

**TRADE UNION RECOGNITION LAW
AS AN AID TO FREEDOM OF ASSOCIATION?**

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* 'Wilson and Palmer' [2002] IRLR 128

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European Convention on Human Rights, Article 11

ILO Convention 87, 'Freedom of Association and Protection of the Right to Organise'

ILO Convention 98, 'Right to Organise and to Bargain Collectively'

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Workplace Relations Amendment Act 2005 (Cth)

Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008

Fair Work Act 2009

Fair Work (Registered Organisations) Act 2009

ABSTRACT

This study examines the distinct approaches taken by legal jurisdictions in the United Kingdom and Australia to the question of how their citizens might exercise freedom of association rights in employment, forming representative bodies – principally in the form of trade unions – that can muster collective strength and bargain with employers to secure the economic and social well-being of their members. The German-born British scholar Otto Kahn-Freund transmitted his observations of employer-employee relations that he made during the mid-20th century into a theory that acknowledged an almost complete retreat by the law from - and embraced a role for the state as a mere facilitator within – the UK’s industrial relations. His notion of a ‘collective laissez-faire’ kind of approach to the settlement of the terms of employment still resonates with labour lawyers and provides a framework within which effective analysis of contemporary industrial relations issues can continue to take place. Governments both in the UK and Australia have, over recent decades, attempted to exert more influence over the manner in which these relationships are conducted through tighter regulation of trade union activity and by shifting the emphasis of labour law away from the collective kinds of approaches that have traditionally been used to resolve workplace conflict to one that has promoted and significantly enhanced the individual’s “personal” employment rights and entitlements at work with consequent effects on their respective legal provision for recognition of trade unions.

INTRODUCTION

Individual nations' approaches to the regulation of industrial relations between employers and their employees have, inevitably, varied according to the character of their legal systems and the political, social and economic influences that have "shaped" their individual societies. Worker organisation for the purpose of bargaining and settling the terms of employment with employers is, in states in the 'modern free world', governed through the exercise of work-related freedom of association rights. These enable employees to join together and form associations, usually (if not necessarily) in the form of 'trade unions', that can represent their interests and secure improvements to pay and conditions on behalf of their members. The social revolution founded on a clamour for wider societal democracy and equality began to take hold during the latter part of the 18th century led directly to the entrenchment of a labour movement and then continued and dramatic expansion of trade unionism through two more centuries. National and international law and the regional and global treaties and conventions that seek to facilitate trade union activity and recognise individual unions as representatives of both collective and individual employee interests embody the response of the law to that phenomenon.

This study follows the evolution of UK law beginning with its early opposition to trade unionism per say and its consequent imposition of criminal sanctions designed to maintain socio-economic stability. This gave way to increased "toleration" in the form of immunities that were developed and bestowed upon trade unions to protect them against the so-called 'economic torts' at the start of the 20th century and the inception of measures designed first to curb union power and then more precisely regulate the involvement of unions in bargaining processes with employers at its end. It also contains a significant comparative element with

the inclusion of a detailed exposition of Australia's simultaneous establishment and development of arrangements that would enshrine trade unions firmly within its federal and state industrial relations system.

The work of the renowned academic, Otto Kahn-Freund – and, in particular, his theory of a minimal role for the state as a facilitator for parties on either side of the employer-employee industrial relations “divide”, represents a recurring and vital “backdrop” within the discussion of arrangements that both countries have instituted to acknowledge a role for trade unions as representatives of collective worker interest may take place and conclusions regarding the effect of international legal instruments, globally accepted labour standards and their “post-Kahn Freund era” domestic legislation on those “models”.

CHAPTER ONE

THE EMPLOYER-EMPLOYEE RELATIONSHIP WITHIN KAHN-FREUND'S THEORY OF INDUSTRIAL RELATIONS

Introduction

The lawful right of workers to associate, organise and assemble with colleagues to pursue common objectives while at work is the product of struggles that have taken place over time between competing interests of capital and labour and conflicting political ideologies.¹ A defining characteristic of UK collective labour law has been its historical commitment to what has variously been referred to as *voluntarism* and/or *legal absenteeism*.² These terms refer to the character of the system of collective bargaining that has evolved under English law and shown itself to be relatively free of regulation. The traditional view that both the law and legal profession preferred that they should “withdraw” from the industrial relations arena was most famously articulated by the German scholar Otto Kahn-Freund during his long and distinguished academic career in England from the early 1930s. Prior to Kahn-Freund’s publication of his ‘theory of industrial relations’, the (English) common law’s stance had been one of “deep-rooted” hostility towards workers’ collective self-organisation.³ This revealed itself from the 19th century as the crime (and later tort) of conspiracy, the doctrine of restraint of trade (as a ground for the invalidation of contracts) and in the form of the ‘economic torts’ (conceived to protect the trade and livelihoods of businesses and individuals against direct or

¹ Bob Hepple, ‘Factors Influencing the Making and Transformation of Labour Law in Europe’, in Guy Davidov and Brian Langille (eds) *The Idea of Labour Law* (Oxford University Press 2011) 40.

² Alan Bogg, ‘Representation of Employees in Collective Bargaining within the Firm: Voluntarism in the UK’, Report to the XVIIth International Congress of Comparative Law (July 2006); A Chommeloux, ‘Bevin, the Law and Industrial Relations in Britain: The Impact of the Second World War Assessed’, *Université François-Rabelais (Tours)* (9 March 2005).

³ Simon Deakin and Gillian Morris, *Labour Law* (3rd edn, Hart Publishing 2012) 13.

intentional interference). Support for these measures persisted into and throughout the modern period⁴ until it became clear that some form of statutory intervention would be required if lawful union activity was to take place.⁵ Chapter One discusses the most significant aspects of Kahn-Freund's philosophy with particular emphasis on his representation of 20th century British industrial relations regulation in a conceptual model dubbed 'collective laissez-faire'⁶ and including his classification of most of the UK's labour law as 'abstentionist' in character.

1.1 Kahn-Freund's Theory Explored

Otto Kahn-Freund's observations on industrial relations issues have impacted significantly on the thinking of UK labour lawyers⁷, trade unionists, employers, judges and successive governments of differing persuasions over several decades.⁸ Born into a middle-class Jewish family in 1900, he studied law at the University of Frankfurt under the direction of Professor Hugo Sinzheimer and readily acknowledged his tutor's "decisive influence" on his own work.⁹ Sinzheimer demanded that his students looked beyond the mere content of legal provisions and encouraged them to also develop an understanding of the nature of the relationship between legal theory and the realities of social and economic power, the practical operation of the law and the formation of legal policy. He argued that employment contracts served as a "mask" for employer "domination" and employee "subordination" and promoted a sense of trade unions and employer associations as "law creators" by virtue of their interaction in collective disputes, participation in collective bargaining and as conclusers of agreements

⁴ *ibid* 6.

⁵ *ibid* 7.

⁶ Alan Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart Publishing 2009) 3.

⁷ Anne Davies, *Perspectives on Labour Law* (Cambridge University Press 2009) 3.

⁸ Ruth Dukes, 'Otto Kahn-Freund and Collective Laissez-Faire: An Edifice without a Keystone?' (2009) 72(2) MLR 220.

⁹ Roy Lewis, 'Kahn-Freund and Labour Law: an Outline Critique' (1979) 8 (1) ILJ 202, 204.

(though he conceded that there would inevitably always be the need for some state involvement, whether as a facilitator or the ultimate enforcer of rules). Kahn-Freund completed a PhD study of the normative effect of collective agreements between employers and employees at Frankfurt before securing an appointment as a judge in the Berlin labour court from 1928. His old tutor's ideas continued to endure both in his judicial decisions while there and throughout his subsequent academic career.¹⁰

Kahn-Freund published two keynote pamphlets while working as a judge. These were 'The Social Ideal of the Reich Labour Court' in 1931 and 'The Changing Function of Labour Law' a year later. Both set bare Kahn-Freund's unease with the "interference of an over-zealous State" in matters that he believed ought to remain the autonomous concerns of employer and worker representatives.¹¹ The publications were considered to be highly provocative by the Nazis (the first pamphlet identified an encroachment into 'the Court' of the kind of fascist values already embodied in Italian labour legislation while the second analysed the shift of Weimar labour law away from the promotion of "collectivism" and a legitimate role for trade unions in collective industrial conflict to suppression of workers' concerns through the weakening of unions and reinforcement of State mechanisms, all as a precursor to accelerated development of Nazi labour policy).¹² Kahn-Freund was dismissed by the Nazis in 1933. He fled to the UK, pursued a career in academia and became, according to Roy Lewis, "the doyen of British labour law".¹³

1.1.1 'Legal Abstentionsim' and 'Collective Laissez-Faire'

¹⁰ *ibid.*

¹¹ Dukes (n8) 224.

¹² Lewis (n9) 205.

¹³ *ibid* 202.

Kahn-Freund's concerns regarding the role of the state and his fervent desire that there should be autonomous regulation of industrial relations by the collective parties would remain recurring themes in his work in the UK. He completed an LLM in 1935 at the London School of Economics (LSE), qualified as a barrister at Middle Temple and was then appointed as a lecturer at the LSE in 1936. He became Professor there in 1951 and finally left in 1964 to take up the position of Chair of Comparative Law at Oxford. His early studies of English labour law saw him apply his knowledge of German collectivist principles to UK industrial relations and legislation. He continued to emphasise the concept of the individual contract of employment as a 'mask' for worker subordination and studied the effects of the conflict that he believed arose between conservative judges and more enlightened legislatures, while his experiences in the Weimar Republic continued to influence his examination of collective agreements.¹⁴ His long-held conviction that trade unions should be able to operate "autonomously" appeared to sit well with what he saw at that time as an English preference for (relatively) small government and adherence to pluralism.¹⁵ His first article on the UK's collective labour law was published in 1943 and considered the effects of wartime legislation on "the legal status" of collective agreements.¹⁶ Pursuing Sinzheimer's thinking, he distinguished between the 'contractual' and 'normative' functions (concerned with standards) of collective agreements and determined that any such accords concluded in the UK were contractual in the legal sense. The trade unions and employers (and their associations) that were party to them were accordingly bound to abide by the terms contained within them¹⁷, while the use of statutory means to enforce collective agreements could be justified if this bolstered autonomous collective bargaining. He maintained his opposition, however, to the

¹⁴ Dukes (n8) 230.

¹⁵ *ibid* 223.

¹⁶ Otto Kahn-Freund, 'Collective Agreements Under War Legislation' (1943) 6(3) MLR 112.

