculture Delegation in Canada, March 2017) <repositorio.iica.int>.

[8] Charlotte Elisabeth Bedford "Picking Winners? New Zealand's Recognised Seasonal Employer (RSE) Policy and its Impact on Employers, Pacific Workers and Their Island – Based Communities" (PhD Thesis, University of Waikato, 2013); and Richard Curtain and others "Pacific Seasonal Workers: Learning from the Contrasting

States,[9] nor Sweden,[10] is there segmentation arising from so many different visa types as there is in Australia.

There is also significant evidence of wage underpayments in horticulture, particularly among WHMs, in academic research,[11] parliamentary inquiries[12] and in publications from the Fair Work Ombudsman (FWO).[13] A FWO report found that 39 per cent of horticulture employers were non-compliant with labour standards.[14] The FWO's Harvest Trail Inquiry recovered over a million dollars in wages but its report indicated the FWO's belief "*that the full extent of wage underpayments is significantly higher than this*".[15] In 2016, another FWO report, following a two-year inquiry into the performance of work by WHMs, found that more than one-third of WHMs surveyed were paid less than the minimum wage, 14 per cent had to pay to secure regional work and six per cent had to pay an employer to "sign off" on their regional work requirement.[16]

In 2017, an online survey of 4,322 temporary migrants in Australia found that the worst paid jobs were in fruit and vegetable picking, where 15 per cent of respondents said they had earned $5 an hour or less and 31 per cent had earned $10 an hour or less.[17] A three-year study investigating the conditions of work in the Australian horticulture industry found that "non-compliance is endemic and multi-faceted" and that the employment of WHMs typically involved substantial wage underpayments, with the lowest wage reported being $1 an hour.[18]

A number of factors contribute to non-compliance in Australian horticulture. Workers are vulnerable to mistreatment when working in remote locations, particularly when they do not have their own transport. In Australia, WHMs are required to work in horticulture for a certain period in order to obtain a visa extension.[19] This possibility of a visa extension introduces a condition that makes WHMs highly dependent on employers. According to the Fair Work Ombudsman, this visa extension has created:[20]

> … a cultural mindset amongst many employers wherein the engagement of 417 visa holders is considered a licence to determine the status, conditions and remuneration levels of workers … without reference to Australian workplace laws.

Temporary Migration Outcomes in Australian and New Zealand Horticulture" (2018) 5 Asia Pac Policy Stud 462 at 471.

[9] Philip Martin *Immigration and Farm Labor: From Unauthorized to H-2A for Some?* (Migration Policy Institute, August 2017) <www.migrationpolicy.org>.

[10] Bjarke Refslund and Annette Thörnquist "Intra-European labour migration and low-wage competition—comparing the Danish and Swedish experiences across three sectors" (2016) 47 IRJ 62.

[11] Underhill and Rimmer, above n 1.

[12] Senate Education and Employment References Committee, above n 1; and Joint Standing Committee on Foreign Affairs, Defence and Trade, above n 1.

[13] Fair Work Ombudsman, *Inquiry into Wages and Conditions,* above n 1.

[14] Fair Work Ombudsman *Horticulture Industry Shared Compliance Program 2010* (Final Report, November 2010) at 1.

[15] Fair Work Ombudsman *Harvest Trail Inquiry*, above n 1, at 4 (emphasis added).

[16] Fair Work Ombudsman, *Inquiry into Wages and Conditions*, above n 1.

[17] Laurie Berg and Bassina Farbenblum "Wage Theft in Australia: Findings of the National Temporary Migrant Worker Survey" (21 November 2017) Migrant Worker Justice Initiative <static1.squarespace.com> at 30.

[18] Howe and others, above n 3.

[19] Fair Work Ombudsman *Inquiry into the Wages and Conditions of People Working under the 417 Working Holiday Visa Program*, above n 1.

[20] At 33.

Other groups of temporary migrant workers are also vulnerable. SWP workers rely on continuing sponsorship from their employers to remain in Australia and to return. Undocumented workers have limited access to jobs in Australia and rely on farm work to earn an income. Many of these workers also possess the usual vulnerabilities common to temporary migrants and young workers, such as poor English language skills and temporary migration status.

The financial circumstances of growers can create downward pressure on wages. Growers interviewed reported rising costs but stagnant income in recent decades. The nature of the product market contributes to this, with 73 per cent of it made up of only two supermarkets which use price competition to keep wholesale prices down,[21] even below cost price in some cases.[22]

There are also quite weak employment law enforcement institutions. The FWO has limited capacity to effectively enforce employment laws due to the geographically disbursed locations of farms, difficulties locating some labour hire contractors and under-resourcing of the inspectorate.[23] Unions also have a limited, albeit growing, presence in the horticulture sector. Additionally, the industry's reliance on unregulated labour hire contractors and accommodation providers to source, transport and house its workforce has created greater opportunities for migrant worker exploitation.[24]

Thus, it is clear that horticulture workers in Australia are a vulnerable workforce. This vulnerability is created by inherent aspects of low skilled farm work, but is exacerbated by the dominant use of visa holders in the industry, in particular WHMs and, to a lesser extent, Pacific workers, and the regulatory design of these two visas contributes to migrant workers' labour market vulnerability. The dependence of Pacific workers on employer sponsorships to remain in Australia, and for the opportunity to return for subsequent harvest seasons, creates an unwillingness to question or report exploitative treatment by their employer. Likewise, for WHMs, the regulatory incentive to complete a period of work on a farm in order to attain a visa extension also contributes to their susceptibility to exploitation. Furthermore, the existence of a large cohort of undocumented migrant workers produces a core horticulture workforce that is unable to report workplace exploitation because of fear of deportation. This segmentation of the temporary migrant workforce, coupled with the poor enforcement of labour standards in the industry, has entrenched precarious work as a norm in the Australian horticulture industry.[25]

[21] Senate Education and Employment References Committee, above n 1; and Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, above n 1.

[22] See, generally, Chloe Booker "Big supermarkets blamed for driving 'ridiculous' strawberry prices" *The Sydney Morning Herald* (online ed, Sydney, 19 September 2016).

[23] Stephen Clibborn and Chris F Wright "Employer Theft of Temporary Migrant Workers' Wages in Australia: Why has the State Failed to Act?" (2018) 29 ELRR 207.

[24] Joanna Howe and others "A critical examination of the relationship between growers and labour hire intermediaries in the Australian Horticulture industry" (2019) 32 AJLL 83.

[25] Joanna Howe and others "Slicing and Dicing Work in the Australian Horticulture Industry: Labour Market Segmentation within the Temporary Migrant Workforce" (2020) FL Rev (forthcoming).

III. Comparative Examples of Legal Intervention to Address Precarious Work

This section of the paper considers the introduction of two new forms of legal intervention to address precarious work in Ireland and New Zealand. Although mindful of the challenges of comparative study,[26] these two countries have been selected as the focus for this comparative study for two reasons. Both are advanced and developed economies which, like Australia, rely on temporary migrant labour in low-skilled sectors where attracting a supply of local workers has proven challenging. Further, these two jurisdictions have many of their legal fundamentals in common. Legal origins theory recognises that Australia, Ireland and New Zealand are from the same legal family, with all three adopting the United Kingdom's common law system and Westminster political system.[27] These jurisdictions are social democracies and have a common economic system. These characteristics suggest that labour migration policy in relation to temporary migrant workers in Australia, Ireland and New Zealand share similar foundations.

In both Ireland and New Zealand, a new regulatory scheme was introduced to address a seemingly intractable problem of temporary migrant worker vulnerability in a particular industry. In the case of Ireland, a new system of employer permits was introduced by the government to address reports of systematic human trafficking and substantial migrant worker exploitation in the fishing industry. In New Zealand, a new visa scheme was introduced to meet the horticulture industry's labour needs whilst seeking to guarantee a more effective system of protection for vulnerable temporary migrant workers from the Pacific. This section considers the impetus for the introduction of these new forms of regulation, their effect on driving greater employer compliance with labour standards and their ability to remedy worker vulnerability.

A. The Introduction of a New Atypical Work Scheme for the Irish Fishing Industry

In 2015, after a *Guardian* newspaper investigation revealed the severe exploitation of Irish migrant fisherman, the Irish Government convened a special Taskforce to develop recommendations to improve compliance with labour laws in the Irish fishing industry.[28] This industry was heavily reliant on temporary migrant workers from the European Economic Area.[29] As with horticulture, the Irish fishing industry has inherent requirements that made it more likely to produce exploitation in its workforce: the work is seasonal, physically demanding and dangerous, often informally arranged and in isolated locations. Typically, prior to 2015, the migrants worked as "share fishermen", in that they were not deemed employees, because they received a share of the vessel's catch rather than a regular wage. The media investigation exposed that many of the workers were in a human trafficking situation and were confined to their vessels, not receiving rest days and typically earning less than GBP 500 for unlimited hours over a monthly period.[30] The intergovernmental Taskforce proposed a new atypical work scheme which would create an additional regulatory apparatus intended to

[26] Otto Kahn-Freund Labour and the Law (2nd ed, Stevens & Sons, London, 1977) at 117; see also Konrad Zweigert and Hein Kötz *An Introduction to Comparative Law* (3rd ed, Oxford University Press, Oxford, 1998).
[27] Rafael La Porta and others "Legal Determinants of External Finance" (1997) 52 J Fin 1131; Rafael La Porta and others "Law and Finance" (1998) 106 J Pol Econ 1113; and Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer "Corporate Ownership around the World" (1999) 54 J Fin 471.
[28] Felicity Lawrence and others "Revealed: trafficked migrant workers abused Irish fishing industry" *The Guardian* (online ed, London, 2 November 2015).
[29] Migrant Rights Centre Ireland "Left High and Dry – The Exploitation of Migrant Workers in the Irish Fishing Industry" (December 2017) <www.mrci.ie>.
[30] Felicity Lawrence and others, above n 28.

remedy the vulnerability of migrant workers in the Irish fishing industry.[31] Under this scheme, 500 12-month permits were made available to workers, requiring that the worker enter into a contract of employment with the fishing boat license holder (the employer) and that the contract of employment operate before the worker travels to Ireland. In the pre-approval application stage, the employer was required to supply a range of documents and the contract of employment to the relevant regulatory body and demonstrate that they can provide an adequate level of healthcare to the employee. The scheme was also intended as a mechanism to encourage undocumented migrant fisherman to come forward and regularise their status by moving onto a work permit which gave them a right to work in the Irish fishing industry.

Within three years of the introduction of the atypical work scheme, it was patently clear that it did not drive greater compliance with labour standards in the Irish fishing industry. The first issue was that very few employers signed up to the scheme and arranged for work permits for their migrant workforce. Of the 500 permits available at the end of June 2017, only 199 were taken up.[32] The International Transport Workers Federation considered that employers were reluctant to sign up to an employment contract in order to avoid paying the minimum wage.[33] It was also noted that employers did not want to engage with the levels of formality associated with the scheme and the solicitor's fees associated with certifying the contract were too expensive. Thus, many fishing operators ignored the scheme altogether by employing undocumented migrant workers, a situation which has been made possible through fragmented and weak enforcement of the permit system.[34]

Accompanying the introduction of the scheme was the appointment of 10 inspectors who were trained and made available for fisheries enforcement operations. Their target was to oversee the Irish fishing fleet of 176 vessels which were over 15 metres in length, and thus likely to engage a temporary migrant fishing crew because of their larger scale of operation.[35] In the first six months of the scheme's operation, the inspectorate had undertaken 208 inspections, including 150 pertaining to the 176 vessels over 15 metres in length, detecting almost 200 contraventions and embarking on five prosecutions.[36] These inspections were largely pre-arranged "educational" visits, although the inspectorate did launch two strategic investigations, "Operation Egg Shell" and "Operation Trident", which involved several unannounced inspections focussing on uncovering human trafficking and labour exploitation in the fishing industry.[37]

Nonetheless, it appears that the appointment of new inspectors and their enforcement activities did little to disrupt the normal practice of relying on undocumented workers, the pre-existing human trafficking networks and the wage underpayments, long hours and unsafe practices which had characterised the industry prior to the scheme's introduction. A hearing of the Joint Committee on Jobs, Enterprise and Innovation in July 2017 was told that the enforcement

[31] Simon Coveney *Report of the Government Taskforce on non-EEA Workers in the Irish Fishing Fleet* (Department of Agriculture, Food and the Marine, 14 December 2015).
[32] Workplace Relations Commission *Report on WRC Enforcement of the Atypical Worker Permission Scheme in the Irish Sea Fishing Fleet* (June 2017) <www.workplacerelations.ie> at 7.
[33] Cliodhna Murphy "Tackling Vulnerability to Labour Exploitation through Regulation: The Case of Migrant Fishermen in Ireland" (2017) 46(3) ILJ 417 at 428.
[34] Paul O'Donoghue "'The system is a joke': A quarter of Irish fishing vessels caught with illegal workers" (9 April 2017) TheJournal.ie <www.thejournal.ie>.
[35] Workplace Relations Commission, above n 32, at 8.
[36] At 3.
[37] At 10.

system was ineffective and that "gross forms of exploitation" were continuing,[38] with a recent survey of migrant fisherman finding that around one-third of migrant workers reported routine verbal and physical abuse and nearly half of migrant workers reported injuries, such as serious cuts and crushed limbs, in addition to feeling unsafe as a result of exhaustion from long working-hours and sleep deprivation.[39]

Media stories continued to expose human trafficking after the introduction of the atypical work scheme[40] and, in 2018, the United States Department of State's *Trafficking in Persons* report criticised the Irish Government's failure to adequately protect victims of trafficking for sexual exploitation and labour abuse, and failure to convict traffickers.[41] This was followed in 2019 with an open letter by four UN rapporteurs issuing a strong rebuke to the Irish government, saying they had received information that the permits were making migrants from outside the EU vulnerable to modern slavery and serious abuse on Irish fishing vessels.[42] In that same year, the International Transport Federation (ITF) sought an injunction against the atypical work scheme and the issuing of work permits on the basis that the scheme sanctioned "modern day slavery".[43] Although ultimately unsuccessful, this legal action did lead to a settlement between the ITF and the Irish government which involved a new immigration agreement stipulating that non-European workers will no longer be tied to individual employers, and a commitment by the government to introduce new measures to reinforce regulations on pay, hours of work, hours of rest and minimum safe manning on fishing vessels.[44] The agreement also stipulated tougher sanctions on employers in breach of the atypical work scheme, improved cooperation between government departments responsible for enforcement, preventing boat owners from deducting permit fees from fishers' wages and providing information about employment rights to migrant workers in their language.[45]

Although it is too early to tell whether the 2019 reforms will be effective, it is clear that the original regulatory intervention introducing the permit system had very little success in meeting its objectives. Irish scholar Cliodhna Murphy suggests that, within the Irish fishing industry, there was a "continuum of exploitation" of migrant workers, ranging from relatively minor breaches of the law to trafficking and slavery.[46] She notes that labour law regulation has to be capable of responding to the different regulatory challenges produced by different types of exploitative work. Other scholars have observed how the "modern slavery" frame of criminal law and trafficking focusses on "individualised instances of domination" and thus operates to exclude analyses that attempt to account for how states are involved in structuring labour

[38] See Edel McGinley in Joint Committee on Jobs, Enterprise and Innovation "Atypical Work Permit Scheme: Discussion" (4 July 2017) Houses of the Oireachtas.

[39] Joint Committee on Jobs, Enterprise and Innovation, above n 38.

[40] Felicity Lawrence and Ella McSweeney "'We thought slavery had gone away': African men exploited on Irish boats" *The Guardian* (online ed, London, 18 May 2018).

[41] United States Department of State *Trafficking in Persons Repor*t (June 2018).

[42] Felipe González Morales and others *Mandates of the Special Rapporteur on the human rights of migrants; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Special Rapporteur on contemporary forms of slavery, including its causes and consequences; and the Special Rapporteur on trafficking in persons, especially women and children* UN Doc OL IRL 1/2019 (12 February 2019).

[43] Aodhan O'Faolain "Group alleging 'slavery' in fishing industry denied injunctions" *The Irish Times* (online ed, Dublin, 7 December 2018).

[44] International Transport Workers' Federation "ITF secures major agreement to protect migrant workers in the Irish fishing industry" (press release, 23 April 2019).

[45] International Transport Workers' Federation, above n 44.

[46] Cliodhna Murphy "Tackling Vulnerability to Labour Exploitation through Regulation: The Case of Migrant Fishermen in Ireland" (2017) 46(3) ILJ 417.

markets for migrant workers that encourage exploitative practices by employers.[47] In the case of the atypical work scheme, in its first three years of operation, it was ineffective in either detecting and disrupting human trafficking, or in ensuring the enforcement of minimum legal standards in relation to pay, rest breaks and other conditions under the contract of employment.

