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Grasping the Moment: Some Cross-Tasman Thoughts on Australian Labour Law Reform

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It is something of a poisoned chalice to be asked to comment on another country's labour law reforms. Even proffering such advice at home can lead to suggestions that one's opinion is lacking in credibility; a former Minister of Labour asserting that my 'assertions stray into the domain of the wild and erratic'.[1] Commenting on a system that has many similarities to one's own, and which until the last quarter of the twentieth century had largely the same legal structure, seems a straightforward task, but carries the risk that nuances may not be fully understood or be overlooked. Close similarities may mask quite different political and economic dynamics that may be misunderstood. The devil, as always, is in the detail.

I began writing this comment on the twenty-fifth anniversary of the signing of the Australia-New Zealand Closer Economic Relations Free Trade Agreement (CER). Given the very high degree of trans-Tasman economic integration and the existence of an open trans-Tasman labour market, it is worth making the point that one area of law that has remained outside the CER harmonisation project has been labour law. The only exception has been reinforcing free movement of labour.[2] Implementing CER has required a high degree of legal and regulatory harmonisation, in turn dependent on a high level of policy congruence and mutual confidence in the other's regulatory and administrative systems. In this respect CER differs significantly from the European Union, where harmonisation of labour standards has been an important part of the integration program. The reasons for excluding labour regulation from CER are essentially pragmatic. There is no need to include it and every reason not to. Each country can have confidence that at the macro-level neither is disadvantaged by the mode of regulation in the other.

Even though there may be no wish for joint regulation, there has long been and there remains a considerable exchange of ideas between the two countries. Each has adopted precedents from the other, beginning with compulsory arbitration.[3] A combination of this shared legal history and the fact that the exter-

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nal economic challenges facing the two countries are not dissimilar suggests that each country may continue to have something to learn from the labour law structures of the other. And, from that rather tenuous peg, I will attempt to hang at least some observations, partly based on New Zealand's experience of reforms since 1991, relevant to Australia's current opportunity for labour law and industrial relations reform.

In this contribution to the debate on the Australian reforms, I intend to focus on the legal construct of the 'employee' in the early twenty-first century. The argument I would make is that any comprehensive reform must recognise that the law's definition of an 'employee' is limited and fails to recognise that employees have legitimate stakeholder expectations in their employment. The consequence of this failure is that the legal allocation of risk in employment relationships is biased against employees, the group that is least able to diversify and protect itself against economic risk. One solution to this problem may be the introduction of a broad statutory good faith obligation, the solution adopted in New Zealand in the *Employment Relations Act 2000* (ERA). That solution is not without its difficulties, but it does offer one way forward. I do not intend to discuss the institutional structures and institutions that might evolve in Australia, an area where others are considerably more knowledgeable than I.

Grasp the Opportunity

Perhaps the first and most obvious comment is that opportunities for comprehensive labour law reform occur rarely, perhaps once in a generation. In New Zealand that opportunity occurred in 1991 when a National government enacted the *Employment Contracts Act* (ECA).[4] Australian experience over the last decade also makes it clear that opportunities for major reform are likely to be equally rare under its constitutional arrangements. Australia was unfortunate that the Howard government used its opportunity to enact highly partisan and neo-classically-inspired ideological reforms compounded by what appeared to be a highly personalised reform agenda intended to ensure that the invisible hand was properly guided to prevent the market producing unwelcome outcomes.[5] As a consequence WorkChoices, as was the case with New Zealand's ECA, was politically unsustainable over the medium term in a democratic society. The concept of a 'fair go all round' may be nebulous and difficult to define. Its absence is blindingly obvious. The unambiguous rejection of WorkChoices by the Australian electorate made it clear that fundamentally inequitable and iniquitous labour legislation is unacceptable in a modern democracy.[6]

The rejection of WorkChoices has provided the Labor government with a mandate for reform and the extent of the election victory seems sufficient to provide the opportunity to act on that mandate. The *WorkChoices*[7] case allows that mandate to be implemented nationally. The Rudd Labor government has the opportunity to enact a comprehensive, balanced and sustainable system of labour law that will determine the shape of the law well into this century. It must grasp this opportunity for another may be a long time coming.