¹⁷ Dukes (n8) 231.

introduction of compulsory arbitration to settle disputes on the basis that it could only threaten bargaining processes.¹⁸ This early “unfolding” of his theory coincided with the development by a United Nations agency, the International Labour Organisation, of its Conventions 87 (‘Freedom of Association and Protection of the Right to Organise’) and 98 (‘Right to Organise and Bargain Collectively’), both of which will be considered in more depth in Chapter Two of this thesis. These all combined to inform and promote the development of collective labour law during the immediate post-Second World War period.

Kahn-Freund began to adjust aspects of his work in line with his changing perceptions of UK industrial relations during the early 1950s, concluding that it was no longer possible simply to apply German law principles to English conditions.¹⁹ He continued to draw heavily on his personal experience of living and working in the Weimar Republic, but he no longer looked upon collective agreements as legally binding contracts and instead focused on the extent to which industrial relations were exercised “beyond the reaches of the law”.²⁰ His declaration, in 1954, that “there is, perhaps, no major country in the world in which the law has played a less significant role in the shaping of these (collective industrial) relations than in Great Britain and in which day-to-day the law and the legal profession have less to do with labour relations”²¹ was the first recognisable expression of the philosophical ‘model’ that evolved and became ‘collective laissez-faire’. He believed that it was both a term that conveyed the real sense of “the retreat of the law from industrial relations and of industrial relations from the law” and that it represented an “ideal” that the legal system should strive to maintain.²² Fully explained, he judged that it encapsulated the “particularly British approach”

¹⁸ *ibid* 232.

¹⁹ *ibid* 223.

²⁰ *ibid* 232.

²¹ Otto Kahn-Freund, ‘Legal Framework’, in Allan Flanders and Hugh Clegg (eds), *The System of Industrial Relations in Great Britain* (Oxford 1954) 42.

²² Otto Kahn-Freund, *Selected Writings* (Stevens 1978) 9.

to industrial relations regulation and reflected successive UK governments' enthusiasm for the promotion of collective bargaining as a means of setting terms and conditions of employment and resolving industrial disputes.²³ Collective agreements now merely bestowed 'rights' and 'duties' on those who were parties to them. Enforcement of agreements was a social rather than a legal responsibility²⁴, but their normative elements could be made legally binding through a process of voluntary incorporation into individual employment contracts.²⁵ The UK regime therefore differed from that in the Weimar Republic, where collective agreements were legally enforceable as a matter of routine.

Kahn-Freund's consideration of the issues surrounding legal abstentionism (or voluntarism) was heavily influenced by his view of "pluralist society", which he believed consisted of a number of conflicting sectional groups including "the autonomous collective forces of capital and labour."²⁶ He argued that the "imbalance of power" between individual employees and employers was of such magnitude that it rendered any idea of workers' freedom of contract completely illusory.²⁷ Collective bargaining could, however, be used across whole industries and within workplaces to mitigate the inequality that was inherent in individual employment relationships and help maintain industrial conflict within tolerable bounds. Workers could counter the negative effects of their "submissive" relationship with employers if they banded together to form trade unions to increase their bargaining power with the state's role confined to one of acting as "the custodian of the national interest." This meant ensuring that only those levels of co-ordination that were deemed strictly necessary for the effective maintenance of collective relations should be established and that any legislation that was

²³ Dukes (n8) 232.

²⁴ Kahn-Freund (n21), 57-58.

²⁵ *ibid* 58-61.

²⁶ Lewis (n9) 209.

²⁷ Paul Davies, Mark Freedland and Otto Kahn-Freund, *Kahn-Freund's Labour and the Law* (3rd edn, Stevens 1983) 8.

introduced was (at least theoretically) “even-handed” in character. There had also to be some means of instilling “greater equilibrium” in the employment relationship as a pre-condition for meaningful collective bargaining. Kahn-Freund believed that to sustain and endorse autonomous collective powers and endow them with freedom of action was merely to observe some of the essential requirements of a democratic society. Industrial action was bound to break out from time to time, but a more stringent system of regulation would simply encourage more “unofficial” kinds of skirmishes. Statutory intervention, such as the introduction of the immunities for trade unions created in TDA 1906, could be justified where it helped to establish greater equilibrium between employers and employees.²⁸

Kahn-Freund emphasised that the other fundamental requirement of abstentionist policy was that there should be minimal state intervention in “individual” employment relations, that regulation should instead be undertaken by the autonomous *collective* concerns and that any laws that were introduced in respect of collective labour relations should remain pointedly “non-interventionist” in character. Parliament should, therefore, avoid regulating in respect of trade union recognition or unions’ organisational rights, the non-contractual status of collective agreements and the wholly consensual (and non-compulsory) incorporation of terms agreed by the collective parties into individual contracts of employment.²⁹ The state also sought to encourage the resolution of disputes through a system of conciliation and arbitration ahead of recourse to direct legal sanction.³⁰ Kahn-Freund’s preference for collective bargaining was based on three assertions. First, he argued that legal intervention was unnecessary because collective bargaining had shown itself to be an effective means of protecting workers’ interests. Second, he claimed that rights that had been secured by workers through collective bargaining

²⁸ Lewis (n9) 209.

²⁹ *ibid* 208.

³⁰ *ibid* 209.

remained somehow more robust and had acquired a legitimacy that could not be secured through any kind of constitutional or legislative guarantee. Third, he argued that the collective laissez-faire model afforded employers and unions flexibility to take charge of their own affairs and respond to changing circumstances to a greater extent than would be the case if they were subject to more stringent legislative “constraints”.³¹ The state’s role was to remain in the background, from where it could promote the creation of unions and establish machinery deemed necessary to facilitate collective bargaining.³² In other words, it could be suggested that the model “allowed space” for the creation (and validation) of trade union organisation that itself facilitated freedom of association in employment. Recognition at the legal level was not the basis of freedom of association. Instead, the law permitted and supported a freedom of association and trade union organisation that led to de facto recognition of trade unions by employers. A vibrant, “organic” trade union movement neither sought legal legitimisation nor any kind of formal recognition. Autonomy was maintained and sufficient freedom of collective action provided in order that processes could be established through which effective collective bargaining could be progressed.

1.1.2 Kahn-Freund’s Subsequent Embrace of ‘Interventionism’

Kahn-Freund sat as a member of the Donovan Commission from 1965 to 1968. One of his Commission associates, Professor Hugh Clegg, suggested that Kahn-Freund’s perception of the actuality of UK industrial relations was no longer what it had been during the period when he conceived his notion of collective laissez-faire. He was said to have concluded that trade union national leaderships and employers’ associations at the “industry level” did not

³¹ Davies (n7).

³² Lewis (n9).

exert influence over the settlement of terms and conditions to the extent that he had thought previously and that they were in fact almost mere observers of wider and more erratic forms of workplace level bargaining and industrial action that had taken hold.³³ Kahn-Freund revealed his growing enthusiasm for legal intervention in his 1968 submission to Donovan, 'Note on the Legal Enforceability of Collective Agreements', which argued that the Minister of Labour should play an active role in the reference of contentious matters to compulsory arbitration and the legal enforcement of compliance with arbitration orders.

In his 1970 article, 'Trade Unions, the Law and Society'³⁴, Kahn-Freund suggested that the time had come to remove the "dead hand" of historical trade union opposition to legal involvement in their internal affairs, although he cautioned that unions' distrust of the court system should be acknowledged within that process³⁵ and argued for the introduction of a legal remedy to address controls that he believed, while not widespread, were being unacceptably imposed by some unions to restrict access to certain sections of the labour market.³⁶ In 1972, he made clear his disapproval of the picketing practices employed during the miners' strike earlier on during that year.³⁷ Each of his submissions reflected a far more accommodating stance towards direct legal intervention in industrial relations than had been implied in his earlier exposition of collective laissez-faire and he was now prepared to express a view that the principal purpose of labour law was "to regulate, to support and to restrain the power of management and the power of organised labour". The welfare state had a role as the provider of institutions and processes that could help to maintain a "fair" balance between employers and workers with a focus on subordinated workers within the employment relationship rather

³³ Dukes (n8) 239.

³⁴ Otto Kahn-Freund, 'Trade Unions, the Law and Society' (1970) 33(3) MLR 241.

³⁵ *ibid* 241.

³⁶ *ibid* 243.

³⁷ Otto Kahn-Freund, 'The Industrial Relations Act 1971 - Some retrospective reflections' (1974) 3 ILJ 186.

than any wider analysis of the labour market as a whole.³⁸

In his final (1979) book³⁹, Kahn-Freund acknowledged the upheaval in industrial relations during the 1970s including the general upsurge in turmoil and the effects towards the end of the decade of the expansion of the service and white-collar sectors.⁴⁰ He felt that the effects were visible in legislation as well as in collective bargaining and disputes and that one of the principal consequences had been the supplementation of voluntary recognition with statutory recognition. He justified this on the basis that it helped to sustain collective bargaining in the face of employer hostility to union activity⁴¹ and because the constitution of the working population had prompted a “much enlarged sphere of legislation applicable to the individual relations between employer and employee.”⁴² He had become much more troubled by the “social effects” of industrial action and what he saw as the consumer (rather than the employer) having become the object of such skirmishes. He believed that hardship had been visited on people who could not possibly seek to influence the outcome of particular disputes and that “victimisation” of the working class proportion of the consumer population was now commonplace.⁴³ He rejected the proposition that there should be any curbs on the right to strike and instead argued for reform of collective bargaining processes that might help avoid industrial action and understanding within union circles that workers were “consumers” as well as “producers” (of goods and services).⁴⁴

Summary

³⁸ Otto Kahn-Freund, Paul Davies and Mark Freedland, *Labour and the Law* (Stevens 1983) 5.

³⁹ Otto Kahn-Freund, *Labour Relations: Heritage and Adjustment* (Oxford University Press 1979).

⁴⁰ *ibid* 73.

⁴¹ *ibid* 70.

⁴² *ibid* 71.

⁴³ *ibid* 76-77.

⁴⁴ *ibid* 80-84.

An obvious criticism that can be made of Kahn-Freund's work is that it does not appear in the form of one explicit or comprehensive "essay", leaving students to assemble his theory largely by themselves from the various texts that he published over several decades from his arrival in the UK in 1933 through to the post-Donovan and 'Social Contract' era of the 1970s. Kahn-Freund's supporters would presumably counter such claims by pointing out that his theory was quite necessarily developed over several decades, featuring all manner of disparate episodes in British social history and including the most significant global armed conflict that humans have ever experienced?