> A key aspect in the scheme's limited success in the first three years of operation was the limited buy-in by the Irish fishing industry, who were largely resistant to its introduction. Murphy attributes this to the fact that the scheme was designed by an inter-departmental Taskforce comprised solely of government agencies, to the exclusion of fish producers and migrant worker support groups. This then had the effect of producing a new scheme which was being introduced 'within a regulatory vacuum',[48] but which introduced a substantial level of regulation, with the pre-approval mechanism for securing work permits being costly, administratively complex and time-consuming for employers. In giving evidence to a government committee hearing, a fishing industry representative was critical about the lack of engagement with industry when designing the scheme and the failure to take into account the practical realities of fishing operations:[49]
>
> Only one consultation was held with fishing industry experts prior to the atypical scheme. It would have been preferable if the industry had been fully included in its drafting. There is a consensus among fishermen with whom I have spoken that the complexities of how vessels operate and how operators often have to change a plan of operation in a moment was not understood or taken into consideration.

It is also notable that the fishing industry disputed the need for the atypical work scheme, largely rejecting claims of endemic exploitation of temporary migrant workers. Industry representatives tended to characterise the reported stories of exploitation and trafficking situations as isolated examples. One industry representative told a government hearing that "there probably are rogue operators in the Irish fishing industry, like any other industry and they need to be weeded out" but was disappointed that:[50]

> … very little of a positive nature has been said in the media about, for example, those in my organisation who are fully compliant with the atypical scheme for migrant workers and who are paying well above the minimum wage.

Another industry representative accused the ITF and the Migrant Rights Centre of giving false evidence to the Government hearing about the extent of non-compliance with labour standards in the industry. He stated:[51]

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[47] Judy Fudge "Migrant Domestic Workers in British Columbia, Canada: Unfreedom, Trafficking and Domestic Servitude" in Howe and Owens eds *Temporary Labour Migration in the Global Era: The Regulatory Challenges* (Hart Publishing, Oxford, 2016) at ch 7; See also Genevieve LeBaron "Unfree Labor Beyond Binaries: Insecurity, Social Hierarchy, and Labor Market Restructuring" (2015) 17 IFJP 1 at 2.

[48] Murphy, above n 46.

[49] See Patrick Murphy in Joint Committee on Jobs, Enterprise and Innovation "Atypical Work Permit Scheme: Discussion (Resumed)" (21 September 2017) Houses of the Oireachtas.

[50] See Francis O'Donnell in Joint Committee on Jobs, Enterprise and Innovation debate, above n 49.

[51] See Hugo Boyle in Joint Committee on Jobs, Enterprise and Innovation debate, above n 49.

> We take issue with the fact that people who had vilified the industry with misleading and unsubstantiated accusations at every opportunity in various media were invited to come before this committee and make false allegations against the industry … wildly inaccurate figures for [exploited] migrant workers … have been bandied about. But of course, sensational stories make the news.

This, combined with the lack of a robust and strategic mechanism for oversight and enforcement, meant there was little incentive for employers to move to the new scheme.

B. The Introduction of a New Visa for Pacific Workers in the New Zealand Horticulture Industry

The Recognised Seasonal Employer (RSE) scheme was introduced in New Zealand in 2007.[52] The scheme had the twin aims of meeting the labour needs of employers in horticulture and viticulture, and providing work opportunities to workers from Pacific Island countries, as part of New Zealand's contribution to the economic development in these countries. The visas are for a maximum of 11 months.[53] In 2017, the cap on migrant workers under the scheme was 11,000,[54] but this was increased in 2019 to 14,400.[55]

A key driver for the introduction of the RSE was the horticulture industry's reliance on undocumented workers and the poor level of labour standards more generally. According to an industry association official, prior to the introduction of RSE, there were over 17,000 undocumented workers in the industry, comprising almost a third of its harvest workforce. In an interview he stated:[56]

> The policy driver [for RSE] was all about changing the behaviour of our industry. And the carrot was RSE … we had to change our industry because government was going to throw the book at our industry. So we had to change our industry as we would have been unviable without those illegal workers. So we understood we needed to change our industry, so we all came together.

Alongside the introduction of the RSE in 2007, the New Zealand Government increased its efforts to detect and deport undocumented workers employed in the horticulture industry,[57] and closed down pre-existing visa pathways for workers from Asia and Pacific allowing temporary work in horticulture. These two reforms meant that growers had less access to a cheaper, unregulated labour source once the RSE was introduced, although there remained an incentive for WHMs to work in horticulture to gain a three-month visa extension.

The RSE introduced a robust pre-approval mechanism for growers, including labour hire contractors seeking to supply labour to the industry. The program requires growers to apply to

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[52] Immigration New Zealand "Recognised Seasonal Employer (RSE) scheme research" <www.immigration.govt.nz>.
[53] Immigration New Zealand "Operational Manual" (19 June 2017) <www.immigration.govt.nz> at WH1.15.6.
[54] At WH1.15(a)(c).
[55] Immigration New Zealand, above n 52.
[56] Howe and others, above n 3, at ch 13.
[57] Richard Curtain "New Zealand's Recognised Seasonal Employer Scheme and Australia's Seasonal Worker Program: Why So Different Outcomes?" (paper presented to New Research on Pacific Labour Mobility Workshop, Australian National University, Development Policy Centre, Canberra, 2 June 2016).

become an RSE employer before accessing temporary migrant workers, and to be subject to additional checks and balances on the ongoing employment of Pacific workers through the RSE, including regular audits, an annual accommodation inspection and union induction for workers. Although the New Zealand horticulture industry has been identified as a key industry in which exploitation of temporary migrants occurs, this has been largely identified as involving other cohorts of temporary migrant labour rather than RSE workers, such as international students, WHMs and undocumented workers on tourist visas without an entitlement to work.[58] A government official referred to RSE workers as "the best protected migrant workers in New Zealand".[59] This view is supported by an interview with a union official, saying that the RSE has been largely effective in improving compliance by those growers participating in the scheme and in removing the industry's dependence on undocumented workers provided by unscrupulous labour hire contractors:[60]

> Before the RSE came in, 90 per cent of the contractors were crooks, with the RSE coming in, it has improved, but there's still a certain amount of things going on, such as excessive deductions for rent, linen, and petrol but it is much better than it was. Most of ours here are getting at least the minimum wage which is $16.50 and going up another dollar in April to $17.50 and Labour's promised to put it up to $20 by the end of their first term. Maybe some of the contractors outside of the RSE are paying them bugger all, but within the RSE, I don't think so, at least the minimum wage is paid.

A key aspect of the RSE's success is the strong and enforced penalties for growers who fail to comply with its requirements and the likely adverse impact of this on their reputational risk, given their supply of fresh produce to European export markets who are more conscious of buying products within ethical labour supply chains, often indicated through Global GAP accreditation.[61] Growers can lose their RSE status if they engage labour contractors who are non-compliant with labour standards or are unregistered. Growers and contractors who are expelled from the RSE are subsequently "blacklisted" for a period of months or years, and their names are published on a Government website. As the quote below indicates, while the system is not foolproof,[62] greater regulation has reduced the prevalence of labour exploitation and grower undercutting. According to an immigration compliance officer:[63]

> RSE employers never have illegal workers in their workforce. MBIE's Immigration Compliance team monitors RSE employers very closely. RSE employers are asked to set up a system of pre-employment checks and demonstrate that they are using Visa View. Because employers know we have compliance officers and they are regularly monitored, they don't want to do anything to jeopardise their RSE status. Just the thought of having their RSE status rescinded means they don't want to go near illegal workers.

[58] Francis Collins and Christina Stringer *Temporary Migrant Worker Exploitation in New Zealand* (Ministry of Business, Innovation and Employment, July 2019) <https://www.mbie.govt.nz/dmsdocument/7109-temporary-migrant-worker-exploitation-in-new-zealand>.
[59] Howe and others, above n 3.
[60] At ch 13.
[61] For more on GlobalGAP see GlobalGAP <https://www.globalgap.org>.
[62] See, generally, Workers First "Union calls on Coalition Gov't to reassess RSE scheme" (January 17 2019) <workersfirst.nz>.
[63] Howe and others, above n 3, at ch 13.

Another more recent reform introduced a mechanism for enabling growers to verify that workers are legally entitled to work in New Zealand. The New Zealand Government's Ministry of Social Development has also funded and developed a Contractor ID Scheme, which developed a worker ID card that proves a worker holds a valid work visa and has a tax file number.[64] Growers can ask to see a worker's ID cards as proof of eligibility to work in New Zealand.

A key aspect of the RSE scheme is that it allows multiple growers to share Seasonal Workers through two mechanisms. The first way this occurs is through the facility known as a 'Joint Agreement to Recruit'. Many smaller and medium-sized growers have successfully used joint agreements to access RSE workers. Growers apply at the same time for a joint agreement and they can share the costs associated with the scheme, such as the contribution to up-front costs like airfares. It also means that they can provide RSE workers with a longer and more consistent term of employment. The second facility that assists small and medium-sized growers to access the RSE is the Grower Cooperatives, as these allow small growers in the same regional area to employ the same group of Seasonal Workers.

Despite the RSE increasing the level of regulation on growers, it appears that the scheme has been largely accepted by industry and growers as a key solution to the industry's labour supply challenges. The RSE is viewed positively by growers with RSE status. In a 2018 survey of RSE employers, 98 per cent believed that the benefits of participating in the scheme outweighed the costs, with 90 per cent strongly agreeing that this was the case.[65] In this same survey, 92 per cent of RSE employers expanded their area of cultivation in the past 12 months, with 86 per cent reporting that participation in the RSE was a contributing factor in the expansion because of the scheme's ability to improve labour supply as well as present and future productivity.[66]

There is also strong industry buy-in and support for the RSE. The peak industry body, Horticulture New Zealand (HortNZ), employs a full-time staff member with primary responsibility for promoting the RSE amongst employers and for assisting them to access the scheme. HortNZ also coordinates a national RSE Conference, which in 2018 attracted over 200 attendees, including key representatives from government, other stakeholders and growers. HortNZ's leadership in promoting discussion and dialogue between all stakeholders within the RSE has been critical to the scheme's success and to ensuring the scheme is not used to exploit Pacific workers. HortNZ has also shown leadership on a number of key issues related to horticulture labour supply, including the industry's need to eliminate non-compliant employment practices. The CEO of HortNZ was quoted in 2018 as stating:[67]

> We have a lot of employers in horticulture that are not playing the game as they should. They will pull us all down. They could put the Recognised Seasonal Employer Scheme down. We have to unite to deal with them.

[64] At ch 13.
[65] James Maguire and Mark Johnson *Recognised Seasonal Employers Survey – 2018* (Working Report, Research New Zealand, 2018) at 9.
[66] At 39.
[67] Heather Chalmers "Horticulture Employers Must Clean Up Their Act to Address its Worker Shortage" (26 July 2018) Stuff <www.stuff.co.nz>.

This pressure from growers and the industry as a whole has been a critical factor in the RSE's success, as exemplified by the following quote from a government official:[68]

> There's a lot of pressure from other employers, no one wants to bring the scheme ruined or brought into dispute. Industry leadership has been very important to making RSE employers the most compliant of any group of employers in any industry in New Zealand. They have to do pastoral care, they have to do accommodation … there's a lot of responsibility that comes with the rights [to access Pacific workers under the RSE] and industry's been very supportive of those extra responsibilities.

Thus, the RSE scheme introduced in New Zealand in 2007 has been largely successful on a number of levels. Firstly, the scheme has been effective in terms of its responsiveness to employer needs and, secondly, it has contributed to grower compliance with labour standards within the horticulture industry for those within the RSE. Growers report high levels of support for the program to deliver a reliable and consistent source of labour supply, and it appears that unions are largely supportive of the RSE's design and ongoing operation. Nonetheless, it does appear that the wider concerns of systematic exploitation of migrant workers within the New Zealand horticulture industry continue to exist more generally and that, within the RSE, there is scope for government and industry to more proactively draw on trade unions to provide additional monitoring and oversight of the employment of RSE workers.

C. Analysis

To varying degrees, these two case studies of legal interventions to address precarious work show that the law by itself was insufficient in fully achieving the goals of the intervention.

First, the case studies demonstrated the importance of developing a broad consensus in favour of the legal intervention amongst key stakeholders. Developing a genuinely tripartite support base and joint stakeholder approach to reform was important in the introduction of a new visa in New Zealand, whereas the Irish example demonstrates that the absence of industry buy-in and a failure to co-design a regulatory intervention can lead to employers resisting the shift to a new form of regulation. In Australia, there is an absence of consensus amongst government, industry and unions on how to resolve migrant worker exploitation in the horticulture industry. Within government, there are four government departments (Home Affairs, Jobs, Agriculture, Foreign Affairs and Trade) responsible for addressing labour supply challenges in the horticulture industry and for managing different aspects of that labour supply. This fragmentation within government creates challenges when developing a coherent response to the industry's labour needs. Moreover, within the Australian horticulture industry, there is no clear consensus on how to respond to the challenge of migrant worker exploitation, with some industry groups advocating labour hire licensing and others proposing an amnesty for undocumented workers. There is also no official industry position on how to address the problem arising from the visa extension incentives in the WHM scheme which can lead to this cohort of workers being particularly susceptible to accepting precarious work.

Relatedly, the two case studies illustrate the importance of union involvement in designing and enforcing new forms of regulation aimed to address worker precarity. In the Irish example, the ITF was critical to exposing the ineffectiveness of the work permits scheme and putting

[68] Howe and others, above n 3, at ch 13.

pressure on government to reform its operation. In New Zealand, unions were critical in designing the RSE and have an ongoing role in providing worker inductions and participating in the regional and national steering groups responsible for managing the RSE. In Australia, there is a clear need for greater engagement between unions, industry and government through a formal framework to design reforms to address the labour challenges in the horticulture industry. Extensive international research has shown that multi-stakeholder forms of supply chain regulation are generally more effective at maintaining labour standards and minimising supply chain risks for lead firms and suppliers than industry-driven regulation.[69] These initiatives also provide a channel for worker involvement and participation, which can provide a valuable feedback mechanism that can allow deficiencies in supply chain regulation to be readily identified and addressed.[70] By contrast, industry-driven regulation has been criticised for being more difficult to enforce, ineffective at providing sustained improvements in working conditions, and for often being adopted by businesses whose main concern is to portray themselves as socially responsible rather than to systematically improve standards.[71] Thus, it is disappointing that, in Australia, the Government has provided funding for the development of an industry-led certification scheme aimed at facilitating an improvement in labour standards but that this has not been accompanied by a stipulation that the scheme includes the involvement of unions.[72]

The two examples demonstrate the importance of appropriately balancing the level of regulation with the needs of employers. If the regulatory burden is too onerous and does not have the requisite level of industry support, it can drive employers to find work arounds in a less formal economy, as exemplified by the Irish example. However, if the regulatory burden is too light, it can produce a situation where compliance is broadly achieved but substantive improvement is less remarkable. A key learning from the New Zealand example is that employers need to be involved in designing the regulatory intervention so that it is likely to work in practice. Although there appears to be increasing employer involvement within the management and oversight of the SWP, the lack of flexibility within the scheme compared with other readily available pools of temporary migrant workers has meant that there has been less incentive for Australian growers to move to the SWP than there was for the RSE in New Zealand.

Relatedly, the two case studies expose the importance of ensuring that less and unregulated forms of temporary migrant labour are minimised when a new regulated visa option is introduced. In Ireland, the continued supply of undocumented migrants to the fishing industry via human trafficking networks meant that employers did not need to use the new work permits scheme to source workers. In contrast, the New Zealand example, which saw the RSE's introduction accompanied by the closure of other visa options and the removal of many undocumented workers from the industry by enforcement authorities meant that growers had an incentive to apply for accreditation through the RSE. Both examples are instructive for the Australian horticulture industry which has a highly segmented labour market where there is a

[69] See generally Christina Niforou "International Framework Agreements and Industrial Relations Governance: Global Rhetoric versus Local Realities" (2012) 50 BJIR 352; and Chris F Wright and Sarah Kaine "Supply Chains, Production Networks and the Employment Relationship" (2015) 57 JIR 483.

[70] Kelly Pike and Shane Godfrey *Two Sides to Better Work – A Comparative Analysis of Worker and Management Perception on of the Impact of Better Work Lesotho* (International Labour Organization, Better Work Discussion Paper Series No 20, September 2015).

[71] Niklas Egels-Zandén and Jeroen Merk "Private Regulation and Trade Union Rights: Why Codes of Conduct Have Limited Impact on Trade Union Rights" (2014) 123 JBE 461.