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A Vision for Reform

Opportunity alone is not enough. A reform agenda must be accompanied by a clearly articulated vision of the principles on which reform is to be based. In turn, that vision must be able to achieve a political consensus and the government must have the political courage to legislate from the vision to enact a balanced, coherent and sustainable system of labour law and industrial relations. The difficulties of doing so should not be underestimated. A reform process can be subverted and dominated by special interest groups, especially those with the money and influence to manipulate the public debate. As the New Zealand experience demonstrated, employers who have grown accustomed to excessive power in the employment relationship are reluctant to cede such power and will invest considerable resources in attempting to prevent reform. Slogans such as 'the need for increased competitiveness' or 'loss of productivity due to increased red tape' have a sufficient germ of truth to seem credible, but are used to mask a clear pro-business agenda. Instead of coherent reform, the political process becomes diverted by the desire to appease such groups, principles tend to be forgotten and the potentially negative impact of structural reforms overlooked.

Fortunately much of the work needed to define an Australian vision for reform has already been articulated in the *Australian Charter of Employment Rights*.[8] The *Charter*, prepared by a distinguished group of Australian legal and industrial relations experts, sets out a balanced set of legitimate expectations for both employers and employees. Achieving those expectations is however not as straightforward as might be expected. The dilemma facing modern labour law reformers has been summarised by Collins (2003: 5):

> Employment law … regulates employment relations for two principal purposes: to ensure that they function successfully as market transactions, and at the same time, to protect workers against the economic logic of the commodification of labour.

The recognition that modern labour law structures must take into account the need for the economy to be internationally competitive, a matter of vital concern in Australia as it is in New Zealand, is of course widely accepted in economic and legal debate. Unfortunately, a consequence has been that reforms by conservative governments have lost sight of the principle that labour is not a commodity. One prominent business advocate in New Zealand has argued that '[w]hile people are not commodities the labour services they provide … most certainly are' (Kerr 1999: 5), a theoretical separation likely to appeal only to Chicago economists, neo-classical think-tanks and Cartesian dualists. Reforms that weaken employment rights increase the commodification of the employee and shift employment risk to the disadvantage of employees, a risk already disproportionately carried by that group both legally and economically. One does not have to look far to see the consequences of this shift in employment practice.

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It is easy to lose sight of an alternative view of the function of labour law. Kahn-Freund's classic 1972 vision of the role of labour law was straightforward:

> The main object of labour law has always been, and I venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship. (Kahn-Freund 1972: 8)

This inequality of power is specifically recognised in the objects section of New Zealand's ERA.[9]

What is less recognised, and much less understood outside legal discourse, is the extent to which the common law enshrines and maintains this inequality. As the common law contract of employment continues to form the foundation of modern labour law, it is important that this characteristic of labour law be both recognised and dealt with. A failure to do so risks the substantial failure of any vision of reform.

The Twenty-First Century Employee

The law not only regulates markets, it also creates the actors it regulates. An 'employee', as much as the modern corporation, is an artificial legal entity. The manner in which the law conceptualises and defines an 'employee' shapes the nature of the legal rules that regulate transactions within the labour market. Any labour law reformer must keep at the front of their mind Kahn-Freund's observation that '[t]o mistake the conceptual apparatus of the law for the image of society may produce a distorted view of the employment relation' (Kahn-Freund 1972: 16).

The legal difficulty facing a contemporary reformer is that the common law conception of an employee remains firmly rooted in the nineteenth century.[10] Kahn-Freund summarised the contract of employment in the following terms:

> In its inception it is an act of submission, in its operation it is a condition of subordination, however much that submission and subordination may be concealed by that indispensable figment of the legal mind known as the 'contract of employment'. (Kahn-Freund 1972: 8)

This conception of employment continues to exert a strong influence for at least two reasons.