Ruth Dukes articulates many of more substantive concerns that have been levelled at Khan-Freund's work. She refers to the Hugh Clegg's inference⁴⁵ that Kahn-Freund's early assessment of UK industrial relations was unduly "rosy" and that it perhaps reflected an overly-simplistic comparison between an over-bearing exercise of state power in Germany by 1933 and English institutions that encouraged discussion and participation, including by workers and their unions.⁴⁶ Kahn-Freund did, of course, later concede that it was not possible simply to "replicate" every aspect of his Weimar experience in the UK. Dukes also cites criticisms by Roy Lewis and Keith Ewing that the conception of 'collective laissez-faire', complete with its assertions that successive governments preference for collective bargaining as a method of job regulation had left employers and trade unions "free" to agree the 'rules' that governed working lives and production⁴⁷ and that legislative intervention in workplaces had been accorded "a necessary but (only) secondary role"⁴⁸, did not in any way portray the historical evolution of British labour law, not least because it ignored workers' and trade unions' struggles for

⁴⁵ Dukes (n8) 237.

⁴⁶ *ibid* 236-7.

⁴⁷ *ibid* 221.

⁴⁸ Roy Lewis, 'The Historical Development of Labour Law' (1976) 14(1) BJIR 1, 8.

Parliamentary recognition of their legal rights and downplayed the state's part in the establishment of effective collective bargaining "infrastructure".⁴⁹ A particular accusation levelled at Kahn-Freund has been that he failed to define a convincing role for the state in industrial relations (as Sinzheimer had when he described its function as "the guardian of the public interest").⁵⁰ Dukes believes that Kahn-Freund's pre-occupation that employers and trade unions possessed an ability to "self-regulate" their relations without state involvement was naïve in that it implied that neither would choose to make "unreasonable" demands of the other and that both sides could be relied on to bargain with the public's interest in mind as well as their own concerns. She acknowledges that Kahn-Freund eventually recognised this shortcoming in his theory but suggests that he remained reluctant to properly endow the state with appropriate levels of responsibility within the system of management for industrial relations. She concludes that he remained content to view the 'public interest' in terms of the consumer's expectation that production and industrial harmony should be maintained and disputes his inference that the employers should be identified as the guarantor of that interest.⁵¹

Kahn-Freund's name would latterly become more synonymous with findings contained in the 1968 Donovan Report. It should be noted though that while he had by then become convinced that "classical" collective laissez-faire had been overtaken by changing circumstances, he maintained his opposition to what he believed were the impractical, counter-productive and anti-trade union provisions contained in IRA 1971. His final book, *Labour Relations: Heritage and Adjustment*, was his attempt to respond to changing socio-economic conditions and ensure that his work remained relevant following the expansion of collective bargaining in the white collar and service sectors and the increase in trade unions' political

⁴⁹ Dukes (n8) 222.

⁵⁰ *ibid* 244.

⁵¹ *ibid*.

power under successive governments. Dukes concedes that in circumstances where “the regulation of employment relations has less and less in common with the forms of regulation described by Kahn-Freund”, the collective laissez-faire “doctrine” continues to resonate with labour lawyers and remains their “most obvious starting point for discussion of employment law and employment relations.”⁵² The intention in this study, is to use Kahn-Freund’s industrial relations theory as a “frame” within which the evolution and characteristics of the UK and Australian models of union recognition may be appraised and the extent to which they comply with the various treaties and conventions that have been accepted by democratic states internationally as having established ‘norms’ and standards that their societies should observe. The purpose of Chapter Two will be to explore the most significant of those measures in detail. The remainder of the study will consider how the UK and Australian authorities’ early reliance on criminal and civil sanctions to curb individuals’ participation in trade unions gave way to distinct models of recognition that were designed to regulate and control rather than prohibit union activity (whether in the form of Kahn-Freund’s notion of a ‘collective laissez-faire’ regime or the state’s creation of a ‘Social Contract’ that allowed large unions to wield substantial power in the UK for a period during the 1970s or Australia’s “incorporation” of the trade union function into its arbitration- and conciliation-based industrial relations system) and assess their respective legislatures recent attempts to more closely “prescribe” how trade unionists may exercise their rights.

⁵² Dukes (n8) 221.

CHAPTER TWO

LEGAL UNDERPINNING OF FREEDOM OF ASSOCIATION IN THE CONTEXT OF EMPLOYMENT

Introduction

Chapter Two identifies the principal European and global legal “instruments” that purport to guarantee employees the human right to freedom of association. It examines the extent to which “the law” has acknowledged collective labour force interests resulting in the formation of professional associations or trade unions by workers seeking to defend their economic and social interests, identifies some of the essential characteristics of trade unions and endeavours to assess the continuing impact of legal intervention on workplace bargaining and trade union activity.

The fact that human rights generally in the United Kingdom and Europe tend most commonly to be discussed in the context of the protection afforded to them by the European Convention on Human Rights (ECHR) should not detract from the significant other legal mechanisms that exist and purport to protect freedom of association and assembly in the context of workers’ right to organise throughout the wider global community. Principal among these are the collection of documents (a resolution and two treaties) that have been adopted by the United Nations (UN) General Assembly and have, together, become known informally as the ‘International Bill of Human Rights’. The provisions that they contain form the basis of international, regional and national labour law rights, all of which continue to be observed by the International Labour Organisation (ILO), the UN agency whose international standards uphold the rights of workers and employers to form organisations and then bargain collectively.

2.1 Components of Freedom of Assembly and Association

The right to freedom of association has particular resonance in the context of labour law because of the opportunity that it affords workers to form trade unions as vehicles through which they may secure their economic and social status. Asmita Naik has identified particular ‘Rights at Stake’ that she believes remain central to freedom of assembly and association and enjoy protection in international and regional human rights treaties and conventions.⁵³ The first right is the right to peaceful assembly, which should only be denied in situations of national security or public safety (the right to violent assembly is not upheld while international standards also place limits on the force that authorities may use to control peaceful and non-peaceful assemblies). The second right is that of association, which covers the right of individuals to freely associate with others and establish associations (it is suggested that some countries have attempted to outlaw particular groups or activities on political grounds or impose bureaucratic measures designed to obstruct citizens’ free exercise of the right). The third right is to join or not join an association, including consideration of any reprisals that may be visited on individuals who join (proscribed) organisations and coercion of citizens to join state-approved groups.

The fourth of “Naik’s rights” is the right to belong to trade unions. It splits into further “sub-rights”, whose cumulative effect is to render the individual’s union membership effective.

⁵³ Human Rights Education Associates, ‘Freedom of assembly and association’ (HREA, 2010) <http://www.hrea.org/index.php?doc_id=406%20%20ights> accessed 20 November 2010 Human Rights Education Associates is a not-for-profit organisation that seeks to promote human rights education programmes with non- and inter-governmental bodies, educational institutions and government agencies throughout the world.

The first sub-right enables individuals to form and join unions in order that they can secure their economic and social interests and has met with resistance from some states (who have sought to impose restrictions on union activity both through national legislation that purports to exclude certain categories of workers and the international law exception that permits them to bar members of the police and armed forces from membership). The second sub-right enables trade unionists to form national and international confederations and this has also been resisted by some states. A third sub-right specifies that individuals should have the right not to be penalised for belonging to a union and that membership should not be used to deny employment to new applicants or to discipline, disadvantage or dismiss existing employees. The fourth sub-right, the right to strike, is not an absolute right and is invariably “fettered” by other societal interests including in occupations where employees provide essential public services.⁵⁴ A final (fifth) sub-right permits organisations to elect representatives and establish their own rules and constitutions, ostensibly free of “unreasonable interference in their governance” by state authorities (the interpretation of which may prove highly controversial).⁵⁵

The fifth “substantive right” specifies that restrictions should not be placed on any of the above unless save for on grounds of national security or public safety. Naik suggests that the narrow interpretation favoured so far by institutions such as the European Court of Human Rights (ECtHR), will prove most effective in ensuring that freedom of association rights in employment may be denied only in *exceptional* circumstances. The views of libertarians and others who remain trenchantly opposed to any suggestion that collective rights should take

⁵⁴ Emergency service workers, for example, are prohibited from taking strike action in some countries. Some governments have also sought to adopt a “permanent replacement doctrine”, where strikers have been replaced by more compliant employees who are then willing to vote that in favour of the union’s de-recognition even though this contravenes international law.

⁵⁵ For example, the United Kingdom Employment Act 1988 made it illegal for trade unions to discipline any of their members who chose to ignore a call for industrial action even where this followed a lawful ballot resulting in a vote in favour of that action.

precedence over those of individuals will, of course, continue to appear irreconcilable with any legal framework that purports to support trade union rights.

2.1.1 The Significance of Freedom of Association in the Context of Employment

Rights to freedom of association in employment provide a means through which workers may form representative trade unions that they can then use to challenge the inherent “imbalance” in the relationship between employers and individual employees. The Director-General of the International Labour Office has reported that the freedoms to associate and bargain collectively are fundamental rights that represent the most obvious means through which employers and employees may settle terms and conditions of employment.⁵⁶ Workers who are able to exercise bargaining rights can enhance their personal economic and social well-being and may discover that they can exert greater influence over government policies. Thus, legal recognition of these rights can impact on the governance of the labour market and yield solutions to the sources of conflict that can exist in employer-employee relations. UK Conservative ministers acknowledged the need to protect employees’ freedom of association (and their right to strike)⁵⁷ in their 1981 Parliamentary Green Paper, ‘Trade Union Immunities’⁵⁸, which stated that:

“The freedom of employees to combine and withdraw their labour is their fundamental safeguard against the inherent imbalance of power between the employer and the individual employee. This freedom has to be accepted as a hallmark of a free society”.

It follows that for such freedom of association to prove meaningful, then a process of collective

⁵⁶ International Labour Office, ‘Freedom of Association in Practice: Lessons Learned (Report of the Director-General to the International Labour Conference, 97th Session’) (2008) 5.

⁵⁷ John Bowers, Michael Duggan and David Reade, ‘The Law of Industrial Action and Trade Union Recognition’ (Oxford University Press 2004) 1.

⁵⁸ Cmnd.8128.

bargaining between employees and their employer must be established. Independent trade unions, with their infrastructure and ability to organise, can act with more potency than less powerful staff associations in workplaces where they enjoy recognition.

2.2 European Freedom of Assembly and Association Rights

The pre-eminent body responsible for post-Second World War protection of European rights to freedom of assembly and association has been the Council of Europe (CoE). The CoE, unlike the European Union (EU), is not a “binding law maker”. It instead promotes collaboration between member states in respect of human rights, the development of democratic principles and “cultural co-operation”, principally through the ECHR. Responsibility for ensuring that Member States comply with its provisions rests with the ECtHR.