[72] Growcom "Fair Farms Training & Certification Program: Information Sheet" (2018) <www.growcom.com.au>.

clear substitution effect arising from the availability of different pools of temporary migrant labour. Ruhs and Anderson note that, "[e]mployer demand for labour is malleable, aligning itself with supply: 'what employers want' is critically influenced by what employers 'think they can get' from different groups of workers".[73] In Australia, although the SWP provides employers with a regulated visa option, its operation, alongside the loosely regulated WHM scheme and the substantial presence of undocumented workers, has hampered the growth of this scheme. There has been continued pressure on the Australian Government to reduce the level of regulation of the SWP over time to make it more attractive to employers but even these reforms have not reduced the "substitution effect" created by the existence of strong incentives for WHMs to work in horticulture in order to obtain a second and third year on their visa,[74] and the ready availability of undocumented workers provided to growers through labour hire contractors.

Finally, in both case studies, it is clear that the effectiveness of robust regulation depends on sound oversight and enforcement frameworks.[75] Enforcement processes need to include strong penalties for non-compliance, as well as a clear risk that non-compliant behaviour will be detected.[76] Depending on the type of intervention, this typically requires regular audits and unannounced site visits and a well-resourced independent authority to store and build on existing expertise. In the New Zealand example, the willingness of the industry peak body to monitor employers and report ongoing and wilful non-compliance to the authorities communicated to its members the importance of the new visa for Pacific workers to the viability of the industry as a whole. In Australia, the industry peak bodies appear more reluctant to acknowledge and report non-compliant growers. Furthermore, the Australian horticulture industry lacks a robust framework for oversight and enforcement of growers' employment practices. Although the Fair Work Ombudsman (FWO), the generalist labour law regulator in Australia, has coverage over the horticulture industry and has been active in conducting inquiries and other types of enforcement action such as litigation, it acknowledges that the scale of wage underpayments, particularly in relation to piece rates, is likely to be far higher.[77] It is also revealing that FWO's site visits have failed to detect undocumented workers on farms[78] and, similarly, although the increasing presence of unions in the industry was also created, its report on the harvest trail contains no mention of the contribution of undocumented workers to the industry's labour force.[79] Furthermore, union coverage is not consistent or strong across the entire industry and, although the NUW's Fair Food campaign has been effective in engaging more farm workers to join the union, their presence tends to be concentrated in certain geographical regions in Victoria and South Australia.

[73] Martin Ruhs and Bridget Anderson *Who Needs Migrant Workers?: Labour Shortages, Immigration, and Public Policy* (Oxford University Press, Oxford, 2010) at 16.

[74] Joanna Howe and others "A Tale of Two Visas: Interrogating the Substitution Effect between Pacific Seasonal Workers and Backpackers in Addressing Horticultural Labour Supply Challenges and Worker Exploitation" (2018) 31 AJLL 209; and Curtain and others, above n 8.

[75] For more on the importance of enforcement, see Howe and Owens, above n 47, at Ch 18.

[76] Leah F Vosko and others "The Compliance Model of Employment Standards Enforcement: An Evidence-Based Assessment of its Efficacy in Instances of Wage Theft" (2017) 48(3) IRJ 256.

[77] Fair Work Ombudsman, *Harvest Trail Inquiry*, above n 1, at 4.

[78] Per report of FWO inspector (Qld): "[W]e hear about all these illegal workers, but [when we visit farms] we just don't see them." See Howe and others, above n 3, at 40.

[79] See, generally, Fair Work Ombudsman *Harvest Trail Inquiry*, above n 1.

IV. Conclusion

Around the globe, temporary migrant workers often toil in workplaces with unacceptable wages and conditions. There is now considerable evidence that temporary migrant workers in the Australian horticulture industry face substantial precarity. Just as this precarity is multi-pronged, so too are the potential solutions to it. But while legal and institutional frameworks can be responsible for creating such vulnerability, legal tools may also be significant in minimising such vulnerability. In the two cases considered in this article, a number of key factors determined the effectiveness of the legal intervention in meeting the goals of the intervention and are instructive for developing reform proposals for the Australian horticulture industry.

In the Irish fishing industry, the potential for continued exploitation remained despite the introduction of the employer permits scheme. In part, this was due to the limited industry involvement and buy-in to the atypical work scheme. The regulatory burden associated with the new work permits and the costs associated with complying with it also resulted in the low take-up by both employers and workers. There was also little incentive for employers to move to the new regulated system, given that the enforcement and oversight mechanisms were weak and there remained a consistent supply of undocumented workers who could be employed with little chance of detection, without an employment contract and outside of the new work permits scheme. The precarious nature of the Irish fishing industry and the dependency of workers on sponsoring employers led to a "hyper-precarity" and "hyper-dependency" that was difficult to dissolve through the introduction of the atypical work scheme.[80] This example demonstrates the ineffectiveness of regulation which is not embedded in strong institutional, industry and stakeholder support and combined with a robust oversight and enforcement mechanism.

In contrast, the introduction of a new visa for Pacific workers in New Zealand has proven to largely be a success in reducing migrant worker exploitation and addressing employers' labour supply needs for those employers operating within the new visa scheme. However, the success of this reform is not purely based on its legal framework but on the involvement of industry, unions and government in designing the new visa and promoting its implementation and use on a widespread basis by growers. This new visa was also accompanied by a suite of other reforms that contributed to the RSE's success. For employers, the benefits of participating in the RSE in providing access to a stable labour supply enabling easier accreditation for the purpose of accessing export markets has also proven an important driver in moving growers into the regulated scheme. That the scheme was co-designed and continues to evolve and build in flexibilities to meet employer needs has also assisted in encouraging greater take-up.

In sum, both the Irish and New Zealand examples attest to the potential for regulation to ameliorate the precarious status of temporary migrant workers in the labour market and the importance of contextual factors, the institutional setting and other drivers which will affect the success of a new regulatory scheme. For the Australian horticulture industry, which faces an ongoing challenge of widespread non-compliance with labour standards, there is an urgent need to rethink the mix of pathways for temporary migrants into the industry, the role and function of the social partners and government departments, and the apparatus for oversight and enforcement.

[80] Mimi Zou "The Legal Construction of Hyper-Dependence and Hyper-Precarity in Migrant Work Relations" (2015) 31(2) IJCCLIR 141.

Accessorial liability in Australian and in New Zealand workplace laws

KERRY O'BRIEN*

Abstract

Workplace laws in Australia and New Zealand prescribe responsibility for those involved in breaches of those laws by others, typically employers. However, the New Zealand regime, which followed and was modelled on the Australian regime, departs from the largely settled operation of these provisions.

This paper outlines the nature of this liability by reference to its history, its developments and assesses the practical difficulties that the New Zealand regime may face given its departure from the Australian model.

I. Introduction

In Australia, the open access to accessorial liability provisions in the Fair Work Act 2009 (Cth) (FW Act) has been extremely useful in recovering compensation from parties involved in underpayment and other contraventions. This remedial scheme also serves as a deterrent in addition to the pecuniary penalties potentially available against those accessories.

In New Zealand, the Employment Relations Act 2000 (NZ) (ER Act), whilst defining accessorial liability in an identical manner, provides for a very different structure thereafter. Importantly, the remedies that can be imposed against a person who is involved, and when, is limited under the ER Act; the right to seek sanctions against a person involved is limited further and defences are available.

This paper will examine the origins of involvement in each jurisdiction and will then examine the practical effects of the different regimes. Given the use of accessorial liability in Australia to extend liability beyond the binary employment relationship, this paper also comments on the utility of broad involvement provisions to increase access to justice. Lastly, this paper concludes that clear and broad involvement provisions strengthens the deterrent purpose of pecuniary penalty regimes and suggests the ER Act may be amended to effect this purpose.

II. Liability for breaches of the law

Accessorial liability, the focus of this paper, is one method by which a person can be held liable for breaches of the law. It is useful to set out the different avenues of liability and illustrate the differences between primary liability and secondary liability, both of which are critical to the enforcement of workplace laws.

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Primary liability is the kind of liability a person has for breaches of their own obligations, including duties owed by them to others that cannot be delegated or as a result of their own conduct falling short of a set requirement. In workplace laws, for example, an employer has a primary liability to pay in accordance with the minimum standards set by law. That kind of primary liability is assessed as strict liability, comparing what needed to be done with what was actually done by that person. Another common test for primary liability of an employer is its vicarious liability. Vicarious liability, in an employment relationship, is defined in the general law as well as in different subject matter statutes.[1] Vicarious liability will attach liability to the employer for the conduct of its employees within the course of their employment, or completing acts incidental to those duties.[2]

Secondary liability is an auxiliary method of determining liability for a wrong. Unlike primary liability (whatever method is used to assess that liability), secondary liability relies on the primary wrongdoer being engaged in actionable conduct before secondary liability can be considered. This is because secondary liability, also known as derivative liability, arises because of the different type of conduct, knowledge and position of the person engaged in conduct that could attract secondary liability. This is explored in further detail below, given its central nature to the statutory provision dealt with in this paper.

The question of who bears the legal responsibility and in what way for wrongful conduct is an evolving consideration in modern, statutory regulatory regimes.

III. The Starting Point: the Provision Itself in Current Law

The FW Act and the ER Act provide an identical test for a person's involvement in a contravention of those laws,[3] if the person:

a) has aided, abetted, counselled, or procured a breach (or contravention); or
b) has induced, whether by threats or promises or otherwise, a breach; or
c) has been, in any way, directly or indirectly, knowingly concerned in or party to a breach; or
d) has conspired with others to effect a breach.

The liability created by this provision, once established, is personal to the accessory. The law sees the accessory in the same way as the primary wrongdoer. However, accessorial liability hinges on that primary wrong and is derivative from it. For example, where a body corporate is vicariously liable for the wrongful conduct of its employee or agent, that employee or agent would be held liable as an accessory on the basis of their own conduct (depending upon the statutory regime at play).[4] This has been described as:[5]

> … the logical consequence of Salomon's Case … that the company, being a legal entity apart from its members, is also a legal person apart from the legal

[1] See, for example, *Dye v Commonwealth Securities Limited* [2012] FCA 242 at [631].
[2] *Morton v Commonwealth Scientific and Industrial Research Organisation (No 2)* [2019] FCA 1754 at [78].
[3] See s 550 of the FW Act and s 142W of the ER Act.
[4] Australian Law Reform Commission *Principled Regulation: Federal Civil and Administrative Penalties in Australia* [ALRC 2002 Report] (2002) ALRC 95 at 8.26. This general principle was established in *Mallan v Lee* (1949) 80 CLR 198 26 and was affirmed in the trade practices context in *Wright v Wheeler Grace & Pierucci Pty Ltd* [1988] FCA 129.
[5] *Hamilton v Whitehead* (1988) 166 CLR 121 at 128.

> personality of the individual controller of the company, and that he in his personal capacity can aid and abet what the company speaking through his mouth or acting through his hand may have done.

The origins of the provision are conspicuously of the criminal law. This informs our thinking about accessorial liability regimes. In particular, there is to be a practical connection between the accessory and the breach. Regardless of the exact words of the statute, accessorial liability depends upon the accessory associating themselves with the contravening conduct, such that they are "linked in purpose" and "must participate in, or assent to, the contravention".[6] They must have actual knowledge, beyond suspicion or negligence, of the essential elements of the contravention; but the accessory need not know that those elements amount to a breach of the law.[7]

The purpose of an accessorial liability provision is to create secondary liability for the same offence, but separate conduct associated with the primary wrongdoing. The object of these provisions is to create a sanction for the associated conduct, assessed under a different test of liability than the primary wrongdoing. The purpose is not, or at least was not initially, to substitute the accessory's liability for the primary wrongdoer's liability.

IV. The landscape in Australia

It is convenient and chronological to commence this part of the paper with the history of pecuniary penalty regimes and accessorial liability in Australia.

A. The Development of the Legislative Position in Australia

Australia's federal laws have always contained pecuniary penalty mechanisms, commencing with the Customs Act 1901 (Cth). In 1974, the then Trade Practices Act 1974 (Cth) introduced a modern pecuniary penalty regime "to avoid criminalisation of the types of commercial activity it governed".[8] This was, in contrast, to the consumer protection provisions concerning false or fraudulent representations. The then Attorney-General drew the distinction between conduct made unlawful by the Trade Practices Act which "is more commercial conduct dealing with competitors, driving them out of business and so forth. An endeavour has been made to treat this area in the civil sense."[9] Pecuniary penalties, resulting from civil litigation and not criminal prosecution, were advantageous by achieving deterrence of unlawful conduct and establishing norms of compliance within a newly regulated business community.

In 1977, amendments to the Trade Practices Act created the continuing form of accessorial liability in legislation today. The new provisions were transposed from existing sections of the Trade Practices Act that dealt with criminal liability; those sections were, in turn, based on the

[6] *Fair Work Ombudsman v South Jin Pty Ltd* [2015] FCA 1456 at [227] and [278] citing, amongst other authorities, *Construction, Forestry, Mining and Energy Union v Clarke* [2007] FCAFC 87, (2007) 59 AILR ¶100–686, 164 IR 299 at [26]. See also T Hardy "Who Should Be Held Liable for Workplace Contraventions and on What Basis?" (2016) 29(1) AJLL 78 at 87.

[7] *Yorke v Lucas* [1985] HCA 65, 158 CLR 661.

[8] ALRC 2002 Report, above n 4, at 2.54.

[9] Commonwealth of Australia *Parliamentary Debates* Senate (15 August 1974) 984–5.

Crimes Act 1914 (Cth).[10] The statutory criminal law dealing with accessories was longstanding at that time, and declaratory of the common law.[11]

From that time, a significant amount of diverse federal legislation incorporated pecuniary penalty provisions.[12] The accessorial liability provision in the Trade Practices Act has also appeared in workplace laws for some time, including the predecessor to the FW Act, the Workplace Relations Act 1996 (Cth). The effect of that provision was to allow pecuniary penalties to be imposed against accessories. However, there was no power for a court to order compensation to make good an underpayment other than against the employer.[13]

In 2009, when the FW Act was being enacted, Parliament intended the purpose and form of accessorial liability as it had existed to be replicated. The Government stated that the FW Act provision:[14]

> [2176] … means that a pecuniary penalty for a contravention of a civil remedy provision can also be imposed on a person involved in a contravention. For example, where a company contravenes a civil remedy provision, a pecuniary penalty can also be imposed on a director, manager, employee or agent of the company.
>
> [2177] However, while a penalty may be imposed on a person involved in a contravention, the clause does not result in a person involved in a contravention being personally liable to remedy the effects of the contravention. For example, where a company has failed to pay, or has underpaid, an employee wages under a fair work instrument, the director is not personally liable to pay that amount to the employee.

Clearly, the status quo in limiting remedies against accessories to pecuniary penalties was to be maintained. Because of this, before 2016, there was a limited appetite for compensatory remedies from accessories in Australia,[15] despite clear commentary expressing the availability of recovery of unpaid wages from accessories under the FW Act.[16] For the reasons set out below, and critically for a comparative analysis of the two regimes, the text of the FW Act and

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[10] Michael Pearce "Accessorial liability for misleading or deceptive conduct" 80 ALJ 104. See also *Fencott v Muller* (1983) 152 CLR 570 at 583, saying the Trade Practices Act's accessorial liability provisions "closely resemble those of s 5 of the Crimes Act [1914 (Cth)], although, of course, the former section refers to civil and the latter to criminal liability, a circumstances which provides no ground of distinction for present purposes".

[11] *Giorgianni v The Queen* (1985) 156 CLR 473 at 480 (Gibbs CJ), 490 (Mason J). See also *Yorke v Lucas*, above n 7, at 677: "[t]he term adds little to the more specific terms to be found in s 5 of the Crimes Act, but it ensures that none is omitted from the net of criminal liability whom the common law would include" (Brennan J).

[12] See, for example, s 301 of the *Navigation Act 2012* (Cth); s 352 of the *Commonwealth Electoral Act 1918* (Cth); and s 174 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth). There are also other forms of involvement or derivative liability provisions in Australia: for example, s 105 of the *Sex Discrimination Act 1984* (Cth).

[13] See the discussion of *Fair Work Ombudsman v AM Retail Solutions Pty Ltd [No 5]* [2010] FMCA 981, a case discussing the availability of compensation remedies against a director of the employing entity under the predecessor legislation, in Helen Anderson and John Howe, "Making Sense of the Compensation Remedy in Cases of Accessorial Liability under the Fair Work Act" (2012) 36(2) Melbourne University Law Review 335.

[14] Explanatory Memorandum to the Fair Work Bill 2008 (Cth).