First, the interpretation of labour law statutes is heavily influenced by the common law preconceptions of the judiciary. The courts have a strong tendency to interpret employment statutes restrictively with an implicit, and sometimes explicit, assumption that the common law 'rights' of employers should be diminished to the least extent possible. For example, in New Zealand during the 1990s, the Court of Appeal, in a series of cases, significantly undermined statutory protection against unjustified dismissal by introducing an increasingly subjective, employer-focussed, test of justification, seemingly in a conscious effort to limit the restriction of the employer's 'right' to dismiss for whatever reasons it felt appropriate.[11] Within Australia, the restrictive interpretation of 'industrial matters'[12] and more recently 'matters pertaining' to the employment

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relationship also illustrate the relatively narrow view taken of employment and of the extent to which employees should be able to influence the environment in which they work. The common law, even in the twenty-first century, has yet to concede that an employee has any legitimate expectation of continuing employment[13] or any 'property' interest in employment.

The second is that the neo-liberal economic concept of employment which has influenced much of the debate over labour law structures for the past two decades has adopted the common law concept of employment and argued that its rules are necessary for economic 'efficiency.' In particular, the common law's antipathy to collective organisation and collective action and its support for employment-at-will have become part of the neo-liberal mantra.[14] One result of neo-liberal advocates dominating political debate has been that their ideas have become strongly entrenched among many members of the interest groups likely to oppose significant reform.

Any effective reform of employment law must recognise and deal with this restrictive view of employment and ensure that the law adequately reflects the legitimate expectations of employees in a modern democratic society. Democratic values and democratic citizenship are incompatible with the belief that labour is a commodity. Employees legitimately expect to be treated with regard for their safety and health and with recognition given to their economic security and to the investment they make in employment. They can legitimately expect to participate in determining their conditions of employment, to be involved in workplace governance and to be consulted if their economic future is threatened.

The law must recognise that employees, as well as employers, take risks in an employment relationship and that the simplistic property-contract divide of the common law does not adequately regulate long term relationships where both parties make a significant investment. By choosing an employer, employees make an investment, the value of which increases over time. Employees accept the risks of economic uncertainty or the consequences of misconduct, but they are also entitled to expect that their personal and economic security should not be compromised by incompetent management or unjustifiable decisions.

It must also be recognised that in contemporary society a significant risk faced by employees is the risk to their educational, reputational and intellectual capital, often developed at considerable personal financial cost before and during employment. An employee dismissed without credible justification may find their reputation compromised, their educational qualifications devalued, and their employability undermined.

Employees are members of society with legitimate expectations for their personal security and the security of their dependants. This expectation must be at the centre of any reform of labour law.

Realising the Expectations of Employees

A labour law system that recognises the legitimate expectations of employees must have at least four characteristics: it must provide employees with an effec-

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tive voice in determining the terms and conditions under which they will be employed; it must provide protection against arbitrary and unjustified treatment while employed; it must provide employees with a voice when decisions that will affect their employment are to be made; and it must provide protection against arbitrary or unjustified dismissal.

I will not dwell on the first of these. A voice on terms and conditions, including the adjustment of terms and conditions over time, is best achieved by a strong collective voice. The 'Australasian experiment' of compulsory arbitration established this characteristic in the late nineteenth century. While the arbitration system was designed for a different time and a different economic environment, it is important that reforms do not lose sight of the values built into that system. However with union density now in the mid-20 per cent, collective bargaining alone will not achieve employee voice. At one level a strong minimum floor to protect the more vulnerable sectors of the workforce is needed and this is well-recognised. It must also be recognised that bargaining and negotiation are unlikely to follow the traditional patterns of collective bargaining. Australia already has experience of non-union bargaining and in New Zealand the requirements for union recognition were relaxed to allow the creation of small house unions.[15] The need to support the individual negotiation of employment relationships must be increasingly taken into account. A comprehensive good faith obligation may be one solution to some of these problems.