2.2.1 Article 11 of the ECHR

The ECHR’s Article 11 guarantees rights to freedom of assembly and association. It states that:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Citizens can choose whether to form and join associations such as political parties and trade unions, but the entitlement is not without restrictions. Mass protest, demonstration and industrial action are all common manifestations of the exercise of the right. Article 11(1) confers a positive obligation on member states to legislate to protect both public and private sector workers' union rights⁵⁹, but omits to specify details of the nature of the treatment that trade unions or their members can expect to enjoy.⁶⁰ Union members have a right that the union is heard⁶¹, which includes the provision of facilities by the employer to the union to allow it to make representations.⁶² The ECtHR has adopted a "cautious approach" when determining which union rights should be recognised and protected under national law⁶³, "stranding" Article 11 some way short of the ILO's aspirations. It (the ECtHR) was not for a long time prepared to hold that a union has the right to be consulted or recognised for the purpose of collective bargaining of pay and conditions.⁶⁴ This permitted employers to decide whether to enter into such bargaining with a trade union *or* negotiate directly with individual employees, suggesting that workers could be denied the opportunity to exercise trade union rights and that the protection purported under Article 11 could be rendered "illusory".⁶⁵ The right in Article 11 not to have to join a trade union is also assured with a positive obligation placed on member states to ensure enforcement. Meanwhile, in *Aslef v United Kingdom*⁶⁶, the ECtHR ruled that the Article 11 provisions did not extend so far as to specify that anyone should be able to join a union irrespective of its rules, so accepting that unions had the right of stewardship in their own affairs and running contrary to the effect of much UK legislation from 1980.

⁵⁹ Clare Ovey and Robin White, *The European Convention on Human Rights* (4th edn, Oxford University Press 2006) 339.

⁶⁰ Stephanie Palmer, 'Human rights: implications for labour law' (2000) 59(1) CLJ 168, 196.

⁶¹ Ovey and White (n60).

⁶² *ibid.*

⁶³ *ibid.*

⁶⁴ *National Union of Belgian Police v Belgium*, Judgment entered 22 October 1975, Series A, No 19 [1979-80] 1 EHRR 578.

⁶⁵ *Wilson and the National Union of Journalists and Others v United Kingdom*, (Apps 30668/96, 30671/96, 30678/96), Judgment entered 2 July 2002 [2002] 35 EHRR 523, para 46.

⁶⁶ [2007] ECHR 184.

2.2.2 The Ruling in *Demir and Baykara v Turkey*

In *Demir and Baykara v Turkey*⁶⁷, the ECtHR reversed its earlier jurisprudence to hold that the exercise of the right under Article 11 to form and join trade unions included the right to collective bargaining. The case involved the Tum Bel Sen trade union, which represented civil servants in Turkey. Turkish trade union law however, did not permit civil service trade unionism at the time when the union was formed. Demir (a member) and Baykara (the union president) represented the union and its members and claimed that the right to bargain collectively was an intrinsic component of Article 11. The Court held that the declaration contained in Article 11(1) and the restrictions set out in Article 11(2) should be “strictly construed”. The right to organise remained sacrosanct, while the ability to bargain collectively with the employer had become enshrined as one of the essential elements of the right to form and join trade unions under Article 11. Member states had to demonstrate that any proposed restrictions were legitimate and civil servants could not be deemed to be included as part of “the administration of the State”.⁶⁸

The ECtHR expanded on its ruling in *Demir* in *Enerji Yapi-Yol Sen v Turkey*⁶⁹, which was a case concerned with prohibition by the state of public sector union-sponsored industrial action. Members of the Enerji Yapi-Yol Sen trade union who had ignored the prohibition were disciplined by their employer, prompting the union to argue before the ECtHR that the ban on

⁶⁷ [2008] ECHR 1345.

⁶⁸ EurWORK, ‘ECHR upholds right to collective bargaining and to strike’ (Eurofound, 14 January 2010) <<http://www.eurofound.europa.eu/observatories/eurwork/articles/echr-upholds-right-to-collective-bargaining-and-to-strike>> accessed 20 November 2010

⁶⁹ [2009] App 68959/01, Judgement entered 21 April 2009.

strikes interfered with their right to form and join trade unions under Article 11. The Court acknowledged that the right to strike was not absolute and could be subject to certain conditions and restrictions, but held that a ban that applied to all public servants represented a restriction that was too wide and that the state's disciplinary action was "capable of discouraging trade union members and others from exercising their legitimate right to take part in such one-day strikes or other actions aimed at defending their members' interests" to the point where it did not amount to a justifiable restriction on Article 11 rights.

Keith Ewing and John Hendy argue that the decision in *Demir and Baykara* saw "social and economic rights... fused permanently with civil and political rights, in a process that is potentially nothing less than a socialisation of civil and political rights."⁷⁰ They conclude that "it is a decision in which human rights have established their superiority over economic irrationalism and 'competitiveness' in the battle for the soul of labour law and in which public law has triumphed over private law and public lawyers over private lawyers."⁷¹ Charles Barrow observes that the ECtHR's consideration of the scope of Article 11 and interpretation of the Turkish authorities' restrictions (through reference to international instruments and common practice across the entire membership of CoE) proved decisive in terms of the final ruling, but he also emphasises the importance of the judges' insistence that international law permitted them to consider instruments that had not necessarily been ratified by the respondent state⁷² and argues that the effect of the decision in *Demir* is to establish the case as one of a

⁷⁰ Keith Ewing and John Hendy, 'The dramatic implications of *Demir and Baykara*' (2010) 39(1) ILJ 2, 47.

⁷¹ *ibid.*

⁷² Charles Barrow, 'Demir and Baykara v Turkey: breathing life into article 11' (2010) 4 EHRLR 419, 422. The Court reportedly claimed that it had, historically, never distinguished between sources of law (according to whether they had been ratified or not by the respondent state) when searching for common ground among the norms of international law. It also re-affirmed that the Convention was a living instrument, to be interpreted in the light of present-day conditions and evolving norms and principles of international and national law applicable across the Council of Europe. The Convention was first and foremost a system for the protection of human rights and this obliged ECtHR judges to give effect to it in a manner that rendered its rights "practical and effective" rather than theoretical and illusory".

number that have, together, extended the scope of Article 11. The ECtHR's cautious approach in some earlier cases became superseded by its declaration in *Demir* that the right to participate in collective bargaining should be treated as an *essential* element of the Article 11 right.⁷³ Separately, it remains open to the ECtHR to choose whether it may embark upon a further, more in-depth consideration of UK trade union laws generally at some point in the future.⁷⁴

2.2.3 The EU 'Social Charter' (or Social Chapter)

The EU's Community Charter of the Fundamental Social Rights of Workers (or 'Social Charter') was adopted in December 1989 by all member states with the exception of the UK. It sets out the rights of employers and workers to form associations and conclude collective agreements and upholds the right to strike subject to certain obligations that may be imposed under national regulations. It established the fundamental principles on which the European labour law model is based and includes specific provisions in respect of freedom of association and collective bargaining as well as information, consultation and participation of workers.

The UK remained exempt from EU legislation covering Social Charter issues and vetoed its inclusion in the 1992 Maastricht Treaty as its "Social Chapter". A compromise was reached with the addition to the Treaty instead of a 'Social Policy Protocol' that included an 'opt-out' for the UK and so resulted in the creation of a 'twin-track' EU social policy. All twelve member states agreed that the eleven "signatories" would be able to implement employment and industrial relations policies compatible with the new procedure laid down in the Agreement

⁷³ *ibid* 423.

⁷⁴ *ibid*. Barrow suggests that the inability of UK trade unions to maintain autonomy over their rule books, free of statutory interference, may be an issue that the ECtHR chooses to consider in the future.

on Social Policy annexed to the Protocol. A newly-elected Labour government in the UK terminated the 'opt-out' in 1997 ahead of the Treaty of Amsterdam's deletion in June of that year of the Social Policy Protocol and the incorporation of the Agreement on Social Policy (with minor amendments) into a revised 'Social Chapter' of the EC Treaty.⁷⁵

2.3 The United Nations, Rights and the Promotion of Global Labour Standards

The UN arguably continues to be the pre-eminent global promoter of labour human rights, both through the collection of instruments that form the 'International Bill of Human Rights' and the work of the ILO. Members of the UN General Assembly have historically agreed and directed broad principles and policies to be observed by Member States in the form of declarations and treaties, while authority to draw up and oversee the implementation of international labour standards has been delegated to the ILO.

⁷⁵ EurWORK, 'Agreement on Social Policy' (Eurofound, 3 January 2011) <<http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/agreementonsocialpolicy.htm>> accessed 3 November 2012

2.3.1 The UN General Assembly's 'International Bill of Human Rights'

The UN Charter, agreed following the meeting of delegates of Allied nations at the San Francisco Conference from April to June 1945⁷⁶, set out the UN's purpose and detailed its various organs and institutions and their powers, published criteria to be satisfied by members, clarified the means through which the organisation's objectives should be assimilated with existing international law mechanisms and explained how the powers of the UN's various bodies would be enforced. The UN General Assembly undertook to become the lead protector of human rights globally and its members resolved it should publish a declaration setting out broad human rights principles alongside a convention (treaty) containing tangible, binding commitments. The former document became the Universal Declaration of Human Rights (UDHR) and was adopted on 10 December 1948. The Declaration provided the foundation for two separately binding covenants, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR)⁷⁷ to reflect differences between General Assembly members regarding the relative significance of "negative" civil and political rights and their "positive" economic, social and cultural counterparts.⁷⁸ Together, the three documents form what is sometimes referred to as the 'International Bill of Human Rights'.⁷⁹

The UDHR is, as a resolution of the UN General Assembly, not formally legally binding. Its principles have, however, subsequently been incorporated into UN treaties and enshrined in

⁷⁶ United Nations, 'History of the United Nations – San Francisco Conference' (United Nations) <http://www.un.org/en/aboutun/history/sanfrancisco_conference.shtml> accessed 13 November 2012

⁷⁷ United Nations General Assembly Resolution 543, 5 February 1952.

⁷⁸ P Sieghart, *The International Law of Human Rights* (Clarendon Press 1983) 25.