[15] *Scotto v Scala Bros Pty Ltd* [2014] FCCA 2374; *Sponza v Coal Face Resources Pty Ltd* [2015] FCCA 1140; *Fair Work Ombudsman v Windaroo Medical Surgery Pty Ltd* [2016] FCCA 2505; *Fair Work Ombudsman v Chia Tung Development Corp Ltd* [2016] FCCA 2777 (concerning a compliance notice issued by a Fair Work Inspector); *Clarke v Elite Systems Australia Pty Ltd (No 2)* [2016] FCCA 2864.

[16] See Anderson and Howe, above n 13.

effect of the provision did not reflect that intention. The current position has developed since that time.

B. The Application of S 550 of the FW Act by Australian Courts

In 2016, *Fair Work Ombudsman v Step Ahead Security Services Pty Ltd* (*Step Ahead*)[17] was handed down. This was the first case brought by the Fair Work Ombudsman (the federal agency responsible for enforcing the FW Act) that proactively sought compensatory remedies from a director. The regulator was successful, with the Court providing a considered approach to s 550. The Court found that it had power to order individuals involved in the primary contravention to remedy the effects of that primary contravention, where appropriate.[18]

The facts of *Step Ahead* are relevant to the issue pressed in this paper. The director of the employer had previously come to the attention of the regulator, being responsible for the underpayment of employees across several failed businesses. Relevantly, the director was an officer of the company and had ultimate responsibility for its affairs, being its controlling will and mind.[19] The employing entity was in liquidation and, thereby, protected from being ordered by the Court to pay employees monies owing to them.

The Court determined that the director, as an accessory to the employer's underpayment contraventions, was liable to pay both compensation to the employees as well as penalties. In doing so, the explanatory memorandum to the FW Act was effectively ignored, or at least read down as not consistent with the plain language of the FW Act, particularly the broad powers of federal courts to make orders thought appropriate.[20]

Compensation orders against accessories were not described in *Step Ahead* as automatic on a finding of being an accessory. The Court sketched out some parameters:[21]

- It is not necessary for an applicant to establish that an act or acts of an accessory caused the relevant loss or contravention. This is because of the accessory is taken to have committed the contravention; in that sense, there is no different contravention.
- Whether or not a court should make orders, other than penalty orders against an accessory, will depend up the following non-exhaustive considerations:
    - whether such an order is unnecessary given the capacity of the employer to make the compensation payments;
    - the nature and extent of the accessory's involvement in the contravention, and their ability to pay;
    - any relevant public policy reasons; and
    - the nature of the order sought, including whether the accessory is to be made solely liable, or jointly liable.

[17] *Fair Work Ombudsman v Step Ahead Security Services Pty Ltd* [*Step Ahead*] [2016] FCCA 1482 per Judge Jarrett.
[18] See, in particular, at [47] to [77].
[19] At [33] to [36].
[20] This power is found in s 545 of the FW Act.
[21] *Step Ahead*, above n 17, at [67] to [72].

Where an accessory was not in a position to influence whether the employer brought about the loss, then compensation orders would be a less likely order of the Court.[22]

Since this decision, there has been an increase in the utilisation of s 550 of the FW Act to seek compensatory relief against accessories, beyond directors of the employing company. The advantages gained by the ability to name and pursue third parties to the employment relationship before and during litigation are self-evident. The category of persons who may be liable under the FW Act is an open one.[23] This is because s 550 of the FW Act acts "to protect the public by making each entity or person that is responsible for the unlawful conduct accountable for their conduct and separately penalised".[24] Non-director accessories may occupy a position of any description. The Courts have made orders against human resources managers,[25] payroll employees,[26] and other management or supervisory staff.[27] There is also a growing interest in corporate accessories being held liable.[28] There is little judicial discussion in these cases about the appropriateness of compensation orders against accessories.[29]

However, there is also broad agreement that the available remedies in the FW Act are not effective enough in deterring contraventions. The federal parliament has acknowledged that s 550 of the FW Act falls *"*short in addressing the range of ways that workers are exploited" and "there is more to be done to provide a more comprehensive solution to the deliberate and systematic exploitation of vulnerable workers that occurs in some Australian workplaces".[30] At that time, the views of Australian labour law academics to incorporate a test of control and influence, coupled with a reasonable steps test similar to vicarious liability defences in Australian anti-discrimination law, were endorsed as an appropriate test for non-employer third parties.[31] More generally, there has also been scrutiny of the disparate legislative mechanisms to improve recovery of outstanding employees' entitlements beyond the direct employer.[32]

This view persists even after the significant expansion in maximum penalties under a new "serious contraventions" regime and an evolution of other enforcement mechanisms (such as a

[22] At [73].

[23] Goodwin and Donaghey *General Protections Under the Fair Work Act* (Lexis Nexis, Chatswood (NSW), 2019) at 8.70.

[24] *Fair Work Ombudsman v NSH North Pty Ltd trading as New Shanghai Charlestown* [2017] FCA 1301 [*New Shanghai*] at [154] per Bromwich J.

[25] *New Shanghai*, above n 24; *Fair Work Ombudsman v Oz Staff Career Services Pty Ltd & Ors (No 2)* [2016] FCCA 2594; and *Fair Work Ombudsman v Centennial Financial Services Pty Ltd* [2010] FMCA 863, (2010) 63 AILR 101–27.

[26] *Fair Work Ombudsman v WY Pty Ltd & Ors* [2016] FCCA 3432; and *Fair Work Ombudsman v Ross Geri Pty Ltd* [2014] FCCA 959.

[27] *Fair Work Ombudsman v Grouped Property Services Pty Ltd* [2016] FCA 1034, (2016) 152 ALD 209, being a chief operating officer; and *Fair Work Ombudsman v Jay Group Services Pty Ltd* [2014] FCCA 2869, being a group operations manager and a recruitment manager .

[28] *EZY Accounting 123 Pty Ltd v Fair Work Ombudsman* [2018] FCAFC 134.

[29] In *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 92 ALJR 219, 273 IR 211, [2018] HCA 3, a majority, at [110], noted that the allowing orders to be made against accessories (and all other parties) "is limited to making appropriate preventative, remedial and compensatory orders and as such does not include a power to make penal orders" (per Keane, Nettle and Gordon JJ).

[30] Senate Education and Employment References Commission, Parliament of Australia *Wage theft? What wage theft?! The exploitation of general and specialist cleaners working in retail chains for contracting or subcontracting cleaning companies* (Report, November 2018) at 50, [5.32] and [5.33].

[31] At 50, [5.32] and [5.33].

[32] See Helen Anderson "*Determining Secondary Liability: In Search of Legislative Coherence*" (2019) 43(1) MULR 1.

reverse onus of proof where record keeping is deficient).[33] Together with the view that the form and utilisation of accessorial liability in the FW Act is lacking, discussions in Australia have now turned to whether or not criminal sanctions for deliberate wrongdoing are needed,[34] including to those outside of the employment relationship.[35] These proposals demonstrate some symmetry with the origins of accessorial liability in the Trade Practices Act.

V. The Landscape in New Zealand

Accessorial liability provisions in New Zealand laws have, similarly to Australia, mirrored the criminal law for the same reasons outlined above. In *New Zealand Bus Ltd v Commerce Commission* (*New Zealand Bus Ltd*), concerning accessorial liability provisions under the Commerce Act 1986 (NZ), the Court of Appeal said:[36]

> [127] It will be apparent from the way this case was approached by counsel and the Judge in the High Court that there was an acceptance that this subject area of the law is closely analogous to the criminal law relating to accessory liability, requiring both an actus reus and a degree of intention based on knowledge. Accordingly, the argument was as to the extent of the required knowledge which the alleged accessory must be shown to have possessed.
>
> [128] It is true that much of the language of s 83 mirrors the language in s 66 of the Crimes Act 1961, relating to parties to offences.

As in Australia, New Zealand has increasingly adopted pecuniary penalty regimes as a central part of its regulatory framework.[37] The majority of these regimes have been introduced since 2000.[38] From 2014,[39] amendments to the ER Act were contemplated to capture broader accessorial liability provisions and create a new pecuniary penalty regime to be effected in the Employment Court.[40]

A substantive cabinet paper,[41] which lead to the Employment Standards Legislation Bill 2016 (NZ), outlined the reasons for the amendments. It was noted that:

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[33] These reforms were enacted in Fair Work (Protecting Vulnerable Workers) Act 2017 (Cth), in effect from 20 September 2017.

[34] Australian Government, Attorney-General's Department consultation *Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance* (September 2019).

[35] *Report of the Migrant Workers Taskforce* (Commonwealth of Australia, March 2019) at Recommendation 11.

[36] *New Zealand Bus Ltd v Commerce Commission* [*New Zealand Bus Ltd*] (2008) 12 TCLR 69, [2008] 3 NZLR 433.

[37] Law Commission *Pecuniary Penalties: Guidance for Legislative Design* (NZLC 133, 2014) at 14.

[38] At 15.

[39] On 9 June 2014, Cabinet agreed to the release of the discussion document *Playing by the Rules – Strengthening Enforcement of Employment Standards* to seek views on a number of high-level options to address the issues identified above: Cabinet Paper 'Strengthening Enforcement of Employment Standards' (28 July 2015) (2015) Cabinet Report) at [19].

[40] Section 134 of the ER Act provides that a person who "incites, instigates, aids, or abets any breach of an employment agreement is liable to a penalty imposed by the Authority", which concerns a claim of a different nature and has existed in labour laws in New Zealand historically. This paper is concerned with pecuniary penalties enforceable in the Employment Court only as enacted from the Employment Standards Legislation Bill 2016 (NZ).

[41] (28 July 2015) 2015 Cabinet Report. See also at [76].

- "the ability for directors and other individuals to avoid accountability, including commonly winding up a company to avoid paying arrears when they are found to have breached employment standards" was a contributor to the low levels of compliance with employment standards;
- "sanctions that are appropriate for most breaches but are not adequate to deter serious and systematic non-compliance";
- "resourcing constraints in the employment standards regulatory system has contributed to the system struggling to adequately respond to the pressures emerging at the more serious end (such as migrant exploitation) and at the less serious end (such as employers needing information and advice)";
- the Labour Inspectorate was, at the relevant time, investigating a growing number of serious breaches of employment standards, such as serious breaches involving migrants and other vulnerable groups and systemic breaches (where breaches are aggregated over a large number of employees); and
- the amendments were intended to enhance the ability to hold persons other than the employer accountable for breaches.

What would become s 142W of the ER Act was taken from both s 550 of the FW Act and a number of pieces of legislation in New Zealand.[42] Given that New Zealand's adoption of pecuniary penalty regimes has been strongly influenced by practice in Australia,[43] this is not unusual. It was intended that Australian case law concerning accessorial liability would be relied upon in interpreting and application the new provision,[44] which is also a usual feature of Trans-Tasman judicial reasoning.[45]

Section 142W of the ER Act was introduced in 2016 as part of a broader reform of the ER Act.[46] Other labour laws in New Zealand contain involvement provisions but are all referable to this primary test.[47] The 2016 amendments are framed around the serious breaches of minimum entitlement provisions, allowing declaratory, penalty and compensation orders to be sought by a Labour Inspector.[48]

However, with the introduction of the amendments to the ER Act, additional provisions were incorporated that go beyond the accessorial liability provisions known to Australian law and which cannot be found in the FW Act. In response to concerns raised that accessorial liability could capture "innocent or even negligent participation" such that "individuals could be unwittingly caught" by the new provisions,[49] the category of persons who could be involved in a contravention was restricted. This restriction is despite the requirement at law for a court to conclude that an accessory had sufficient knowledge of the essential elements of the breach, and was practically connected with the commission of the breach. Only officers of corporate employers and those in positions of seniority to exercise significant influence within the

[42] At [43].
[43] NZLCR, above n 37, at [4.4] and [5.2].
[44] 2015 Cabinet Report, above n 41, at [45].
[45] There is a degree of comity between Australian and New Zealand courts in the application of similar laws. See *New Zealand Bus Ltd*, above n 36 (a case concerning the liability of accessories for pecuniary penalties) at [135], citing *Union Shipping NZ Ltd v Port Nelson Ltd* [1990] 2 NZLR 662 at 700: "real respect is to be accorded to the Australian authorities, and there is much to be said for trans-Tasman uniformity in this area".
[46] Employment Relations Amendment Act 2016 (NZ).
[47] See subs 13(3) of the Wages Protection Act 1983 (NZ); subs 10(4) of the *Minimum Wages Act 2016* (NZ); and subs 75(3) of the Holidays Act 2003 (NZ).
[48] See subs 142A(1) of the ER Act.
[49] 2015 Cabinet Paper at [46].

employer's business could be involved. Further, "in order to guard against excessive and/or vexatious claims",[50] employees who were affected by the serious breaches do not have standing to pursue pecuniary penalties. Those novel departures from accessorial liability provisions in Australia and New Zealand became law.[51]

Perhaps the furthest departure from the developed position in Australia and New Zealand in this space, the ER Act also introduced the concept of a defence to accessorial liability.[52] A defence to an order to pay compensation was inserted to remove liability for wages or other monies owed if the defence is established.

VI. Discussion of the Differences Between the FW Act and the ER Act

The key differences between the FW Act and the ER Act are the category of persons who can be involved as an accessory, what can be sought against those persons, the identity of those with standing to bring relevant proceedings and the fact of available defences are critical.

Those differences are relevant to the practice of the law but are, more importantly, significant in how the regulated community is liable for breaches of the ER Act. The extent of liability is relevant to the level of deterrence being effected by the ER Act's accessorial liability provisions. The legislature clearly contemplated that the 2016 amendments were intended to increase access to justice, strengthen enforcement options and activity, highlight the need for deterrence and to do this in a manner aligned with existing, and well understood, accessorial liability regimes in New Zealand and the FW Act. However, as the differences between the FW Act and the ER Act were borne from policy considerations outside of the normative practices surrounding accessorial liability, the effectiveness of the ER Act may be hindered by the conceptual and legal conflicts created by those carve outs. The ER Act's regime is also, on any view, more complicated, difficult to navigate and produces less certain outcomes. A contrasting view, explored below, is that the outcomes achieved are not dissimilar but that the two jurisdictions have alternative approaches to accessorial liability within pecuniary penalty regimes.

A. A Different Emphasis on the Role of the Courts

In Australia, the FW Act does not extend beyond stating the test to be met in finding accessorial liability and requiring orders made by relevant Courts to be, in the Court's view, "appropriate". The rest is up to the Courts, drawing on a long history of judicial authority and reasoning, as exhibited in *Step Ahead*.

In New Zealand, much is prescribed in the ER Act itself. The Court can only entertain claims, for example, against directors or those senior enough to have significant control and influence over the employing entity. Compensation can only be sought against an accessory to the extent that the employer cannot make good the wages or other money owing. Should involvement be determined, orders against an accessory for compensation to make good the underpayment may be refused if a defence is made out. The Courts are provided with a clear roadmap for their decision making.

[50] 2015 Cabinet Paper at [47].
[51] See s 142W and s 142X of the ER Act, respectively.
[52] See s 142ZD of the ER Act

In many ways, the *Step Ahead* decision and the reasoning helpfully set out by the Court in that case illustrate a similar liability framework. To compare the ER Act and the comments made in *Step Ahead*, it can be seen that there is a high degree of convergence.

The ER Act	**The FW Act's application re *Step Ahead***
Identity of an accessory: who can be involved as an accessory?	
An officer of an entity. If the breach is by a company, partnership or sole trader, only an "officer of the entity", being a director, partner, a person occupying a position comparable to a director or a position with significant influence over the management or administration of the entity, can be a person involved in a breach	The category is unlimited. However, accessorial liability requires a practical connection between the accessory and the primary wrong. Accessories must have actual knowledge of the essential elements of the contravention. A person adjacent to wrongdoing that is not an intentional participant is not an accessory.
Nature of the order for compensation: solely liable, joint and several liability or proportionate liability	
An accessory involved in a contravention is shielded from making good an underpayment or other loss where an employer is "able" to pay. The assessment of this ability is unclear, other than in previous cases where the company is in liquidation.	Whatever is appropriate; the Court will have regard to the form of the order in determining whether compensation should be ordered against the accessory.
Standing: who can bring a claim for penalties in the Court?	
Only a Labour Inspector	The regulator, the employee, employee organisations (unions) on behalf of an employee and, if concerning an enterprise agreement, an employee organisation

Reflecting on the facts of the *Step Ahead* case, it is unlikely that the case would have resulted in a different outcome had it also been brought by the New Zealand regulator.