The second and third characteristics, protection against unjustified treatment and a voice in decisions affecting continuity of employment, can also be achieved through a strong good faith obligation. I will return to this obligation below but would note at this point that New Zealand's personal grievance procedure allows an employee to advance a claim that their employment has been disadvantaged by an unjustifiable action of the employer. Such claims provide some remedy for at least more egregious or obvious forms of disadvantage. Indeed, as with protection against unjustified dismissal, the most important protection may derive from the human resource policies that are devised to limit legal liability. Such policies set standards of procedural fairness and criteria for disciplinary action which impact positively on many more employees than are ever likely to initiate legal action. Once generally accepted such policies may also create legally enforceable expectations of employer conduct.

Finally, any modern system of labour law must have strong protection against unjustified dismissal. Without such protection, all other rights are largely meaningless. WorkChoices seriously undermined such protection in Australia with consequences that were patently obvious and which received considerable publicity after the enactment of the law. Arguments that employers should be totally or partially exempt from employment protection laws because of size or because of the need for 'flexibility' are arguments that employees should assume even greater risk in employment than is already the case. It needs to be appreciated that employees are already least able to diversify economic risk — arguments that employers as owners carry the risk in employment are highly problematic.

A Comprehensive Obligation of Good Faith?

One technique to consolidate the characteristics referred to above may be the enactment of a comprehensive obligation of good faith, the solution adopted by New Zealand in the ERA. The advantage of this technique is that it provides a protection that may be utilised both at a collective and at an individual level. Equally importantly, it provides legislative support to a stakeholder concept of the employee, recognising that employees have an economic and psychological investment in employment that warrants legal protection. I have discussed the nature of the obligation in New Zealand in detail elsewhere (Anderson 2006) and for the purposes of this paper it is necessary only to identify some core features.

The obligation goes to the heart of the employment relationship and to management prerogative.[16] It requires the parties to an employment relationship to 'be active and constructive in establishing and maintaining a productive employment relationship in … which the parties are responsive and communicative.' Importantly it applies to 'any matter arising in relation to an individual employment agreement', including the negotiation of such agreements, as well as to collective representation and collective bargaining. One particularly significant aspect of the obligation is that employees are entitled to be consulted on proposals by an employer that might affect their employment. If the continuation of employment is at risk, this obligation is particularly strong.[17] The Act makes it clear that consult is not a synonym for 'tell'.[18] Employers must involve employees during the development of a proposal, provide relevant information, allow sufficient time for a developed response, and properly consider that response. Failure to consult carries significant legal risk as the courts may delay the implementation of redundancies, and a failure to consult may lead to substantial compensation being awarded if a dismissal is challenged.

Perhaps most importantly for the longer term, the duty of good faith is likely to impact on the standard of conduct expected of employers in the normal administration of the employment relationship. The view of the Court of Appeal that 'the common law implied term of fair treatment does not require an employer to conform to the highest standards of good management practice'[19] is now highly contestable as the duty of good faith seemingly requires the courts to take a more proactive approach, and to require employers to act in accordance with at least contemporary standards of good management practice and in some cases with best standards.[20]

A strong obligation of good faith that requires employers to conform to the standards of good management practice, supported by strong and effective protections against unjustified dismissal and unjustified treatment, has the potential to shift the focus of the law away from the narrow common law formulation of the employment relationship and towards one that adequately recognises the legitimate expectations of employees.

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Conclusion

A modern system of labour law needs to ensure that businesses are able to operate flexibly and to ensure that they remain competitive. Unfortunately, there has been a tendency to conflate competitiveness with a diminution of employee protections and the treatment of employees as commodities whose economic and other expectations cannot be allowed to inhibit business flexibility. I would suggest that this view is both misguided and unacceptable to workers in a modern society. Solutions that balance business needs with employee expectations are possible. The New Zealand experience may not be perfect but it does provide one avenue for reform that is worth consideration.