⁷⁹ **Office of the United Nations High Commissioner for Human Rights, 'Covenant on Economic, Social and Cultural Rights' (United Nations)** <<http://www2.ohchr.org/english/law/cescr.htm>> accessed 19 November 2012

numerous international laws. The UDHR's Article 20 states simply that everyone has the right to freedom of peaceful assembly and association and that nobody can be compelled to belong to an association. Article 23 purports to guarantee decent working conditions and employment rights⁸⁰ and includes specific provision that everyone has the right to form and join trade unions in order to protect his or her interests.⁸¹

The ICESCR was adopted by the General Assembly in December 1966 to give practical effect to the principles set out in the UDHR. In force since January 1976, it purports to safeguard economic, social and cultural rights in the 160 states that are parties to it.⁸²⁸³ Several of its articles guarantee labour rights, including Article 6 (the right to “freely chosen or accepted” work), Article 7 (the right to enjoy just and safe working conditions), Article 9 (concerned with social security and social insurance, including provision for unemployment benefits and workers' compensation rights), Article 10 (which sets out various “family rights”, including the entitlement to paid maternity leave⁸⁴ and measures to prevent exploitation of children and young people) and Article 12 (which commits parties to measures to improve industrial hygiene⁸⁵ and combat occupational diseases⁸⁶). Provision for freedom of association is contained in Article 8, which recognises the right of workers to form and join trade unions⁸⁷ and includes protection of the right to strike.⁸⁸ However, restrictions on these rights can be

⁸⁰ United Nations, ‘The Universal Declaration of Human Rights – Full Text’ (United Nations) <<http://www.un.org/en/documents/udhr/index.shtml>> accessed 13 November 2012

⁸¹ UDHR Article 23(4).

⁸² **Office of the United Nations High Commissioner for Human Rights, ‘International Covenant on Economic, Social and Cultural Rights’ (United Nations)** <<http://www2.ohchr.org/english/law/cescr.htm>> accessed 19 November 2012

⁸³ United Nations, ‘International Covenant on Economic, Social and Cultural Rights’ (**United Nations**) <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en> accessed 19 November 2012

⁸⁴ ICESCR Article 10(2).

⁸⁵ *ibid* Article 12(2)(b).

⁸⁶ *ibid* Article 12(2)(c).

⁸⁷ *ibid* Article 8(1)(a).

⁸⁸ *ibid* Article 8(1)(d).

imposed on members of the armed forces, police and government administrators.⁸⁹ Article 8 also enables unions to establish national and international federations⁹⁰ and function free of interference.⁹¹ Some parties have chosen to derogate from Article 8's provisions, including China (which chooses to interpret it in a manner consistent with provisions contained within its own constitution) and Japan (which has chosen to extend the restriction of union rights that it applies to members of its police to include fire service personnel).

The ICCPR, adopted in December 1966 and in force from March 1976, addresses a much narrower array of labour rights than the ICESCR. Its Article 8 absolutely prohibits slavery⁹² and servitude.⁹³ Forced labour is also outlawed, save for the imposition of 'hard labour' as part of a criminal sentence, military conscription (as well as other forms of national service required of conscientious objectors), compulsory service deemed to be necessary in circumstances of "emergency or calamity threatening life or the well-being of the community" and "any work or service that forms part of normal civic obligations".⁹⁴ Articles 21 and 22 are of more directly relevance to trade unionism. The right to peaceful assembly is recognised in Article 21 while Article 22 guarantees freedom of association, including the right to form and join trade unions.⁹⁵ The rights set out in both articles are not subject to any restrictions other than those that are prescribed by law and necessary to safeguard national security or public safety or public order or protect public health or morals or the rights and freedoms of others.⁹⁶ Article 22 also acknowledges that it shall not itself prevent any application of lawful restrictions either on armed forces or police personnel in respect of any exercise of the right⁹⁷ and reminds those

⁸⁹ *ibid* Article 8(2).

⁹⁰ *ibid* Article 8(1)(b).

⁹¹ *ibid* Article 8(1)(c).

⁹² ICCPR Article 8(1).

⁹³ *ibid* Article 8(2).

⁹⁴ *ibid* Article 8(3).

⁹⁵ *ibid* Article 22(1).

⁹⁶ *ibid* Article 21, Article 22(2).

⁹⁷ *ibid* Article 22(2).

members of the UN who are also members of the ILO that they should not legislate to any extent that the guarantees contained within the ILO's 1948 Convention No 87 (concerned with 'Freedom of Association and Protection of the Right to Organise') become compromised.⁹⁸ This appears consistent with the Asmita Naik's demand (in 'Rights at Stake') that rights should not be derogated without compelling evidence?

2.3.2 The ILO's Promotion of 'Labour Standards'

The ILO, established in 1919 by Part XIII of the Treaty of Versailles and a specialised agency of the UN since 1946, undertakes its work through three main bodies, the International Labour Conference (ILC), the Governing Body and the Office (its secretariat), which consist of governments', employers' and workers' representatives. Its principal objectives are the promotion and realisation of employment rights, to improve employment opportunities for all, the enhancement of social protections and the strengthening of dialogue between the different partners in employment matters.⁹⁹

The ILC meets annually and brings together government, employer and worker delegates from each member state to discuss policy and devise programmes as well as establish conventions and produce recommendations (regional meetings of member states are also held at periodic intervals to explore matters of particular concern in the geographical areas concerned) and it is these conventions and recommendations that combine to form what has become known as the 'International Labour Code'. Once a convention has been adopted by

⁹⁸ *ibid* Article 22(3).

⁹⁹ International Labour Organization, 'About the ILO – Mission and objectives' (International Labour Organization) <<http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm>> accessed 1 December 2012

the ILC, individual governments may ratify it and proceed to give incorporate it in their national law. The convention will evolve into an international law treaty if the requisite number of ratifications is reached, although it should be stressed that *any* ILO convention that has been adopted by the ILC becomes “enshrined” as an international labour standard irrespective of the number of ratifications. The ILO’s emphasis on ‘tripartism’ ensures that workers, employers and governments enjoy equal voting rights. This, potentially, gives rise to an increase in dialogue between the parties and an expectation that a degree of consensus will prevail both in the organisation’s ‘internal’ proceedings and in the practical implementation of domestic measures by member states.¹⁰⁰ The ILO also provides technical help on a range of employment law-related topics including industrial relations, working conditions and occupational health and safety and assists in the development of independent employers' and workers' organisations through provision of advisory services and training.

2.3.3 ILO Provision for Freedom of Association and Trade Union Organisation

The ILO’s Governing Body has identified eight conventions that it considers fundamental to workers’ rights, irrespective of the extent of individual Member States’ development and two of these relate specifically to freedom of association. The first, Convention 87, was adopted in 1948 and is concerned with ‘Freedom of Association and Protection of the Right to Organise’, while the second, Convention 98, was adopted in 1949 and involves the ‘Right to Organise and to Bargain Collectively’.¹⁰¹

¹⁰⁰ International Labour Organization, ‘How the ILO works – Tripartism and social dialogue’ (International Labour Organization) <<http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/lang--en/index.htm>> accessed 19 December 2012

¹⁰¹ International Training Centre of the ILO, ‘Fundamental ILO Conventions’ (International Labour Organization) <http://actrav.itcilo.org/english/about/about_fundamentals.html> accessed 30 November 2012

Convention 87 provides for the right of workers and employers both to form and join organisations¹⁰² and to devise their own administration and activities (including the establishment of constitutions and election of representatives) free of state interference.¹⁰³ Once it exists, an organisation (defined in the Convention as “any organisation of workers or of employers for furthering and defending the interests of workers or of employers”¹⁰⁴) also has the right to federate with others both nationally and internationally.¹⁰⁵ Responsibility for the determination of any such arrangements in respect of members of the police and armed forces, however, remains the responsibility of national lawmakers.¹⁰⁶ Workers and employers and their organisations are obliged to observe their national law during the exercise of their rights, so long as that law does not impair any of the Convention’s guarantees.¹⁰⁷ Dunning emphasises that Convention 87 offers no guarantees either that workers will be able to form effective trade unions or that they will be able to advance their interests.¹⁰⁸ Its purpose is to promote continuing acceptance that workers should have rights that enable them to participate in union activity and that all ILO member states should adopt laws or regulations to protect those rights.¹⁰⁹ Novitz argues that Convention 87 represented, in its inception, a not altogether successful attempt to reconcile opposing factions who attended meetings of the ILC in 1947 and 1948. She stresses that the trade union rights that it sought to guarantee fell short of those already enshrined in the national law of many countries and that there was, for example, no explicit reference either to collective bargaining or the right to strike. Despite these reservations, she indicates that Convention 87 deserves recognition as the first ILO convention

¹⁰² Convention 87, Article 2.

¹⁰³ *ibid* Article 3.

¹⁰⁴ *ibid* Article 10.

¹⁰⁵ *ibid* Article 5.

¹⁰⁶ *ibid* Article 9.

¹⁰⁷ *ibid* Article 8.

¹⁰⁸ Harold Dunning, ‘The origins of Convention No. 87 on freedom of association and the right to organize’ (1998) 137(2) ILR 149, 149.

¹⁰⁹ *ibid*.

to set out the organisation's constitutional guarantee of freedom of association in detail.¹¹⁰

Anti-union discrimination continued to exist despite the introduction of Convention 87 and the ILO decided to address the problem with the adoption of a further convention, Convention 98.¹¹¹ It guarantees that workers shall not be denied employment on the ground that they are members of a trade union and it also forbids the dismissal of those who are already employed either for membership or for participation in union activity.¹¹² The autonomous nature of workers' and employers' organisations is also afforded some protection with a particular emphasis that trade unions should remain fully independent of employers.¹¹³ Member states are also required to establish national machinery that fully takes account of the right to organise¹¹⁴ and promotes voluntary collective bargaining.¹¹⁵ Two further Conventions "supplement" the provisions contained in Conventions 87 and 98. Convention 135 was adopted in 1978 and is titled, 'Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking'. It seeks to strengthen protection of workers' representatives against imposition of penalties for discharge of their trade union obligations. Convention 151 dates from 1987 and is concerned with 'Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service'. It seeks to extend anti-union discrimination provisions to "public employees".

Novitz observes that Convention 87 and Convention 98 have been acclaimed as being amongst the ILO's most "basic human rights Conventions"¹¹⁶ while Harold Dunning reflects

¹¹⁰ Tonia Novitz, 'Freedom of Association and 'Fairness at Work' - An Assessment of the Impact and Relevance of ILO Convention No. 87 on its Fiftieth Anniversary' (1998) 27(3) ILJ 169, 171.

¹¹¹ *ibid.*

¹¹² Convention 98, Article 1.

¹¹³ *ibid* Article 2.

¹¹⁴ *ibid* Article 3.

¹¹⁵ *ibid* Article 4.