This reflects, perhaps, a difference of perspective between the countries about the role of the courts in determining the scope and application of the law. By analogy, Australian and New Zealand courts are subject to different legislative direction in the consideration and assessment of pecuniary penalties. In Australia, the power to order pecuniary penalties under the FW Act is contained in s 546, but the penalty factors are a creature of the courts, having regard to principles of sentencing.[53] These considerations have been relevant for decades in Australia and were used to assess penalties imposed under earlier legislation.[54] In New Zealand, s 133A of the ER Act demonstrates a prescriptive approach on penalty,[55] codifying most of the matters that the Court is to consider.[56]

B. A Different Emphasis on the Purpose of Accessorial Liability

[53] *Kelly v Fitzpatrick* (2007) 166 IR 14; [2007] FCA 1080 per Tracey J at [14], adopting *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7.

[54] For example, *Gregory v Philip Morris Limited* (1988) 80 ALR 455, concerning the *Industrial Relations Act 1988* (Cth).

[55] This is also a feature of other pecuniary penalty regimes in New Zealand: see subsection 83(2) of the *Commerce Act 1986* (NZ).

[56] *Boorsboom v Preet PVT Ltd* [2016] NZEmpC 143, (2016) 10 NZELC 79-072.

Both Australia and New Zealand's legislatures acknowledge that the objective of pecuniary penalty regimes is deterrence.[57] Deterrence simply means the public interest in compliance. Pecuniary penalties put a price on breaches so that it is not considered as an acceptable cost of doing business.[58] Pecuniary penalties, including as ordered against accessories, counteract the financial gain from any breach.[59] These considerations arise from the civil nature of pecuniary penalty regimes and are unlike the purposes of the criminal law.

It is less certain that the purpose of pecuniary penalty regimes is to have a person involved in a contravention substitute for the primary wrongdoer's liability. As was described earlier in this paper, the assessment of accessorial liability is different and separate to the primary wrong, but an accessory is taken to have contravened the law themselves. Conceptually, that an accessory may themselves have gained financially as a third party to the primary breach is relevant in this discussion.[60] In this analysis, the consideration in *Step Ahead* is instructive.

Allowing court action to require individuals sitting behind a corporate structure, who have caused the loss to arise, to rectify that loss can be important for both specific and general deterrence, especially when combined with a pecuniary penalty.[61] That has been recognised by the courts in Australia.[62] The ER Act is divergent in its construction of the identity of an accessory and the compensation available (including the availability of a defence, explored below). What remedies are available against accessories and in what circumstances reflects on the underlying purpose of the pecuniary penalty regime itself. On this point, it appears that the regimes in Australia and New Zealand pursue similar but not the same objectives. Importantly, the access to and availability of broad remedies against accessories impact upon the ability of aggrieved employees to pursue wrongdoers. A reduced ability to do so departs from the hopes of the legislature, stated prior to the 2016 amendments, that increasing non-compliance and exploitation could be combatted by strengthening enforcement levers and opening up remedies against parties who had previously not been accountable.

C. The Availability of a Defence to Accessorial Liability

In New Zealand, the utility of the defence to accessorial liability arises from avoiding compensation orders being made personally against accessories. Under the ER Act, an accessory who demonstrates a reasonable reliance on information supplied by an external person or who took all reasonable and proper steps to ensure compliance will avoid a remedy against them. There is no defence to the imposition of a penalty.

This concept is not known to the law in Australia for accessorial liability in this form. The defence mirrors similar provisions in vicarious liability provisions in some Australian anti-discrimination law. Those provisions require those potentially vicariously liable (such as employers for the actions of their employees) to demonstrate reasonable steps were taken to

[57] See *New Zealand Bus Ltd*, above n 36, at [193]; and *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 90 ALJR 113, 225 IR 87, [2015] HCA 46 at [55].
[58] See *Trade Practices Commission v CSR Ltd* [1990] FCA 521(1991) 13 ATPR ¶41-076 at [40]; and *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 at 659 [66], [2013] HCA 54.
[59] NZLCR, above n 37, at [1.09].
[60] ALRC 2002 Report at [2.118].
[61] Anderson and Howe, above n 13, at 342–343.
[62] *Zhu v The Treasurer of New South Wales* (2004) 218 CLR 530 at [121]; referred to in *Step Ahead*, above n 17, at [76].

avoid the wrong.[63] However, that is problematic, as vicarious liability is not the same kind of creature as accessorial liability; vicarious liability is direct liability, based on another's conduct, whereas accessorial liability is derivative liability, based on the accessory's conduct that is associated with the primary wrong. This also is likely to cause further confusion, as an examination of a person's reliance on information or reasonable steps may displace the court's analysis (required in any deployment of accessorial liability provisions) that the person had actual knowledge of the essential elements of the contravention or had a sufficient practical connection to the wrongdoing. A further complication may be the adoption of facts more properly suited to the sentencing assessment completed at a penalty stage of proceedings, where the nature and extent of the wrongdoer's conduct and the circumstances of the breach is taken into account in setting an appropriate remedy. It is unlikely, given the complexity, that the provisions will be uniformly applied and may not represent a reliable course of action for an accessory or their advisors to contemplate. Review of the ER Act in due course may consider, as is suggested in Australia, that the form of the defence better suits the ER Act as the test for liability of third parties to the employment relationship.[64]

Finally, allowing an accessory who is involved in a breach to avoid liability to make good the underpayment ignores the very likely fact that accessories have personally benefited from the wrongdoing. Perversely, in New Zealand, the restriction on naming an officer of the employing entity increases the likelihood of this scenario. Pecuniary penalty regimes may not have set out to substitute the primary wrongdoer's liabilities to an accessory in full. As the law is now understood, it is consistent with the accessory being taken to have contravened the law themselves and the desire to discourage financial and other gain by accessories in wrongdoing to do so, where appropriate. Both compensation and penalty remedies against accessories aid in the promotion of deterrence and simple open access to these remedies increases this. By allowing a defence to compensation, which is already a difficult path for affected employees to access, the ER Act has departed the furthest from the objectives and understanding of the FW Act provisions transposed into it in 2016.

VII. Conclusion

This paper has outlined the background and development of accessorial liability provisions in the FW Act and the ER Act. These provisions diverge by placing different emphasis on the role of the courts to determine for themselves what is appropriate. This is likely to impact on the accessibility of the ER Act's regime and its effectiveness in creating deterrence, which this paper argues is achieved both through penalty and compensation orders against accessories. Further differences in the ER Act, particularly the availability of defences to accessorial liability, are likely to upset the application of the existing law. These issues may require amendment of the ER Act in the future.

[63] See s 106 of the Sex Discrimination Act 1984 (Cth).

[64] New Zealand has recently expanded the right for employees who work under the control and direction of another business or organisation to allege a personal grievance against that party, who is not their employer: Employment Relations (Triangular Employment) Amendment Bill 2019 (NZ).

"No Jobs on a Dead Planet": At the Interface of Employment – Climate Change Law

M A GRAHAM*

Abstract

As governments and companies begin to take actions to both mitigate and adapt to the existential threat of climate change, employment relations lawyers and academics must now take notice and prepare for the growing legal reality where climate change issues and employment relations are inextricably intertwined. This paper identifies key areas pertinent to this intersection and the ways it is currently being addressed locally and internationally. The paper explores the emerging concept of Just Transition as a developing analytical tool to better understand the varied actions and options that employment relations actors can take, as well as those being taken under the new climate change regime.

I. Introduction

Following the New Zealand Government's announcement banning all new future off-shore oil-exploration permits in line with its ambition to combat climate change, the future of Taranaki's mostly oil and gas-dependent workforce was thrown into a tailspin.[1] Those workers, as well as others across New Zealand facing similar fates, are likely to turn to lawyers and legal scholars for answers about the impact of the new climate-change regime on their livelihoods.

This article aims to contribute to the small but emerging field that synthesises the usually disparate fields of environmental law and labour law by identifying the key legal challenges and opportunities that are happening now, and are likely to arise in employment law under the new climate change regime. Part I looks at the idea of "Just Transition", a vexed concept that the current Government has declared a commitment to, and yet seems confused about what it is and how to apply it. This section will also examine the adopted Climate Change Response (Zero Carbon) Amendment and its relationship to Just Transition and its expected impact in labour relations. Part II is this author's regulatory impact analysis of climate change issues on essential areas of the New Zealand employment legislation and it identifies several problematic deficiencies needing immediate legal attention. Part III considers the role of the key actors in the employment field, what actions they can and are taking around raising awareness and advocating or litigating climate-employment issues.

It is not the purpose of this article to cover all the features of the future of work, such as the risk of automation (though undoubtedly much of what is raised here is applicable) nor would it be possible to cover all of the countless intractable problems arising at the intersection of climate change and labour relations.

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[1] Isaac Davison "Prime Minister Jacinda Ardern bans oil exploration" *The New Zealand Herald* (online ed, Auckland, 12 April 2018).

II. Just Transition

The 2015 Paris Agreement preamble states that the signatory parties to the agreement are those that take "into account the imperatives of a Just Transition of the workforce and the creation of decent work and quality jobs in accordance with nationally defined development priorities".[2] The question of what is meant by Just Transition has a seemingly straightforward answer about creating 'decent work" and "quality jobs", yet, on deeper analysis, it is an incredibly vexed issue, due to the various meanings attached to and operated on by different stakeholders in climate change thinking. While there is some historical truth and international legal consensus identifying it as an exclusive trade union project of protecting employees from the worst effects of any large-scale industry transition, modern understandings are far more expansive and have very different sets of goals and processes.

That said, despite the large-scale expected interference in work, work processes and labour markets arising from environmental changes and adaptation or mitigation responses to climate change, there has been little movement from legal practitioners in either environmental or employment fields to advocate, litigate or bring attention to potential disputes and issues that may arise under the new climate change regime.[3] In response, there is an emerging exploration of the intersection of environmental and labour market regulations, including one Canadian legal academic who proposes a new legal discipline of "Just Transition Law" to refer to advocacy and litigation occurring in this space.[4]

So far in New Zealand, Just Transition is something that is being considered by the current Government, most notably in the form of the Just Transition Hub (JTH) under the umbrella of the Ministry of Business, Innovation and Employment. In 2019, the Government also held the Just Transition Summit in New Plymouth as a way to engage affected stakeholders from the Taranaki oil and gas permit ban and to facilitate discussion around the Government's commitment to a low-emission future.[5] Arguably, there are also some minor (albeit indirect) elements of Just Transition in the Climate Change Response (Zero Carbon) Amendment Act 2019 (ZCA).[6]

It is legally relevant to critically examine what is happening in this area because both the Summit and especially the JTH, under the heading of Just Transition, are the nexus of climate change and employment issues from which future policy and legal developments in New Zealand will arise.

To guide thinking in this area, *Mapping Just Transition(s) to a Low-Carbon World* by the Just Transition Research Collaborative is an incredibly useful resource. Its authors identify four different and distinct approaches to Just Transitions namely: a "Status-quo" approach; a "Managerial reform" approach; a "Structural reform" approach and a "Transformative" approach.[7] The point of delineation between each approach is how narrow or expansive each view takes as to *whom* would be the focus of Just Transition policies and what changes would be necessary to

[2] The Paris Agreement [Paris Agreement] (opened for signature 22 April 2016, entered into force 4 November 2016) at Preamble.
[3] Ania Zbyszewska "Labor Law for a Warming World: Exploring the Intersections of a Work Regulation and Environmental Sustainability: An Introduction" (2018) 40 Comp Lab L & Poly J 1 at 2.
[4] David J Doorey "A Law of Just Transitions?: Putting Labor Law to Work on Climate Change" (2016) Osgoode Legal Studies Research Paper Series 164 at 5.
[5] Just Transition Hub "About the Just Transition Summit" Just Transition Summit <www.justtransitionsummit.nz>.
[6] Climate Change Response (Zero Carbon) Amendment Act 2019.
[7] Just Transition Research Collaborative *Mapping Just Transition(s) to a Low-Carbon World* (United Nations Research Institute for Social Development, 28 November 2018) at 12–15.

achieve a successful Just Transition for that designated group.[8] For example, a Status-quo Just Transition is one where corporations and "green investment" take the lead in providing replacement jobs in an impacted region after a government creates a market for such investment and possible liberalisation of labour laws.[9]

On the other end of the spectrum, a Transformative Just Transition proposes a complete overhaul of current political and economic systems and attempts to resolve, not just labour issues, but all social and cultural inequalities as the only acceptable solution in transition. Regardless of the respective merits of each of the approaches, the point is simply that Just Transition does not have a unique or broadly accepted understanding, something which, if not clearly defined or decided upon from the outset by policy-makers, can lead to contradictory, vague and frustrated low-carbon transition plans.

A. A Just Transition Hub for Everyone and for No One

This author's view is that the JTH has a concerning problem in that it has defined Just Transition for itself in a very mixed, if not confused, way by attempting to incorporate each of the four approaches mentioned above and, as a policy-maker, it is setting itself up for conflicts and doomed transition planning by trying to include different and disparate stakeholders while also promising different methods that are radically contradictory to each other.

For example, the JTH identifies that Just Transition is about a partnership with "Māori/iwi, local government, business, communities and the workforce to identify, create and support new opportunities, new jobs, new skills and new investments".[10] By trying to treat these groups equally and work with them all at the same time, it is failing to account for zero-sum game conflicts, where one possible transition proposal will be opposed to, if not negatively impact, one or more of the other groups. A foreseeable example would be a plan to redeploy labourers into energy-efficient home insulation or solar-panel home installation schemes yet, in order to allow for the capacity and speed necessary for such large-scale supply of the materials, specific safety standards will need to be relaxed which ultimately could injure the labourers. Incredibly, this has already occurred in Australia, where four young electricians died from fires caused by faulty home insulation under a Federal Government transition scheme, which was ultimately abandoned following the deaths.[11]

Likewise, the ambition for a transformative economy "that is more productive, sustainable and inclusive" raises the question of to what extent can those three elements equally co-exist with each other?[12] A transformative approach of Just Transition would argue that it is impossible to have both a productive and inclusive economy, given that a modern capitalist economy necessarily creates inequalities for the sake of profitability.[13] Inversely, a Status-quo approach would argue that the market and investment is key to creating new green jobs to replace old high-emission ones and would likely expect necessary liberalisation of employment or health and safety regulations in order to attract said investment, yet would inevitably depreciate the quality and safety of these new jobs.

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[8] At 28–29.
[9] At 28.
[10] Cabinet Paper "Just Transition to a Low Emissions Economy: Strategic discussion" (12 April 2018) Ministry of Business, Innovation and Employment <www.mibie.govt.nz> at Annex 2.
[11] Darryn Snell and Peter Fairbrother "Unions as environmental actors" (2010) 16(3) Transfer: European Review of Labour and Research 411 at 417.
[12] Cabinet Paper, above n 10, at Annex 2.
[13] Just Transition Research Collaborative, above n 7, at 29.

The JTH states that its aware of distributional impacts of change and seeks to maximise the net benefits of transition across New Zealand regions.[14] Geography is a particularly troublesome issue because the current attention, investment and consultation happening now in the Taranaki region is unlikely to be replicated at the same level elsewhere in New Zealand, in those communities that, like Taranaki, are equally dependent on carbon-intensive or high CO_2-emitting extractive industries (such as the West Coast of the South Island).

The odd thing is that the JTH is aware that transitions to a low-carbon future will result in inevitable costs and unequal outcomes between many sectors and individuals.[15] Nevertheless, from the available literature about what the JTH is and what it plans to do, it does not seem to be willing to plan for, or at least be honest about this reality.

Perhaps, given that it is a relatively new organisation, the JTH may currently be working on trying to answer these issues, yet, without a clear understanding from the start about who and what is not going to be included in Just Transition, this may result in an uncertain policy and ineffective transition plans.

B. The Zero Carbon Act and Just Transition

Save for one vague mention of "a just and inclusive society" in the Explanatory Note there is no reference to "Just Transition" anywhere in the proposed operative section of the ZCA.[16] This did not go unnoticed during the public submission stage of the Bill; and several submissions declared their support for its inclusion, some envisioning it as part of the s 4 Purpose provisions.[17] That said, there are five areas in the ZCA relating to matters for which the Commission or the Minister must take into consideration that are promising steps towards Just Transition thinking. All five provisions inter alia require reference to or consideration of social and economic impacts as well as distributional impacts in terms of background expertise of appointments of Commissioners, adopted technology, considerations in setting emissions budgets, national risk assessments and national adaptation plans.[18] While there are no explicit references to employment issues or "Just Transition", considerations of social, economic and distributional matters are undoubtedly going to deal with employment changes and labour-market risks in both mitigation and adaptation proposals.

However, there are two queries around this area of the ZCA. First, there is no hierarchy of these matters and no provisions for how the Commission/Minister would balance or qualify each of the matters against each other. Social, economic and distributional factors are not the only matters to be looked at, and the question, then, is: how would the Commission or Minister be able to decide how to proceed when there may be zero-sum gains and losses amongst all the matters under a proposal? For example, in s 5Z(2), a proposed emissions budget may have little or no adverse outcomes in 10 out of the 11 matters, yet the remaining matter would have a profoundly negative impact. Would the Commission then scrap that proposed budget to start again, or would it proceed on a majoritarian basis and accept the negative impacts?