Notes

1. Honourable W F Birch, Minister of Labour 'Correspondence' [1992] ELB, 7.
2. Initiatives since CER was signed include the Trans-Tasman Mutual Recognition Arrangement, which allows people registered to practise an occupation in one country to register and practise it in the other, mutual social security and health arrangements, a Child Support Agreement that provides for the mutual recognition and enforcement of child support obligations.
3. New Zealand's 1894 Act owed a particular debt to the South Australian Bill of 1890 (enacted in a considerably emasculated form). The New Zealand Act in turn fed back into the Western Australia Act of 1900, the NSW Act in 1901 and eventually the federal *Conciliation and Arbitration Act 1904 (Cth)*: see Mitchell (1989: chap 4).
4. National had the advantage of a first-past-the-post electoral system and a unicameral parliament. The introduction of the MMP system with the 1996 election and the need for coalition government limited subsequent reforms to the ECA and acted as a brake on Labour's reforms in the *Employment Relations Act 2000*.
5. One significant difference between WorkChoices and the ECA was that the latter, having 'adjusted' the balance of power in industrial relations, made no attempt to control or regulate the subject matter or outcomes of collective bargaining or other employment negotiations. It might be noted that the ECA was 90 pages long compared to what I believe was the 1500-odd pages of WorkChoices and its regulations.
6. Lest it be thought that this is unique to Australia, in New Zealand polls conducted by the *National Business Review* through the 1990s showed that, for the majority of that period, more people disapproved of the ECA than supported it even though the majority did not see themselves as personally affected by the Act and, in the main, more believed it good for the economy than not.
7. *New South Wales v Commonwealth* (2006) 231 ALR 1.
8. Available on-line at http://www.aierights.com.au/ .
9. Section 3(a)(ii): possibly the result of having a former labour law academic, Margaret Wilson, as Minister of Labour.

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10. As such, the influences shaping it included the law of master and servant and quasi-feudal notions of loyalty and fidelity. For an elaboration of my views on the modern employment relationship see Anderson (2007).
11. This interpretation was reversed by a statutory amendment in 2004: see ERA s 103A and the discussion of the background in *Mazengarb's Employment Law*, (looseleaf, Lexis:Nexis, Wellington) volume 1 para [ERA103A.1] and following and also the account by Judge Shaw in *Air New Zealand Ltd v Hudson* (2006) 3 NZELR 155 (Employment Court).
12. This interpretation was also adopted by the New Zealand courts.
13. As Lord Reid summarised the situation in *Malloch v. Aberdeen Corporation* [1971] 1 WLR 1578, 1581: 'At common law a master is not bound to hear his servant before he dismisses him. He can act unreasonably or capriciously if he chooses but the dismissal is valid.'
14. An interesting example of an Australian lawyer preaching these ideas to New Zealand can be found in Howard (1995).
15. The minimum membership requirement is effectively 15 and the organisation must meet a relatively soft independence test.
16. The nature of the obligation is specified in s 4 of the ERA.
17. This requirement, which overruled a line Court of Appeal decisions holding that an employer was not obligated to consult employees, was not received enthusiastically by that Court and amendments to make the obligations unequivocally clear were needed. Legislative drafters are wise to anticipate judicial hostility rather than acceptance of any reforms that undermine their common law preconceptions.
18. *Simpsons Farms Ltd v Aberhart* (2006) 4 NZELR 170 paras 59–63.
19. *Anderson v Attorney-General* Unreported, CA 292/91 23, October 1992. The Court commented that this 'would be an unlikely obligation for any employer to accept, and it is certainly not one which could be implied into terms of employment.'
20. *Attorney-General v Gilbert* [2002] 2 NZLR 342 (CA) and see further Anderson and Bryson (2006).

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