¹¹⁶ Novitz (n117).

that each has become accepted as “integral” to the other.¹¹⁷ Geraldo von Potobsky questions the effectiveness of the collective labour standards that the Conventions purport to inspire.¹¹⁸ He highlights the difficulties that those who might attempt to measure “success” will encounter and suggests that it is practically much easier to transfer the content of labour standards into national law within the context of the *individual* employment relationship. Von Potobsky argues that changes to collective labour law impact much more directly upon (and can therefore be perceived as more of a threat to) established orders in individual societies, all of which exhibit their own cultural and historical characteristics and that it should not therefore come as any surprise that implementation of labour standards might be resisted in some quarters.¹¹⁹ Despite his concerns regarding the effect of labour standards, he concedes that the ILO has been instrumental in the dissemination of the principle of freedom of association and that this has led directly to its practical implementation and acceptance around the globe.¹²⁰

The ILO sought to further strengthen its fundamental Conventions in its adoption of the Declaration on Fundamental Principles and Rights at Work in 1998.¹²¹ This effectively “wrapped up” all eight Conventions into four ‘fundamental principles and rights at work’, the first of which is ‘Freedom of association and the effective recognition of the right to collective bargaining’.¹²² It asserts that each ‘right’ is universal and so applies to all citizens in all member states, irrespective of the extent of their economic development.¹²³ This means that even if

¹¹⁷ Dunning (n115) 163.

¹¹⁸ Geraldo von Potobsky, ‘Freedom of association: The impact of Convention No. 87 and ILO action’ (1998) 137(2) ILR 195.

¹¹⁹ *ibid* 196.

¹²⁰ *ibid*.

¹²¹ Bernard Gernigon, Alberto Odero and Horacio Guido, ‘ILO principles concerning collective bargaining’ (2000) 139(1) ILR 33, 34.

¹²² The remaining three principles are ‘Elimination of all forms of forced or compulsory labour’, ‘Effective abolition of child labour’ and ‘Elimination of discrimination in respect of employment and occupation’. See International Labour Organization, ‘ILO Declaration on Fundamental Principles and Rights at Work’ (International Labour Organization) <<http://www.ilo.org/declaration/lang--en/index.htm>> accessed 19 December 2012

¹²³ International Labour Organization, ‘About the Declaration’ (International Labour Organization) <<http://www.ilo.org/declaration/thedeclaration/lang--en/index.htm>> accessed 19 December 2012

ILO members fail to ratify particular conventions, they are still obliged to respect and promote the fundamental principles that underpin them.

Two supervisory bodies, the Committee of Experts and the tripartite Governing Body on Freedom of Association (CFA), play a prominent role in enforcement of the rights specified in Conventions 87 and 98. Member states are required to submit biennial reports setting out the extent to which their domestic legislation and practice conforms to the obligations that the ILO's Conventions place on them and these (together with accompanying comments from trade unions and employers' organisations) are then examined by the Committee of Experts, which then comments both in the form of observations on fundamental questions raised by the application of a particular convention by a state that it publishes in an annual report and direct requests which relate to more technical questions or requests for further information that are not published, but which are conveyed directly to the governments concerned.¹²⁴ The tripartite CFA considers complaints from both trade unions and employers' associations relating to alleged breaches of Conventions 87 and 98. This particular body meets privately and reaches unanimous decisions that it then summarises and publishes at regular intervals. All of the CFA's recommendations are forwarded to the Governing Body of the ILO so that it can determine whether further action is required. The CFA also endeavours to co-operate with (and often refers matters to) the Committee of Experts.¹²⁵

The International Labour Office¹²⁶ Director-General, Juan Somavía, reported on the

¹²⁴ International Labour Organization, 'Committee of Experts on the Application of Conventions and Recommendations' (International Labour Organization) <<http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm>> accessed 6 March 2013

¹²⁵ Novitz (n117) 172.

¹²⁶ International Labour Office, 'Freedom of Association in Practice: Lessons Learned (Report of the Director-General to the International Labour Conference, 97th Session, Report I(B))' (2008).

effect of freedom of association in employment globally at the 2008 International Labour Conference. He maintained that the freedoms to associate and to bargain collectively remained fundamental “enabling” rights that were both rooted in the ILO’s constitution and periodically “reaffirmed” by the international community “to promote and realise decent conditions at work”.¹²⁷ Global promotion and ratification of Conventions 87 and 98 had not only enshrined those rights in the domestic law of individual nation states but had also helped to foster a climate within which workers and employers could organise, engage in collective bargaining and themselves become “major tools for labour market governance”.¹²⁸

2.4 Collective Bargaining and Collective Agreements

The ILO considers collective bargaining to be the activity or a process that culminates in the conclusion of a collective agreement¹²⁹ and it provides for voluntary such processes in its Convention 98, ‘Right to Organise and to Bargain Collectively’. The EU has enshrined a separate formal ‘Right of collective bargaining and action’, which appears in Article 28 of the Charter of Fundamental Rights of the European Union and states that:

“Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.”

The Article 28 right was inspired by Article 6 of the CoE ‘Social Charter’ *together with* Points 12 to 14 of the EU ‘Social Chapter’ and the ECtHR has also recognised that the right of collective action is an essential element of the trade union that are set out in Article 11 of the

¹²⁷ *ibid.*

¹²⁸ *ibid.*

¹²⁹ Gernigon, Otero and Guido (n128) 34.

ECHR.

Collective agreements essentially have two purposes. The first of these is to set out procedures that a union and the employer agree to adhere to, while the second is to regulate workers' terms and conditions. Collective agreements made in the UK may or may not fall within the statutory definition of a collective agreement contained in the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA 1992), s178. This states that:

“(1) In this Act “collective agreement” means any agreement or arrangement made by or on behalf of one or more employers or employers’ associations and relating to one or more of the matters specified below; and “collective bargaining” means negotiating, relating to or connected with one or more of those matters.

(2) The matters referred to above are:

- (a) terms and conditions of employment, or the physical conditions in which any workers are required to work;
- (b) engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;
- (c) allocation of work or the duties of employment between workers or groups of workers;
- (d) matters of discipline;
- (e) a worker’s membership or non-membership of a trade union;
- (f) facilities for officials of trade unions; and
- (g) machinery for negotiations or consultation, and other procedures, relating to any of the above matters, including the recognition by employers or employers’ associations of the right of a trade union to represent workers in such negotiation or consultation or in the carrying out of such procedures.

(3) In this Act, “recognition” in relation to a trade union means the recognition of the union by an employer or two or more associated employers, to any extent, for the purposes of collective bargaining and “recognised” and other related expressions shall be construed accordingly.”

The statute contains a presumption that a collective agreement will not be binding unless it is in writing with an express clause to the contrary.¹³⁰ The question of when a collective agreement becomes incorporated in an individual contract of employment rests on the facts of each particular case¹³¹ and it should be noted that the presence of a non-binding clause in an

¹³⁰ TULRCA 1992 s179(1).

¹³¹ See for example, *Robertson v British Gas Corporation* [1983] IRLR 302; *Burke v Royal Liverpool University Trust Hospital* [1997] ICR 730.

agreement as between a union and an employer does not prevent the clause from becoming incorporated by reference as a term in an individual employee's contract of employment.¹³²

Ewing argues that implementation of more widespread collective bargaining processes (in preference to any kind of “tinkering” with the current statutory recognition process in the UK to be discussed in Chapter Four of this dissertation) is bound to increase the effectiveness of trade unions with resulting improvements in employer-trade union engagement and increased numbers of collective agreements.¹³³ For such bargaining to be sustained, however, a legislative framework must exist that provides for protections and guarantees as well as institutions that facilitate collective bargaining and address possible conflicts, efficient labour administrations *and* strong and effective workers' and employers' organisations. While the global economic downturn that began in 2007-8 has prompted a number of (especially centre-right) governments to call for some relaxation in employment protections (including trade union rights)¹³⁴, US President Obama specifically rejected suggestions that collective bargaining rights threatened economic competitiveness when he unveiled proposals designed to boost jobs and the economy to Congress on 8 September 2011.¹³⁵

2.5 Trade Unionism

Trade unions have been subject to legal regulation more or less since their inception and

¹³² *Whent v T Cartledge Ltd* [1997] IRLR 153.

¹³³ Keith Ewing 'The Role of Trade Unions in Economic Growth' in Doug Nicholls, Institute of Employment Rights (ed), *Federation Viewpoint – Autumn 2012 (No 1)* (Institute of Employment Rights 2012) 57.

¹³⁴ See for example, BBC News, 'David Cameron and Ed Miliband clash on sacking' (BBC News, 23 May 2012) <<http://www.bbc.co.uk/news/uk-politics-18170333>> accessed 28 January 2013

¹³⁵ See BBC News, 'US jobs plan: Barack Obama unveils \$450bn package' (BBC News, 9 September 2011) <<http://www.bbc.co.uk/news/world-us-canada-14841746>> accessed 28 January 2013

it is widely accepted that it was not until the twentieth century that they were truly able to choose how to conduct their affairs (whether in terms of their dealings with their members or with employers and employers' associations).¹³⁶ The UK's definition of a 'trade union' now appears in TULRCA 1992, s1 as follows:

“... an organisation (whether temporary or permanent)---

(a) which consists wholly or mainly of workers of one or more descriptions and whose principal purposes include the regulations of relations between workers of that description or those descriptions and employers or employers' associations; or

(b) which consists wholly or mainly of---

(i) constituent or affiliated organisations which fulfil the conditions in paragraph (a) (or themselves consist wholly or mainly of constituent or affiliated organisations which fulfil those conditions), or

(ii) representatives of such constituent or affiliated organisations,

and whose principal purposes include the regulation of relations between workers and employers or between workers and employers' associations, or the regulation of relations between its constituent or affiliated organisations.

A body can only be deemed an 'organisation' if it can demonstrate that it possesses some kind of formal "structure" and is not simply a casual grouping of workers.¹³⁷ As far as the 'regulation of workers as a principal purpose' is concerned, the courts appear to have concluded that where palpable evidence of organisation and a desire to regulate activities (as between workers and employers or employers' associations) can be demonstrated, then that will generally prove sufficient to establish an association as a trade union.¹³⁸ TULRCA 1992, s1(b) also makes it clear that a body that is representative of a number of trade unions, such as the Trades Union Congress, may also be so categorised and it is also the case that where a union takes the form of a "collective" of different trades or exists in several different geographical areas, then it is perfectly legitimate for several constituent unions to operate within one main

¹³⁶ Nick Humphreys, *Trade Union Law and Collective Employment Rights* (2nd edn, Jordan Publishing 2005) 1.

¹³⁷ In *Frost v Clarke & Smith Manufacturing Co Ltd* [1973] IRLR 216, a workers' body purported to be a trade union so that it could claim sole bargaining rights under the Industrial Relations Act 1971. The National Industrial Relations Court heard that the body had no name and did not possess either a constitution or a published set of rules. Regular meetings were not held and no minutes were kept and the body did not possess any funds or property. Consequently, the body did not possess attributes that were required of an organisation.