[14] Just Transitions Unit "Just Transitions Academic Round Table Key Themes" (Just Transitions Unit Roundtable, Wellington, September 2018) at 2.
[15] At 4.
[16] Zero Carbon Amendment Bill, Explanatory Note.
[17] See for example Generation Zero "Public Consultation Submission on the Zero Carbon Bill" (Ministry for the Environment, 09944-Generation Zero, 2018) at 11.
[18] Zero Carbon Amendment Bill, ss 5H, 5L, 5ZN and 5ZQ.

Secondly, what options are there for those from the labour relations space to intervene or challenge an emissions budget, risk assessment or adaptation plan? Assuming that a proposed emission budget would lead to significant job losses in a particular region, what if this decision arose from the Commission, taking a narrow and labour-exclusive interpretation of the respective provisions? Or what if the Commission did consider employment issues but decided to proceed despite the evident harms? In this case, the Commission would have discharged its statutory duties in "referring" to the matter, but it is not obligated to cancel or modify that proposal, even if the specific matter had adverse outcomes.

The only solution possible would be an actor from the employment space, a trade union, business or an individual employee to raise a Judicial Review claim against the Commission or Minister for ignoring relevant employment concerns or proposals falling outside of a "Just Transition" standard. However, without "Just Transition" being mentioned in the operative section of the ZCA, it is unclear to what extent this challenge would be successful.

III. A Climate Change Regulatory Analysis for Employment Legislation

This section will be split into two parts. The first dealing with likely areas of legal dispute arising under climate change in three key employment statutes and fields of law that fall under the heading of employment-centric legislation. Those being the Employment Relations Act 2000 (ERA), the Health and Safety at Work Act 2015 (HSA) and the Accident Compensation Act 2001 (ACA). The second section looks at current and future legal strategies by employment stakeholders in the face of climate change.

A. Application to the Employment Relations Act 2000

Under the new climate change regime, an obvious and inevitable area of dispute under the ERA is likely to arise around redundancy, restructuring and compensation for loss of work. There are several legal issues already existing in this area of law which will be amplified by the new climate change regime.

The first area to examine is the re-focussing of existing roles under the climate change regime. It is expected that a number of existing jobs, especially those in the existing fossil-fuel industry, will not necessarily be made redundant as much as they will be realigned, in terms of changing work duties, requiring different skills, as well as changes in hours and location. In some of these roles, it may be the case that an existing position is to be substantially altered, yet the employer wishes to retain the existing employee in that role. Take for example, a Field Machinist currently employed on an off-shore oil rig, specifically working on drill machining and maintenance. The oil company, in line with company change in direction to green energy, wishes to re-deploy this worker into blade machining and maintenance for a planned wind turbine.

The issue here is, at what point can a role be re-focussed or altered so much that it amounts to unintended cancellation of the existing employment contract and effective redundancy? In *Howard v New Zealand Pastoral,* it was held that there is no redundancy where there is a new job created with a different focus but remained substantially similar to the old role.[19]

[19] *Howard v New Zealand Pastoral Agricultural Research Institute Ltd* [1999] 2 ERNZ 479 (EC).

The ERA does not define redundancy, nor does it offer much in the way of statutory protection for redundant employees.[20] As such, employment cases must rely on the relevant contract to define a redundancy event which raises an additional problem in that, because the definition of redundancy is not clearly defined, confusion by all parties could occur when existing roles are modified to be more climate-aligned. These types of disputes would undoubtedly be fact-driven, but then there remains the issue of what "substantially similar" means.

The second area of interest considers personal grievance for unjustified termination via redundancy under s 103A ERA by a business in a transition scenario. The authority of *Grace Team Accounting v Brake* holds that a Court is permitted to inquire into business decisions about redundancy to ascertain if it falls below what a "fair and reasonable employer" would have done.[21] However, the Court will not go so far as to substitute its view for the subjective business judgment of the employer.[22] The question, here, is how far can the ratio of *Grace Town Accounting* be pushed, for example where the Government decides to provide financial assistance and support packages for an affected region? Say a shopkeeper in New Plymouth makes an employee redundant due to declining business and restricted imports but is the only shopkeeper in the region to do so because the others have taken up the Government offer of subsidies or re-training schemes. In this case, it would be arguable to find the action substandard but, what if in the same scenario, only half of the businesses in the region took up the offer of government support? Or what if the impugned business took up some parts of an offered support package but rejected other assistance which could have prevented the redundancy?

The point here is that the fair and reasonable standard will likely now need to factor in broader governmental economic strategy and plans, given the predicted widespread and regional needs under the new regime and the necessity to meet the 2050 emission reduction targets. That said, it is open at this stage to question how this fair and reasonable employer standard could be consistently applied by the Tribunal or courts when faced with a multitude of disparate regional, economical and work cases where personal grievance is claimed over redundancy dismissals. It would be an inconsistent outcome if courts were to find one dismissal unjustified for a large uptake of government support in one part of country and find the converse in another part of country, where no support was offered but the redundancy was still caused by the change in commercial viability triggered by the new regime.

The third area of dispute is around redundancy compensation. Under the ERA, compensation for redundancy is not a statutory obligation and, where it is absent from a contract, the current case law position affirms the primacy of contract and that it is not the place of the courts to add terms like compensation into it.[23] Further, even where compensation was a contractual term, in cases where a company goes into liquidation, a possibility where the business model collapses under the new climate change regime, compensation owed to employees is ninth on the priority list of preferential creditors' claims, which could easily result in many employees not getting the full amount, if any at all, of the compensation owed.[24]

The prospect of large-scale impoverishment following climate-related redundancies is a key worry, and yet there is no indication by the Government of addressing this deficiency.

[20] Richard Rudman *New Zealand Employment Law Guide* (Wolters Kluwer, Auckland, 2018) at 407.
[21] *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, [2014] ERNZ 129 at [94].
[22] *G N Hale & Son Ltd v Wellington Caretakers IUW* [1991] 1 NZLR 151, (1990) ERNZ Sel Cas 843 (CA) at 157–158.
[23] *Coutts Cars Ltd v Baguley* [2002] 2 NZLR 533 (CA).
[24] Companies Act 2003, sch 7(1).

B. Health and Safety at Work, ACC Cover and Climate Change

The next regulatory impact analysis explores how well-placed New Zealand's health and safety regulations, as well as the ACC scheme, are to deal with the above scenarios in the workplace. Adverse impacts of climate change on the working environment and workers are predicted to be numerous such as: heat stress;[25] reduced air quality;[26] and increased exposure to vector-borne diseases.[27]

Conversely, there are also unique hazards to workers arising from renewable energy and "green" industries, such as increased concentrations of carcinogenic radon arising from efficiency insulation in buildings;[28] fire and explosion risks of hydrogen transportation, storage and use;[29] exposure to toxic chemicals, such as cadmium – a known carcinogen, during solar panel manufacture, disposal and recycling;[30] and carbon capture and storage (CCS), exposing workers to highly toxic concentrations of CO_2 leading to acute respiratory and central nervous system illnesses.[31]

The key legal stressor for the HSW is to what extent are climate-related environmental and occupational harms capable of being foreseeable risks to health and safety and, if foreseeable, in what ways such a risk be "reasonably practicable" to eliminate or minimise by the duty holder?[32]

For example, one of the predicted climate-related harms will be heat-stress, which will impact outdoor workers, such as fruit-pickers or construction workers.[33] In this scenario, the heat-stress harm on outdoor workers in high temperatures is capable of being identified as a "reasonably foreseeable hazard" under HSW Regulations.[34]

However, in these types of work, being outdoors for extended periods is integral to the commercial efficacy and reality of the business. Since elimination of the risk would be impossible, the only option is minimising the risk, yet regularly keeping workers inside or avoiding going outside during the day or other such measures could become so detrimental to the business, especially in time-sensitive fruit-picking or building industries, that the business owner could escape liability under a "grossly disproportionate" cost defence despite the manifest suffering of their workers.[35] Further, some outdoor workers may be obligated to wear personal protective equipment under the HSW Regulations, but this would likely add to the heat-stress of the affected worker.[36]

In terms of ACC cover, there will be a need to update the ACA in order to reflect the nature of

[25] Max Kiefer and others "Worker health and safety and climate change in the Americas: Issues and research needs" (2016) Rev Panam Salud Pública 40(3) 192 at 193.
[26] At 194.
[27] At 194.
[28] Kevin Walls, Geza Benke and Simon Kingham "Potential increased radon exposure due to greater building energy-efficiency for climate change mitigation" (2014) Air Quality and Climate Change 48(1) 16.
[29] Health and Safety Executive "Health and safety in the new energy economy: Meeting the challenge of major change" (15 December 2010) HSE <www.hse.gov.uk> at 11.
[30] At 13.
[31] At 13.
[32] Health and Safety at Work Act 2015, ss 22 and 36.
[33] Kiefer, above n 25, at 193–194.
[34] Health and Safety at Work (General Risk and Workplace Management) Regulations 2016, cl 5.
[35] Health and Safety at Work Act 2015, s 22(e)
[36] Health and Safety at Work Regulations, cl 18.

injuries that may arise from adverse environmental impacts to workers. For example, in terms of mental injuries for emergency responders to natural disasters, the ACA will cover one single traumatic event.[37] However, inconsistently, it will not cover many yet smaller stressors that amount to gradual mental injury, something that is more likely due to increased workload and the challenging nature of the natural disaster response.[38]

The rise of new green technologies may result in unique types of chemicals or processes not yet seen in New Zealand workplaces, are either known but not statutorily accepted risks, or are of such an experimental level that there is not yet a medical understanding of the possible harms. As such, sch 2 of the ACA needs to be immediately updated in light of hydrogen production and fuel-cell technology being planned for Taranaki to cover possible gradual exposure injuries, as well as Parliament amending the ACA to allow for more flexible and immediate additions to the sch 2 list instead of additions being via the normal legislative process.[39]

C. Employment Actors and Future Climate-Employment Legal Strategy.

This section will explore the current employment strategies that are presently available to both employers and employees under the current legal regime as well as set out future developments arising from the interface between employment law and climate change.

i. Changing role of trade unions overseas

Overseas, there is evidence of a trend of trade unions moving beyond the usual industrial disputes over wages or conditions to now also organising, researching, litigating and negotiating around climate change. For example, a number of overseas trade unions have begun to adopt so-call "climate-bargaining" strategies where climate terms feature as part of employment agreements and workplace policy.[40] In one such collective agreement, the Australian National Tertiary Education Union bargained for a specific clause that implemented specific workplace environmental actions.[41] Of particular note is the Minneapolis-based SEIU Local 26 which undertook the strategy of "packaged" collective bargaining, whereby conventional issues of wages, hours and working conditions were proposed *in addition* to green demands, such as the creation of a "green" janitorial training programme and closure of the local rubbish incinerator used by the union's cleaning workers.[42] As of February this year (2020), union members went on strike over the breakdown of negotiations, citing, inter alia, the employer's refusal to accept their green proposals, an action that appears to be the first union strike over climate change issues in the United States.[43]

An example of legal intervention by a trade union is the California-based Southwest Carpenters challenging a number of local city planning decisions approving large-scale developments for inadequate environmental impact analysis including, among other things, greenhouse gas emissions.[44] Additionally, the AFL-CIO and Communications Workers of America filed a Federal

[37] Accident Compensation Act 2001, s 21B.
[38] Kiefer, above n 25, Table 1, at 193.
[39] Accident Compensation Act, sch 2.
[40] Snell and Fairbrother, above n 11, at 412.
[41] Federation University Australia Union Collective Agreement (UCA) 2015–2018 Federation University <www.federationuniversity.edu.au> at 81.2.4.
[42] "SEIU Local 26 Janitorial Bargaining Update #3" SEIU Local 26 <www.seiu26.org>.
[43] Jeremy Brecher "First US-Authorized Climate Strike?" (29 February 2020) Labor Network for Sustainability <www.labor4sustainability.org>.
[44] Letter from Witter Parkin LLP (representing the Southwest Regional Council of Carpenters) to Jamie Murillo

Court complaint in 2017 challenging a deregulation Executive Order by President Trump, where one such consequence of the Order would be to unlawfully undermine the Environmental Protection Agency's statutory duty to promote regulations controlling greenhouse gas emissions.[45]

In the United Kingdom, the Government has financed initiatives bringing trade unions, employers and employees together to create voluntary joint worksite committees to develop and self monitor green efficiency plans at work.[46] An example of this is when public services union, UNISON, successfully negotiated an agreement with the Stockport Metropolitan Council which commits both parties to work together to reduce the high-carbon footprint caused by Council public work activities; for all staff to be educated about climate change; opportunities to give feedback or proposals on sustainability proposals in the workplace; to allow for green workplace internal and external audits and for the creation of "union environmental reps" to promote and engage with the employer on green issues.[47]

Compared to overseas counterparts, climate-facing activity of New Zealand trade union movement is more limited. A study of 11 New Zealand Council of Trade Unions (NZCTU) affiliated unions revealed only two had developed basic climate-facing policies, with the remaining nine either inactive or non-committal to developing such policies, with seemingly little interest being raised by the membership.[48] Whether the NZCTU or local unions in New Zealand take further action beyond such policy discussions and lobbying remains to be seen, but the overseas examples mentioned have not left them wanting for ideas for escalated climate strategies and opportunities.

ii. Scope of "green industrial action" under the ERA

Industrial action remains an effective strategy, if not the most visible, of employment actors to force or change a specific issue, either generally or in relation to the other employment actors. Under the scope of the ERA, there are three identifiable lawful "green industrial actions" that are available for employment relationship stakeholders to bring attention to climate change or compel the other parties in favour of broader environmental issues.

The first action is "green-ban" strike action undertaken by a trade union and its member-workers. This type of action was an innovation of 1970s Australian trade unions where, subsequent to lobbying from local environmentalists, the union would direct workers to down tools on a proposed development project, effectively stopping the project, amounting to an industrial version of a court-ordered injunction.[49]

Currently under the ERA, a "green-ban" in this style is more or less illegal, unless it takes place in

(Senior Planner for City of Newport Beach) regarding Newport Crossings Mixed Use Project Draft Environmental Impact Report (PA2017-017) (14 January 2019) at 239. See also Hillary Davis "Labor union environmental appeal targets Newport apartment project" *LA Times – DailyPilot* (online ed, Los Angeles, 29 March 2019).

[45] *Public Citizen, Inc v Trump* "Memorandum Opinion" Case 1:17-cv-00253 Document 1 (DDC 2019) 41 at 117.

[46] Snell and Fairbrother, above n 11, at 413.

[47] Stockport Council and Stockport LG UNISON *Joint Environment and Climate Change Agreement* (3 May 2016) Stockport Metropolitan Borough Council <stockport.gov.uk>.

[48] Julie Douglas and Peter McGhee "Trade unions and the climate change fight" (5 July 2016) Briefing Papers <www.briefingpapers.co.nz.>.

[49] Verity Burgmann "The Green Bans Movement: Workers' Power and Ecological Radicalism in Australia in the 1970s" (2008) Journal for the Study of Radicalism 2(1) 63 at 65 and 81.

limited scope collective bargaining negotiations or on the grounds of health and safety.[50] Since the ERA does not exclude environmental issues from collective bargaining, it is entirely possible that climate change concerns form part of a package of demands in collective bargaining. For example, a trucking industry trade union could demand that the company and its drivers discontinue transporting fossil-fuel cargo in addition to other "bread and butter" issues during a renegotiation of the collective agreement. As long as the other provisions of s 86 ERA are complied with, this would be a perfectly legal green-ban.[51]

The second type of action is the converse of the first, but on the employers' side, where they could action a "green-lockout". While there is no history of this occurring, it is quite possible for employers to legally engage in a green-lockout pursuant to the relevant lockout provisions of the ERA.[52] For example, an employer could lock out their employees, or even aid another employer to compel a reluctant or protectionist trade union to accept progressive environmental terms, such as climate change mitigation/adaptation measures in the collective agreement. Such a green-lockout in the face of uncooperative employees is increasing in risk, especially where there is a trend towards heightened investor and community pressures on company directors to develop corporate strategies to set or improve low-emissions targets and other mitigation measures.[53]

The third type of green industrial action is on health and safety grounds, something available to both employees to strike for, or employers to lock out over, under the ERA and the HSW.[54] This action would arise, for example, if there is a particularly harmful chemical or dangerous process used. It cannot be ignored that much of fossil-fuel extractive work by its nature is highly dangerous, the disaster at Pike River coal mine comes to mind, so s 84 of the ERA is a possible avenue for fossil-fuel industry employees to both remedy the immediate harms of their workplace, as well as place pressure on their employer to begin a low-carbon industry transition.