¹³⁸ *British Association of Advisers and Lecturers in Physical Education v National Union of Teachers* [1986] IRLR 497.

union.¹³⁹ The size of a union also has a significant bearing on the extent of any remedies and damages that may be awarded against it.¹⁴⁰

Once an association satisfies the 's1' definition of a 'trade union', it can apply to be entered on the list of trade union by the Certification Officer.¹⁴¹ Associations requesting to be listed are required, under TULRCA 1992, s3(2), to supply a copy of their rule book, a list of their officers, a head office address and the name that the association is to be known by (together with a registration fee). The Certification Officer must add it to the list if he is satisfied that it meets all of the requirements contained in the definition in s1, that all of the formalities required under s3(2) have been met and that registration of the name of the applicant body is not prohibited on account of any similarity with another listed organisation (registered as a union either under the Trade Union Acts 1871-1964 or the Industrial Relations Act 1971).¹⁴² The Certification Officer may remove a body from the list in circumstances where it has been listed but then appears in fact not to be a trade union¹⁴³ or if he is satisfied that it actually no longer exists.¹⁴⁴ ¹⁴⁵ Bodies can also request their own removal from the list.¹⁴⁶ Appeals against decisions of the Certification Officer, either to refuse entry to the list or to remove an entry may, following the introduction of the Employment Relations Act 2004, be made to the Employment Appeal Tribunal (EAT) on a point of law only.¹⁴⁷

Bona fide trade unions must ensure that they obtain a Certificate of Independence. This

¹³⁹ *Thomas v NUM (South Wales Area)* [1985] IRLR 136.

¹⁴⁰ TULRCA 1992 s22(2).

¹⁴¹ The administrative arrangements for 'listing' are set out in TULRCA 1992 ss2-5.

¹⁴² TULRCA 1992 s3(3-4).

¹⁴³ TULRCA 1992 s4(1).

¹⁴⁴ TULRCA 1992 s4(3)(b).

¹⁴⁵ In any instance where the Certification Officer has decided to remove a body from the list, he must give the body notice and consider any representations made to him by the body during the notice period, which TULRCA 1992, s4(2) specifies must be of at least 28 days' duration.

¹⁴⁶ TULRCA 1992 s4(3)(a).

¹⁴⁷ TULRCA 1992 s9.

ensures that “full” statutory (collective) rights are exercised only by truly independent bodies and *not* by staff associations (who could, for example, provide a much more likely means for an employer to impose “informal control” over the workforce).¹⁴⁸ The Certification Officer “as an external measure to gauge independence” may also protect union members from employer interference aimed at preventing them from exercising their trade union rights.¹⁴⁹ TULRCA 1992, s5 states that a union will be independent for the purpose of the grant of a Certificate of Independence where it:

“(a) is not under the domination or control of an employer or group of employers or of one or more employers’ associations, and

(b) is not liable to interference by an employer or any such group or association (arising out of the financial or material support or by any other means whatsoever) tending towards such control... ”

The definition first tests whether the union is “simply an emanation of the employer” and then considers, if that is not the case, whether it could be “forced to defer to the wishes of an employer”.¹⁵⁰ The first limb of the test requires the Certification Officer to consider a number of factors which originally came about as a result of the EAT’s deliberations in *Blue Circle Staff Association v The Certification Officer*.¹⁵¹ These include the union’s history (together with any relevant recent history of the relationship with managements), the breadth of the union’s membership base (a smaller base and presence in fewer employers potentially rendering a union more vulnerable to pressure from those employers), the union’s organisation and structure (including whether it has been “infiltrated” in any way by management), how it is financed (it must be self-supporting), whether it is in receipt of facilities provided by the employer and its record in negotiations. The second component of the test¹⁵² is concerned with

¹⁴⁸ Humphreys (n143) 34.

¹⁴⁹ *ibid.* See also *Association of HSD (Hatfield) Employees v Certification Officer* (1978) IRLR 261 at 262.

¹⁵⁰ *ibid.*

¹⁵¹ [1977] IRLR 20.

¹⁵² TULRCA 1992 s5(b)

the union's ability to withstand external pressure from an employer and it can be applied at two alternative time points, namely that liability to interference should be considered at the time of the application for the Certificate of Independence (identified by Humphreys as the point favourable to the applicant union¹⁵³) *or* the union could be considered to be liable to interference at some point in the future (identified by Humphreys as "obviously unfavourable to applicants" because of the scope that it affords the Certification Officer to speculate as to all manner of future eventualities¹⁵⁴). As with entry on and removal from the list of unions, Certificates of Independence can be both granted *and* revoked, on condition that specified criteria are met and subject to any appeal by the union to the EAT.¹⁵⁵

Trade unions perform a variety of functions for their members. These include provision of workplace advice, representation of their collective interests in discussions with management, the negotiation of improvements in wages and working conditions and enforcement of members' employment rights both at work and in employment tribunals and the courts. More broadly, they purport to campaign against discrimination and in favour of equal opportunities, regularly lobbying central government and others in support of policies and legislation aimed at enhancing employment rights.¹⁵⁶ Conversely, opponents of trade unions may argue that they in fact merely secure 'rents' for their members in the form of higher wages than they believe the free market would justify.¹⁵⁷ An obvious attraction of collective bargaining to employers is that it can facilitate much more "streamlined" negotiation with a group or groups of workers, through their trade union(s) rather than with each and every individual employee. This can of course give rise to some difficulty in as much that unions

¹⁵³ Humphreys (n143) 36.

¹⁵⁴ *ibid*, 36-37.

¹⁵⁵ TULRCA 1992 ss 6-9.

¹⁵⁶ Trades Union Congress, *Trade Unions at Work* (Trades Union Congress 2010) 5.

¹⁵⁷ Davies (n7) 176.

remain essentially ‘majoritarian’ organisations and so may not always prove able to fully satisfy the demands, or even protect all of the interests, of every member.¹⁵⁸

2.5.1 Trade Union Recognition

Formal recognition (both in law and by employers) is, of course, fundamentally important to trade unions who aspire to represent and bargain on behalf of their members in any effective sense. Novitz and Skidmore state that:

“Recognition is CENTRAL to British industrial relations. Not only does recognition confer on unions certain basic statutory entitlements, but it is regarded as the door to collective bargaining and consultation rights.”¹⁵⁹

Bowers, Duggan and Reade further augment the definition of recognition to ensure that it specifically entails:

“... the status of an independent trade union having a negotiating voice with the employers on behalf of its members for the purposes of collective bargaining. This goes beyond merely being informed or consulted about decisions.”¹⁶⁰

As has already been stated, this notion of ‘independence’ is absolutely fundamental as it is only after this has been established that the newly-confirmed union can fully assert its statutory rights.

A trade union is said to be ‘recognised’ by an employer once the two have agreed to bargain in respect of employees’ terms and conditions. The group of workers over whose conditions the two agree to negotiate becomes the ‘bargaining unit’. Recognition brings with

¹⁵⁸ Anne Davies, ‘Workers’ Human Rights in English Law’ in C Fenwick and T Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing 2010) 176.

¹⁵⁹ Tonia Novitz and Paul Skidmore, *Fairness at Work - A Critical Analysis of the Employment Relations Act 1999 and its Treatment of Collective Rights* (Hart Publishing 2001) 61.

¹⁶⁰ Bowers, Duggan and Reade (n58) 302.

it a number of legal rights and these typically include time off for representatives to enable them to discharge their union duties, time off for union members to participate in union activities, disclosure of information to representatives to enable them to participate more effectively in the process of collective bargaining with the employer and time off for union learning representatives with regard to employees' training issues generally as well as to undertake training themselves in order that they can perform their duties. Recognised independent trade unions also have the right to be consulted on such matters as health and safety issues, prospective redundancy exercises and proposals for the transfer of an employer's business undertaking. Recognition of trade unions in the UK can be effected either through a voluntary agreement between a trade union and an employer or, since the introduction of the Employment Relations Act 1999 (ERA 1999), following initiation by an applicant union of a statutory procedure that includes an application for recognition to an adjudicating body, the Central Arbitration Committee. The rationale for, and implementation and practical effects of, the UK's provision for statutory recognition is discussed in much more depth in Chapters Four and Five of this dissertation.

Summary

Human rights organisations have had a huge influence on the development of rights of freedom of assembly and association, not only in society generally but also in the specific context of labour law and access of workers to trade union membership. There are a number of essential characteristics that a trade union needs to exhibit if it is to properly take advantage of the protections that the law affords both to it and its members who participate in its activities. Independence from the employer is of crucial importance in enabling a union to fulfil its

obligations and the legal framework that surrounds registration and the issue of the Certificate of Independence by the Certification Officer in the UK provides a degree of certainty and stability to associations seeking to operate as recognised trade unions.

The contribution of the numerous national, regional and international instruments that make provision for freedom of association in employment has been hugely significant. Arguably the ILO's principal "weakness" is that it is a voluntary organisation with only limited power to enforce its instruments in member countries. However, while the ILO's Conventions may not be "mandatory" (and so have no formal status, certainly in English Law), they have proved to be indispensable as levers for the promotion of minimum standards in - and the establishment of benchmarks for - the employment rights of member states' citizens. The peer pressure that exists between member states to respect those of the ILO's provisions that address trade union rights and freedoms thus helps to ensure that protection of freedom of association and collective bargaining rights will almost certainly endure in one form or another. A detailed analysis of the historical context and characteristics of the formal models of recognition for trade union activity that exist in the UK and in Australia will follow in the Chapters Three to Six, including the advantages and apparent drawbacks that exist in both.

CHAPTER THREE

THE EVOLUTION OF COLLECTIVE BARGAINING LEGISLATION IN THE UNITED KINGDOM PRIOR TO 1997

Introduction

Anne (ACL) Davies contrasts the stance of countries who have sought to “facilitate” trade unionism through the conferment of legal rights (enshrined, for the most part, in national constitutions) on their citizens with the approach of English Law. She points to the latter’s focus having fallen on trade union organisations and the extent to which they have served as the principal means for protection of workers’ interests, resulting in the development of a system of statutory immunities designed to protect the unions against liabilities in tort against a background of sustained hostility from the judiciary that itself contributed to periodic statutory intervention by the legislature.¹⁶¹ The result of this conflict between competing “lawmakers” has been the creation and establishment of the legal framework for industrial relations that we know and understand today.