It is worth noting the high school students around the globe who have begun taking "strike" action in protest of climate change. While not occurring in the context of employment relations and thus not a true industrial action, the principle of a strike remains the same – a group that willingly refuses to or absent themselves from their designated activity in order to pressure or advocate a specific issue. Also worth noting is that a number of trade unions, including New Zealand ones, supported the school strikes and, where possible, members attended the strike in solidarity.[55]

iii. Human rights

The last area to examine is noting that an individual employee's belief towards climate change is now likely a relevant consideration in employment discrimination circumstances. While there are no cases in New Zealand on the issue, the United Kingdom decision in *Grainger plc v Nicholson* would likely be mostly persuasive, given the similar subject matter and the precise legal analysis

[50] Employment Relations Act 2000, s 81.
[51] Section 86.
[52] Section 82.
[53] Noel Hutley and Sebastian Davis *Climate Change and Directors' Duties* (The Centre for Policy Development, Supplementary Memorandum of Opinion, March 2019) at 5.
[54] Employment Relations Act, s 84; and Health and Safety at Work, s 83
[55] See for example Huia Welton "NZCTU Supports Climate Strike" (press release, 13 March 2019); Public Service Association "Strong support for School Strike for Climate from PSA" (press release, 13 March 2019); and International Trade Union Confederation "Students strike for the jobs of tomorrow" (press release, 14 March 2019).

of what amounts to an ethical belief.[56] In this case, Judge Burton held that Mr Nicholson's belief in human-made climate change, under a five-point criteria, amounted to an ethical belief protected under the English human-rights legislation Therefore, it was discriminatory to single him out for redundancy on the basis of his beliefs.[57] In the New Zealand context, such a case could be either brought as a personal grievance under the ERA or before the Human Rights Tribunal as a s 22 complaint under the Human Rights Act 1993.[58]

In light of growing public awareness and individual commitments to fighting climate change, this additional dimension of employee's personal beliefs and attitudes towards climate change now needs to be carefully considered by employers when making labour decisions.

IV. Conclusion

In the face of climate change, many jobs and entire industries will disappear while others will be created and expanded. Such a transition will undoubtedly impact on the employment space. The above analysis is something the author hopes will start a synthesis of environmental and employment law, and that lawyers and scholars in those respective fields no longer work in silos, but start considering the real and unavoidable role climate change will play in the world of work. Being literate in this area is crucial in order to understand the real deficiencies in the Just Transition thinking by the current New Zealand Government, and to help illuminate the many and varied challenges and opportunities that climate change will bring on employment. It is also clear that the old "jobs versus environment" dichotomy is no longer true, with the rise and possible leadership of employment parties to, both, address and solve climate change issues.

[56] *Grainger plc v Nicholson* [2010] 2 All ER 253 (EAT).
[57] At [24].
[58] Human Rights Act 1993

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Reducing the complainant's evidentiary burden of proving indirect sex discrimination in the workplace claim – Easier said than done?

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Abstract

In Australia, the Federal Parliament enacted the Sex Discrimination Act 1984 (Cth) (SDA) in 1984, which aimed to eliminate discrimination and promote the concept of gender equality in various social spheres. The SDA outlawed both direct and indirect sex discrimination in employment. The indirect sex discrimination provisions were amended substantially in 1995, in the attempt to reduce the burden of proof on the complainant and better reflect the SDA's legislative purposes. However, it is evident that current relevant provisions still fall short of this optimistic expectation.

This paper seeks to unveil the shortcomings of the elements in the complainant's evidentiary burden through analysing the judges' interpretation in cases relating to workplace disputes. The legislative limitation results from the opaque language of the provision, the lack of guidance to assist the courts in interpreting the elements of the test, and the inconsistency in the judges' approach when conveying the beneficial purposes of the legislation. Based on the analysis, this paper suggests greater clarity to the interpretation of the test in resolving indirect sex discrimination cases.

I. The Complainant's Evidentiary Burden of Proving Workplace Indirect Sex Discrimination

In Australia, the Federal Parliament enacted the first federal act in 1984, which was the Sex Discrimination Act 1984 (Cth) (SDA),[1] as part of its international obligation after signing and ratifying the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[2]. The legislative purposes of the SDA are stipulated under section 3, which focusses on eliminating discrimination to the maximum extent in various social spheres and promoting the notion of gender equality.[3] In the light of these purposes, the SDA prohibits direct and indirect discrimination on the ground of sex.[4] While direct discrimination focusses on mitigating the detriment suffered by an individual by reason of unfair treatment, the concept of indirect discrimination was introduced to combat more structural disadvantages suffered by a wider range of vulnerable women.[5] When reviewing the effectiveness of the indirect sex discrimination

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[1] "Milestones for Australian Women since 1975" (24 September 2015) ABC News <abc.net.au>.
[2] Margaret Thornton and Trish Luker "The Sex Discrimination Act and Its Rocky Rite of Passage" in Margaret Thornton (ed) *Sex Discrimination in Uncertain Times* (The Australian National University, Canberra, 2010) at 27–28.
[3] Sex Discrimination Act 1984 (Cth), section 3 [SDA].
[4] Section 5.
[5] Romary Hunter *Indirect Discrimination in the Workplace* (The Federation Press, Alexandria (NSW), 1992) at 11–12.

legislation of the SDA,[6] many academic commentaries agreed that these provisions fall short from achieving the SDA's legislative aims. This results from the vagueness of the language of the current section 5(2) and the lack of guidance for interpretation from the federal judges.[7] This paper focusses on evaluating the current indirect sex discrimination provisions under section 5(2) of the SDA through the undirected language of the current provision, and the federal court's judgments relating to indirect sex discrimination in employment.

As introduced in 1984, the indirect discrimination test in the SDA required complainants to bear the entire burden of proving the elements of indirect discrimination. Under this version, the burden of proof included proving:

1) the existence of the condition or requirement;
2) that there was a substantially higher proportion of the people of the same sex as the aggrieved person that did not or cannot comply with the requirement;
3) that the aggrieved person did not or cannot comply with such requirement; and
4) that the requirement was not reasonable having regard to the circumstances.[8]

Report 69 – Equality before the Law of the Australian Law Reform Commission[9] criticised the original SDA for imposing heavy evidentiary responsibility on the complainant and suggested that certain legislative reforms should be adopted to mitigate this. In response to this report, the government proposed to amend section 5(2) of the SDA, as well as adding sections 7B and 7C, which shift the onus of proving the reasonableness test to the respondent.[10] These reforms were expected to "fundamentally alter the way in which claims of indirect discrimination are to be handled".[11]

In relation to the complainant's burden of proof, the amended section 5(2) of the Sex Discrimination Amendment Act 1995 (Cth) stipulates that indirect sex discrimination will be proved when:

> … a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of the sex of the aggrieved person if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of the same sex as the aggrieved person.

[6] Australian Human Rights Commission *Free and Equal - An Australian Conversation on Human Rights* (2019) <humanrights.gov.au>; see also Australian Standing Committee on Legal and Constitutional Affairs *Effectiveness of the Sex Discrimination Act 1984 In Eliminating Discrimination And Promoting Gender Equality* (12 December 2008); Belinda Smith "It's about Time - For a New Regulatory Approach to Equality" (2008) 36(2) FL Rev 117; and Margaret Thornton (ed) *Sex Discrimination in Uncertain Times* (The Australian National University, Canberra, 2010).
[7] Beth Gaze " The Sex Discrimination Act After Twenty Years: Achievements, Disappointments, Disillusionment and Alternatives" (2004) 27(3) UNSWLJ 919–920.
[8] SDA, section 5(2).
[9] Australian Law Reform Commission *Equality Before the Law: Justice for Women* (25 July 1994); and Australian Law Reform Commission *Equality Before the Law: Women's Equality* (21 December 1994).
[10] Explanatory Memorandum, Sex Discrimination Amendment Bill 1995 (Cth) 1, at 4–6.
[11] (28 June 1995) AUPD HR 2499.

Under this revised provision, the complainant now only has to prove:

1) the existing or proposed condition, requirement or practice; and
2) which has or likely to create the disadvantaging effects on the people of the same sex as the aggrieved person.

Further discussion in sections IIB and IIC below show that the elements belonging to the complainant's burden of proof, though being substantially amended, bring ambiguity and unpredictability when used to decide workplace disputes.

II. Evaluating the Complainant's Evidentiary Burden in Proving Indirect Sex Discrimination Claim in the Employment Area

A. Limited Number of Cases and Low Success Rate

Under the SDA, there is no legislative guidance assisting the interpretation of section 5(2) and the understandings of this provision rely mostly on the federal courts' judgments. However, during the period from 1984 to 2019, the total number of indirect sex discrimination claims heard by the federal courts was low and very few of them were ultimately successful. There were only seven court decisions that determined indirect discrimination claim in employment, amongst which only three were in favour of the complainants.[12] The analysis in the next section will also show that, in the last decade, the federal decisions leave the complainant and the federal judge in future cases with blurriness and unpredictability in the outcome of future complaints.

Moreover, as seen in the relevant annual reports from the Australian Human Rights Commission,[13] most of the sex discrimination complaints have been resolved during the conciliation process because of its benefits[14]. This contributes to the fact that there are only a small number of claims reaching the courts and tribunals for formal hearings.[15] It is uncertain in the future whether there will be more complaints that are settled by the Court in a formal hearing, to add to the four cases concerning indirect sex discrimination in employment that have already been heard.[16] As a result, the facts in future relevant claims might be read by the judges and the parties with little guidance. A closer look at the basis of the indirect discrimination complaints reveals that, although the SDA does not include protection against indirect discrimination on the grounds of family responsibility, all four complaints applying the amended SDA involved the matter of family responsibility. They were based on the fact that their request for flexible working arrangements was denied by their

[12] *Commonwealth of Australia v Human Rights And Equal Opportunity Commission* (1997) 80 FCR 78 [*Commonwealth Bank Case*]; *Escobar v Rainbow Printing Pty Ltd (No 2)* [2002] FMCA 122 [*Escobar*]; *Mayer v Australian Nuclear Science & Technology Organisation* [2003] FMCA 209 [*Mayer*]; *Kelly v TPG Internet Pty Ltd* [2003] FMCA 584 [*Kelly*]; *Howe v Qantas Airways Ltd* [2004] FMCA 242 [*Howe*]. There are seven decisions delivered by different court levels following the federal jurisdiction. However, two of them were rendered by different court levels and concerned one indirect sex discrimination claim. Therefore, in calculating the cases, these decisions were regarded as a single case.

[13] Australian Human Rights Commission *Australian Human Rights Commission Annual Report 2017–2018* (Australian Human Rights Commission, Sydney, 2018).

[14] Smith, above n 6, at 134.

[15] Dominique Allen "Behind the Conciliation Doors" (2009) 18(3) GLR 780–781.

[16] *Escobar*, above n 12; *Mayer*, above n 12; *Kelly*, above n 12; and *Howe*, above n 12.

employers. Because of the similarities in the substances of the claims, later indirect discrimination complaints involving the matters of domestic responsibility could refer to these precedents to initiate how the elements of section 5(2) may be understood. However, in future situations where other sex-related attributes, such as physical features, constitute the basis of the claim, it is difficult to predict how the claim will be assessed against the elements under section 5(2). In the social context where more working women are attending the workforce, which deepens the needs for working flexibility,[17] this represents a legislative gap of the current indirect discrimination legislation.

B. Proving the "Requirement, Condition or Practice"

This element under the current section 5(2) is different from its original version in two aspects. First, instead of outlawing the existing requirement or condition, the current SDA allows the claims against a proposed employment policy from the employer. For each of the four cases resolved under the amended section 5(2), the matter of consideration was the existing practice of denying a part-time work request from employees. This means how the proposed requirements, conditions or practices should be proven, and whether proving this element requires a higher standard of proof, are undetermined.

Second, the form in which indirect discrimination is presented includes, not only a requirement or condition, but also "practice" of the employer. This additional term "practice" contributes to clarifying that the intention of the legislation is to allow a broad interpretation of what is determined to be a "condition, requirement or practice" and lessens the impression that the subject of this section is only the policy that requires the employee to do something.[18]

Despite the attempt to expand the protection of the current indirect sex discrimination test under section 5(2) through the change in the language, there is a lot to say about the problematic interpretation of the test through analysing four Federal Magistrates' judgments[19]. Among these, three were heard by the same judge, Driver FM.[20] The first indirect sex discrimination case applying the amended test was *Escobar v Rainbow Printing Pty Ltd (No 2)*.[21] The complainant, Ms Escobar, was returning to work after maternity leave and requested a part-time position to accommodate her family responsibilities. However, her employer denied the request and dismissed her on the basis that she was unavailable to work full-time.[22] Driver FM's reasoning contributed to setting out the primary approach to this kind of claim, by reasoning that such denial is indirect discrimination on the ground of sex. Additionally, his Honour also asserted that it is commonly accepted that women bear the dominant role as caregivers. Therefore, it is general knowledge that they will be adversely impacted by this denial. This view was again adopted by Driver FM in ruling in favour of the complainant in *Mayer v Australian Nuclear Science & Technology Organisation*.[23]

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[17] John Von Doussa and Craig Lenehan "Barbequed or Burned – Flexibility in Work Arrangements and the Sex Discrimination Act" (2004) 27(3) UNSWLJ 892; and Beth Gaze "Quality Part-Time Work: Can Law Provide a Framework?" (2005) 15(3) Labour & Industry 89.
[18] Hunter, above n 5, at 196.
[19] *Escobar*, above n 12; *Mayer*, above n 12; *Kelly*, above n 12; and *Howe*, above n 12.
[20] *Mayer*, above n 12; *Escobar*, above n 12; and *Howe*, above n 12. All of these cases were heard by Driver FM.
[21] *Escobar*, above n 12.
[22] At [37].
[23] *Mayer*, above n 12, at [70]–[71].

This approach began to diverge in the last two decisions of the Federal Magistrates Court, where relatively similar facts were presented. In *Kelly v TPG Internet Pty Ltd*,[24] there was an offer that Ms Kelly be promoted to billing manager of the company. After returning from maternity leave, Ms Kelly requested a part-time working arrangement which the employer refused to accommodate. Instead, her employer, TPG Internet, offered her the choice of either a full-time position or a casual position that had limited benefits. Shortly after considering herself to be constructively dismissed, she filed claims of both direct and indirect discrimination against the employer. In rejecting her indirect discrimination claim, Raphael FM distinguished the refusal of a request for a benefit that is not currently provided from what was "generally available" for access.[25] There was no part-time position generally granted within the company and, for that reason, the refusal to accommodate this request could not be perceived as putting Ms Kelly under a detriment.[26]

In *Howe v Qantas Airways Ltd*,[27] Driver FM contradicted the reasoning of Raphael FM on many aspects, including Raphael FM's argument regarding the legitimacy of the employer's denial of working flexibility request. Ms Howe, a previously full-time flight customer service manager, upon returning to work after maternity leave, sought more flexible working arrangements. However, her application for a part-time customer service manager role was declined and, eventually, she was granted a flexible working arrangement as a flight attendant on a long-haul flight which involved demotion and a reduction in pay. Ms Howe claimed that she was forced to transfer to a position with lower seniority and remuneration, which resulted in her being indirectly discriminated against on the ground of her sex. Driver FM found that her claim for indirect discrimination was not substantiated, as Qantas was not in control of providing a part-time arrangement for her proposed position. Additionally, she was offered the alternative part-time position, which was a flight attendant, though it was at a lower rank than her then position being customer service manager. His Honour favoured the respondent on the basis that Ms Howe did not suffer from detriment when accepting the flight attendant position to accommodate her family responsibilities.[28]

The ruling of Raphael FM in *Kelly* sparked concerns because it did not encourage employers to adjust working conditions to accommodate domestic responsibility. In contrast, it allowed possible mischief where the respondent may eschew providing a flexible working policy on a regular and reasonable basis without facing legal compliance risks. Driver FM's judgment in *Howe* also failed in conveying the SDA's intention to promote equal opportunity because it validated the employer's insistence on full-time working requirement by ignoring that the fact an employee with family responsibilities was forced to choose among restricted options.[29] This inconsistence in the way the judges in these cases interpreted the provisions impedes the promotion of positive accommodation for working women and the enhancement of gender equality, which belongs to the SDA's legislative aims.[30] Additionally, all four indirect sex discrimination cases using the SDA following the 1995 amendment were heard by only two judges, who had different approaches from each

[24] *Kelly*, above n 12.
[25] At [80].
[26] At [82].
[27] *Howe*, above n 12.
[28] At [130]–[131].
[29] At [102]; K Lee Adams "Indirect Discrimination and the Worker-Carer: It's Just Not Working" (2005) 23(1) LIC 27; Gaze, above n 17, at 100; and Doussa and Lenehan, above n 17, at 903–904.
[30] Doussa and Lenehan, above n 17, at 903–904.

other in evaluating the denial of a benefit in employment. It is not possible to predict whether Driver FM or Raphael FM's approach regarding the denial of flexible working arrangements in the workplace will be adopted in later cases.[31] This deters the indirect sex discrimination test under section 5(2) from properly responding to social changes.

C. The Introduction of "Disadvantaging Effects" as an Element of Indirect Discrimination

As shown above, one of the elements of the original indirect sex discrimination test under section 5(2) was the proving of the discrepancy in compliance rate between sexes. This element was then removed from the test in the 1995 amendment. Instead, the disadvantaging effects of the condition, requirement or practice constitutes one element of the test.[32] At first sight, the complainants are released from the responsibility to prove a "substantially higher proportion" of men than women can comply with the requirement, which means the complex statistical analysis[33] for disparate compliance rate associating with the test was no longer necessary.[34] Yet there is uncertainty surrounding the interpretation of this element about which types of evidence the complainants could use to demonstrate that the requirement has the effect of disadvantaging them, and how the evidence is to be analysed by the judges.

In the cases *Escobar*, *Mayer*, *Kelly,* and *Howe,* discussed above, statistical data was not required by the federal courts for the establishment of the disadvantaging effects of the requirement. The federal judges consistently maintained the assumption of women's "disproportionate responsibility for the care of children" when considering the adverse impacts of the impugned policy.[35] It could be seen that the use of common knowledge made it fairly straightforward to set out the disadvantage of women in cases involving matters relating to domestic responsibility. However, there is indeed a limit in using common knowledge in substitution for statistical data in proving the disadvantaging effects of the requirement. Common knowledge may only be used in some circumstances where it involves information that is widely accepted among the public sphere and fits the factual findings of the case,[36] which, in the presented cases, is the imbalance in bearing domestic responsibility. In the employment area, indirect discrimination on the grounds of sex can arise from assorted kinds of conduct of the employer. In the recruitment process, a claim may be prompted against a company insisting that its employees meet a minimum standard of height and weight. Gender traits hinders a considerable number of female workers from satisfying physical requirements and this criterion may be deemed indirect discrimination, unless it is proved to be reasonable following the reasonableness test. Hence, both the parties and the courts must refer to a range of evidence that is well established when assessing the disadvantaging impacts of the requirement of a specific gender.

Moreover, section 5(2) stipulates that the complainant only needs to argue that the policy brought the "disadvantaging effect" to those with the same sex as the aggrieved person. There are not enough decisions to suggest whether it is necessary for the detrimental effects to be the result of

[31] Gaze, above n 17, at 100.
[32] Sex Discrimination Amendment Act 1995 (Cth), section 5(2) [SDA 1995].
[33] Beth Gaze "The Sex Discrimination Act at 25: Reflections on the Past, Present and Future" in Margaret Thornton (ed) *Sex Discrimination in Uncertain Times* (The Australian National University, Canberra, 2010) at 116–117.
[34] At 117.
[35] *Escobar*, above n 12, at [37]; *Mayer*, above n 12; *Kelly*, above n 12; and *Howe* above n 12.
[36] Evidence Act 2008 (Cth), section 144.

the comparison between the effects on people of the opposite sex. Therefore, in future cases where common knowledge is not available to support the proving of disadvantaging effect, the federal judges are assigned with great discretion to decide the analytical method to evaluate the disadvantaging effects of the impugned requirement. On one side, this means instead of imposing a rigid requirement on how to establish the impacts of the requirement, as in the pre-amendment provisions, the current language facilitates the courts and tribunals' flexibility in exercising their discretion in interpreting the statistical evidence where necessary. On the other side, this hinders the future parties and judges from navigating how and to what extent the disadvantage impact should be established. The next section will discuss possible legislative reforms to the elements of section 5(2) that could contribute to enhancing clarity and assist interpretation of the legal provision.

III. Mitigating and Overcoming the Ambiguity of the Complainant's Burden of Proof

D. Additional legislative guidance following section 5(2)

In terms of improving the SDA, the Australian Human Rights Commission recently suggested in the national conversation that federal legislation should be "clear",[37] "consistent", "comprehensive", "intersectional", "remedial", "accessible" and "preventative".[38] The following proposals for legislative reforms in this paper serve to enhance a more "comprehensive" and (clearer) legal framework to redress substantive inequality. The legislative supports for comprehensive legal provisions range from additional legislative guidance and practical illustrations to the non-statutory resource assisting the interpretation of the law.[39]

For the purpose of ameliorating the unpredictability of the test for disadvantageous effect under section 5(2), an extra explanation could be included as a subsection to section 5(2) or in form of a stand-alone provision. One example of the existing legislation guidance is section 7B(2) of the SDA. This section provides a list of factors that could be used in determining reasonableness of the alleged discrimination. The value of section 7B(2) is that it codifies the most general factors constituting the basis for the assessment of reasonableness. In future cases, regardless of the basis of the complaint, this legislative guidance serves as the starting point to suggest the adjudicators in customising the criteria against which the reasonableness test in the present case could be assessed.

Provided that a similar legislative explanation is included as a statutory mechanism explaining the complainant's evidentiary burden under section 5(2), it could help set out the general range of decisions from the employer that could fall into the scope of indirect discrimination legislation. For example, under section 11 of the Anti-Discrimination Act 1991 (Qld), the equivalence to the SDA's "condition, requirement or practice" is defined as "term". This definition is further explained under section 11(4) of this Act to include "condition, requirement or practice, whether

[37] Australian Human Rights Commission, above n 6.
[38] At 6–7.
[39] The suggestion regarding real-life examples that could be included into the provisions will be discussed in section E below.

or not written".[40] This type of additional legislative guidance proves its value best in formulating the evidentiary standards of the test for disadvantaging effects. This guidance may be used to explain the necessity of using statistical analysis and the need for proving disparity in disadvantaging effects suffered by people of the opposite sex. As a result, the vagueness of the current section 5(2) could be substantially reduced.

However, it is likely that this guidance may adhere to the existing challenges possessed by the current legislative guidance under section 7B(2). The standardised test could create a false impression of a restricted set of criteria used in future judgments, which may deter the judges from flexibly interpreting the meaning of the law. In an ever-changing society with diverse scenarios of conflicts in the workplace, this could be a challenge to future legislative development. To mitigate the legislative risk borne by this suggestion, apart from requiring a careful drafting process to transfer the beneficial purposes of the anti-discrimination law into the criteria included in this legal provision, it is also helpful to encourage judges' flexible interpretation through a directive clause. For instance, the directive clause may stipulate that: "The court should be, without being restricted by the expressed matters in this provision, flexible in referring to other aspects to determine reasonableness". This model gives express permission for the judges to depart from the consistently narrow approach which they deem appropriate.[41]

E. Additional Illustration Following Legal Provision

Besides additional legislative clarification, the examples of how the provisions may appear in a practical context have been incorporated into different pieces of federal and state legislation. At the federal level, the Fair Work Act 2009 (Cth)'s provision allowing the request for flexible working arrangements stipulates that:[42]

1) An employee who is a parent or has responsibility for the care of a child may request the employer for a change in working arrangements to assist the employee to care for the child if the child:
    a. is under school age; or
    b. is under 18 and has a disability.

Note: Examples of changes in working arrangements include changes in hours of work, changes in patterns of work and changes in location of work.

At the state level, there is also a similar interpretation aid that was incorporated in the state anti-discrimination law.[43] In both federal and state legislation, the examples do not seek to impose a rigid restriction on how the judges should read the provision. Rather, they act as suggestions for the judges in reasoning the case presented before them.

[40] Anti-Discrimination Act 1991 (Qld) [ADA Qld], section 11(4).
[41] Neil Rees, Simon Rice and Dominique Allen *Australian Anti-Discrimination & Equal Opportunity Law* (3rd ed, The Federation Press, Canberra, 2018) at 156.
[42] Fair Work Act 2009 (Cth) section 65.
[43] Equal Opportunity Act 2010 (Vic), section 9. Note that similar provisions with examples are also provided under section 11 of the ADA Qld.

Furthermore, the problematic approach from federal judges, such as those in *Mayer* and *Howe*, could be avoided in future decisions by using examples to alert adjudicators. For example, the illustrations given in the future version of the SDA could suggest that insistence on imposing strict attendance requirements on working parents may constitute indirect discrimination. This supports the promotion of a more proactive approach toward creating a family-friendly workplace for working parents. The downside of additional illustrations and legislative guidance is that the law cannot address all indirect sex discrimination in a limited number of examples to avoid lengthy provisions. A considerable effort is required in the legislation process to determine which circumstances should be reflected in the examples. To compensate for these cons, the proposal in the upcoming section IIIC below will present its value in improving further flexibility and adaptability of the legal interpretation without requiring substantial reforms of indirect sex discrimination provisions.

F. Timely Updated Mechanism for Complementary Guidance

Besides giving the judges and parties a clearer set of provisions and statutory examples, a non-statutory mechanism with detailed interpretation of the law could add value to understanding the meaning of the legal provisions throughout, and better reflect the legislative aims. This section proposes the application of non-statutory resources, replicating the model of the Victorian *Charter of Human Rights Bench Book* and the Victorian Discrimination Law resource.

In 2016, the Judicial College of Victoria published the *Charter of Human Rights Bench Book* (*Bench Book*) as a comprehensive system,[44] supporting the interpretation of the Charter of Human Rights and Responsibilities Act 2006 (Vic) (Charter).[45] This system takes a form of a web page which contains further explanations of the undefined concepts and operative provisions under several provisions of the Charter. Some of the purposes of the *Bench Book* are that it attempts to support educational purposes as well as the interpretative practice of the "judges and lawyers who practice in Victoria, for whom the Charter is an important, if neglected, part of the law".[46] Relevantly, the Judicial College said of the publication that it was not published as a piece of legislation that served as a compulsory source for the judge's reference.[47] However, it is still welcomed as a supporting mechanism for its merits.[48]

Another model for the application of an online resource is the Victorian Discrimination Law published by the Victorian Equal Opportunity and Human Rights Commission in 2013 to support the interpretation of some provisions of the Equal Opportunity Act 2010 (Vic).[49] Recently, in 2019, this resource was updated with the inclusion of the mechanism supporting the understandings of the Victorian Racial and Religious Tolerance Act 2001 (Vic).[50] Similar to the *Bench Book*, the

[44] Judicial College of Victoria *Charter of Human Rights Bench Book* [*Bench Book*] <www.judicialcollege.vic.edu.au>.
[45] Charter of Human Rights and Responsibilities Act 2006 (Vic).
[46] Katy Thorpe "New Bench Book Will Help Bolster Human Rights in Victoria" *Human Rights in Australia* <rightnow.org.au>.
[47] Judicial College of Victoria, above n 44.
[48] Michael Brett Young *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and* Responsibilities *Act 2006* (2015) at 50–51.
[49] Victorian Equal Opportunities and Human Rights Commission "Victorian Discrimination Law" (28 June 2019) AustLII Communities <austlii.community/wiki>.
[50] Victorian Equal Opportunities and Human Rights Commission "Explaining the Types of Discrimination" (28 June 2019) AustLII Communities <austlii.community/wiki>.

Victorian Equal Opportunity and Human Rights Commission made it clear that case law from other jurisdictions and decisions of the Victorian Civil and Administrative Tribunal (VCAT), without being strictly binding, also contributes to the comprehensive guide on how the Victorian law could be understood.[51] This resource was expected to offer a reliable resource with insights on the suitable interpretation of the law to which the judges and tribunal members can discretionarily refer when making decisions.

These online resources were researched and drafted thoroughly with high academic quality in order to be an "accurate and reliable" document. Yet, compared to proposals about adding legislative guidance and practical illustrations to the legal provisions, the additional mechanism in an online form does not require complex legislative passage procedures to incorporate any provisions anew to the existing document. This mechanism can be introduced in the form of an online web page or printed handbook,[52] which is sufficient for timely updates and public education. As a result, this mechanism could also help avoid lengthy statutory provisions. Additionally, as a non-statutory mechanism, this mechanism mitigates the risk of having a rigid nature borne by the proposals in sections IIIA and IIIB above.

Probably the most important value of this mechanism is that it assists the interpretation of the legal provisions, in conjunction with various aspects including, for example, the undefined words of the legislation,[53] the legal principles, and the context of domestic and international jurisprudence.[54] In clarifying section 17(1) of the Charter, for instance, the *Bench Book* introduces the provision in its legislative context, which supports the practice of this provision when read together with other provisions of the Charter.[55] From this basis, the adjudicators and parties to the indirect discrimination claim will be given suggestions for clearer meanings of the law within the historical and legal context in which the provisions were passed. Hence, the provisions will be read to better reflect the purposes of the legislation which the law primarily sought to pursue.[56] This is where the *Bench Book* and the Victorian Discrimination Law resource differentiate themselves from other guidelines that are currently used by the Australian Human Rights Commission and the states' equal opportunity commissions, which are usually limited to providing only simple explanations and examples on the general concept of indirect discrimination.[57]

Finally, this mechanism can be presented in web page form, which enables it to be flexibly amended in order to keep the information speedily updated to reflect legislative evolution.[58] The *Bench Book* and the Victorian Discrimination Law resource can be revised regularly to assist the

[51] Victorian Equal Opportunities and Human Rights Commission, above n 50.

[52] Victorian Equal Opportunities and Human Rights Commission, above n 49. This resource was previously provided in a PDF version. Currently, any updates of this resource will be incorporated into the online source.

[53] Victorian Equal Opportunities and Human Rights Commission, above n 50.

[54] Judicial College of Victoria, above n 44; and Victorian Equal Opportunities and Human Rights Commission, above n 49.

[55] "6.11.2. Families (s 17(1))" in Judicial College of Victoria, above n 44.

[56] Beth Gaze "Context and Interpretation in Anti-Discrimination Law" (2002) 26 MULR 330.

[57] See Australian Human Rights Commission "Guides" (Sex Discrimination) <www.humanrights.gov.au>. For example, the guidelines given by the AHRC do not focus on providing legislative explanation on how the elements of the test have been read by the judges through cases. Rather, they tend to focus on enhancing public awareness on the practice of the AHRC in conciliating and educating the business on ethical practices with regard to sex discrimination in the workplace.

[58] As an online source, there is information on the date of the last update. This supports the tracking purposes of the updating of legal knowledge on this web page.

courts in adapting to social and legal changes.[59] Considering the unpredictability and unlikelihood of having future judgments interpreting the SDA's indirect sex discrimination test,[60] the mechanism would contribute to advancing public knowledge of the meanings of the law.

IV. Conclusion

After the enactment of the Sex Discrimination Act 1984 (Cth) and its amendment in 1995, there have been academic and practical concerns that the SDA has not been effective in tackling structural discrimination and promoting gender equality in the social sphere. The challenges of the current provisions resulted from the vague wording of the provisions as well as inconsistency in the judicial approach to interpreting the elements of the test.

To mitigate problems in the interpretation of the elements of section 5(2) of the SDA, this paper suggests the addition of legislative guidance, practical illustrations and a non-statutory explanatory resource of the meanings of the provisions. It is important that these proposals should be adopted together to maximise their value. This combination would help each proposal compensate for the legislative shortcomings borne by another. While the additional legislative guidance sets out primary aspects that could be more likely to be referred to by federal judges in resolving indirect sex discrimination claim, its rigid nature is, in turn, mitigated by the application of additional practical examples and explanation by online resources. The examples are valuable because they prevent the judges from adopting problematic precedents and suggest a more flexible approach. The legislative guidance, among other relevant statutory provisions, provides the legal basis for the establishment of the online resource that helps further elaborate the meanings of the law.

The recommendations, when working in conjunction with one another, support the comprehensive understandings of the evidentiary standards. They give greater clarity in suggesting how the complainant can evaluate their own complaint and meet their burden of proof in an indirect sex discrimination complaint. This would also be beneficial for the judges in interpreting the meaning of the law in the light of the legislative aims of the SDA when deciding the case presented before them.

[59] Judicial College of Victoria, above n 44; Victorian Equal Opportunities and Human Rights Commission, above n 49. The latest update of the *Bench Book* was published on 10 October 2018. The latest update of the Victorian Discrimination Law resource was published on 12 Sep 2019 and there has been an inclusion of further guidance on the Racial and Religious Tolerance Act 2001 (Vic).

[60] See section IIA.