Chapter Three offers a précis of how the UK’s employment and trade union-related legislation evolved from the 19th and into the latter part of the 20th centuries, its response to the clamour for collective bargaining and its inception of a legal framework designed to facilitate the formation and validation of trade unions and the “last” attempted introduction of a scheme for statutory recognition in the form of provisions contained within the Industrial Relations Act 1971.

¹⁶¹ Davies (n158).

3.1 19th Century Origins of Worker Organisation

Prior to 1824, all attempts by workers to combine with the aim bringing about improvements in the terms of their employment were outlawed. From the period following the Black Death and the Peasants Revolt through to the implementation of measures such as the Combination Acts of 1799 and 1800 and the Master and Servant Act 1823, lawmakers' overriding objective had been to maintain stability and order on employers' terms. This ensured that the principle that underpinned all legislation was that workers should be obedient and loyal to their employer. Justices of the Peace could compel servants to work, applying criminal sanctions as they saw fit. Conversely, any failure by a master to provide work was only punishable by the use of *civil* penalties. Agreements proposed by workers that might enhance their pay and conditions were outlawed and judges maintained a conviction that *any* organisation of workers established with the intention of securing such advances itself amounted to a criminal conspiracy.¹⁶²

Humphreys argues that the Industrial Revolution, complete with its unforgiving working conditions and a consequential upsurge in industrial injuries, resulted in an acceptance that workers deserved greater workplace protection and a “decriminalisation” of trade union activity through the Combination of Workmen Act 1824 and the Combination Laws Repeal Amendment Act 1825 (reform that was, in truth, more “relative” than it was radical¹⁶³). Unions' internal organisations had become more effective and their more professional public image helped them to become more socially acceptable as it became more widely understood

¹⁶² In *R v Mawbey* [1796] 6 TR 619, it was said that, “... each may insist on raising his wages if he can, but if several meet for the same purpose it is illegal and the parties may be indicted for a conspiracy.”

¹⁶³ Humphreys (n143) 2.

that their prime objective was to improve working conditions rather (perhaps) than institute change throughout wider society.¹⁶⁴

The repeal of the Combination Acts allowed workers who were members of former ‘friendly societies’ to organise openly and create what became known as ‘new unions’, even if the initial expansion in membership proved uneven across the country (often occurring on an urban or regional basis more than through “national” institutions). Unions still enjoyed relatively little legal protection. Prosecutions were frequent and punishments severe, culminating in the celebrated case of the ‘Tolpuddle Martyrs’, six agricultural labourers who were sentenced to 7 years transportation in 1834 on a charge of administering ‘illegal oaths’. The Molestation of Workmen Act 1859 (MWA 1859) restricted the meaning of “molestation”, providing that it did not occur wherever a combination of workers sought to picket peacefully with the aim of convincing others that they should leave work to join lawful strike action and the Master and Servant Act 1867 changed the law again to make imprisonment of workers who were deemed to have *individually* breached their contracts of employment exceptional rather than customary. Judicial attitudes, however, remained staunchly conservative throughout.¹⁶⁵ In *Hornby v Close*¹⁶⁶, for example, it was held that trade unions remained unlawful whenever they sought to bring about increases in wage levels and organise workers because their actions amounted to a restraint of trade.

3.1.1 The ‘Creation’ of Trade Unions in UK Law

¹⁶⁴ *ibid* 2-3.

¹⁶⁵ *ibid*.

¹⁶⁶ [1867] 10 Cox CC 393.

Events such as the ‘Sheffield Outrages’ of 1886, which saw trade unionists accused of arson and murder to intimidate non-unionists and William Broadhead, the Secretary of the Sawgrinders’ Union, admit to ordering an employer’s murder, prompted the United Kingdom Alliance of Organised Trades (the forerunner of the Trades Union Congress) to argue that responsibility for those acts lay with individuals and that industrial relations would best improve if legal restrictions on union activity were removed. The (Conservative) government responded with the establishment of a Royal Commission on Trade Unions in 1867. A majority of its members determined that unions should be granted legal status on condition that they abandoned any rules that could be interpreted as being in restraint of trade but a vociferous minority refused to endorse the final report and published alternative findings. These included the proposition that unions should not only be legalised but also given immunity in respect of acts committed in restraint of trade and any criminal consequences that might arise from those acts. The minority report subsequently formed the basis of reforms introduced by Gladstone’s Liberal government in the form of the Trade Union Act 1871 (TUA 1871), Criminal Law Amendment Act 1871 (CLAA 1871) and by Disraeli’s Conservative administration in its Conspiracy and Protection of Property Act 1875 (CPPA 1875).¹⁶⁷

TUA 1871 both provided that “the purposes of a trade union” should no longer be regarded as unlawful merely because that union acted in restraint of trade and effectively also removed the courts’ jurisdiction to exercise judgement over the unions’ internal affairs. CLAA 1871 repealed the remaining active provisions of the Combination Acts and MWA 1859, restricting the definition of ‘molestation’ to threats of violence and removing criminal liability for conspiracy where this involved performance of an act that was not itself illegal, but it actually also introduced new offences of criminal harassment which continued to be enshrined

¹⁶⁷ Douglas Brodie, *A History of British Labour Law 1867-1945* (Hart Publishing, 2003) 1. Simon Deakin and Gillian Morris, *Labour Law* (3rd edn, Hart Publishing 2012) 13

in the law well into the 21st century *and* re-established picketing as a criminal offence.¹⁶⁸ CPPA 1875 then rendered collective bargaining and peaceful picketing lawful. Its s17 repealed the Master and Servant Acts so that it was no longer a criminal offence for workers to withdraw their labour from their employer save in relation to certain prescribed cases (usually involving strikes that would endanger life or property or where the strike occurred within one of the former ‘public utilities’). The Act also created a platform for the right to strike as it removed criminal liability from the acts of a workers’ conspiracy where this took place in furtherance or contemplation of a trade dispute, unless the acts themselves constituted criminal behaviour. The legislation that was introduced during this period is often looked upon as having formed the basis of “modern labour law”.¹⁶⁹ Worker organisation had also built up considerable momentum by this point, culminating in the first meeting of the Trades Union Congress (TUC) in Manchester in 1868.¹⁷⁰

By 1901, trade unions had ceased, at least as far as legislation was concerned, to be regarded as unlawful.¹⁷¹ The judiciary, however, continued to subject trade unionists’ activities to rigorous examination through the common law. The case of *Quinn v Leathem*¹⁷² featured a claimant who was an employer of non-union workers. Both he and one of his major customers were advised by the defendant, a trade union activist, that they would both be subjected to industrial action unless the non-union employees were dismissed. The customer revoked his purchase agreement with the claimant, who then sued the defendant in common law for the (economic) tort of conspiracy in respect of the loss that he sustained. The House of Lords ruled in favour of the claimant and held that while a combination not to work was lawful, the same

¹⁶⁸ Humphreys (n143) 4.

¹⁶⁹ Royal Commission on Trade Unions (Cd 4123, 1869).

¹⁷⁰ See Trades Union Congress, ‘The History of the TUC 1868-1968, Part One 1868-1900’ (Trades Union Congress) <http://www.tuc.org.uk/the_tuc/tuc-2878-f3.cfm#tuc-2878-3> accessed 27 February 2011

¹⁷¹ Humphreys (n143) 4.

¹⁷² [1901] AC 495.

exercise aimed at preventing others from working under circumstances such as described in *Quinn* was prima facie unlawful. The Trade Disputes Act 1906 (TDA 1906) addressed issues raised in *Quinn* and granted unions statutory immunity from the consequences of particular economic torts that they may have committed while pursuing industrial action. Dramatic increases in membership levels enabled unions to extend their political activities. Some joined socialist groups resulting in the formation in of the Labour Representation Committee in 1900 (which would later evolve to become the Labour Party in 1906). It offered direct assistance to unions penalised by court decisions during industrial disputes. An infamous such ruling was the judgement of the House of Lords in *Taff Vale Railway Company v Amalgamated Society of Railway Servants*¹⁷³, which appeared to violate provisions contained in TUA 1871. The Taff Vale Railway Company successfully sued the union for damages in respect of financial loss it had incurred because of a strike. The ruling posed a severe threat because it suggested that any strike would most likely result in a union losing some or all of its funds and the liability was only removed with the introduction of TDA 1906. In *Osborne v Amalgamated Society of Railway Servants*¹⁷⁴, the House of Lords held that it was illegal for a union to spend its funds on purposes other than those laid down in earlier legislation. The Trade Union Act 1913 (TUA 1913) reversed the ruling in *Osborne* and permitted unions, with their members' consent, to establish separate political funds in order to pursue their political objectives.

3.2 The Significance of the Post-Second World War Period, the Industrial Relations Act 1971 and Renewed Attempts at Control of Trade Union Activity

The intervention of two World Wars and a concentration on post-conflict, global issues

¹⁷³ [1901] UKHL 1.

¹⁷⁴ [1910] AC 87.

took precedence over further reform of the UK's trade union law until well into the 1960s. Society had, by then, undergone radical socio-economic change with escalations in inflation and unemployment and an expansion in population resulting in an upsurge in the number of people seeking work. Workplaces had become more mechanised and this restricted the economy's ability to absorb the increased demand for jobs. Meanwhile, industrial relations at local levels had become increasingly strained as trade union officials sought to secure advances beyond the terms contained in nationally negotiated agreements and regularly employed tactics such as the 'wild cat' strike to achieve their aims.

The Wilson (Labour) government responded to the increase in unofficial strikes, wage inflation and claims of economically damaging "restrictive practices" with the establishment of the 1965 Royal Commission on Reform of Trade Unions and Employers' Associations (the Donovan Commission) to consider the role of trade unions and employers' associations and propose changes to industrial relations law with a view to the "acceleration (sic) of the social and economic advance of the nation".¹⁷⁵ Reporting in 1968, Donovan argued that employers failed to recognise the extent to which shop floor bargaining had threatened to supplant "traditional" industry-wide negotiations between employers and unions and had lost control of workplaces. Reform of such *local* bargaining processes needed to take place through a system of recognition of employees' elected representatives (shop stewards) and the establishment and implementation of binding agreements between employers and those representatives at plant and company level.¹⁷⁶ Donovan formed the basis of the 1969 White Paper, 'In Place of

¹⁷⁵ EurWORK, 'Donovan Commission 1965-68' (Eurofound, 14 August 2009) <<http://www.eurofound.europa.eu/emire/UNITED%20KINGDOM/DONOVANCOMMISSION196568-EN.htm>> accessed 31 July 2012

¹⁷⁶ The Commission members also sought to generally defend the principle of voluntarism and the tradition of legal non-intervention, but conceded that it was necessary to legislate to protect specific individual rights such as that against unfair dismissal.

Strife'.¹⁷⁷ This included wider proposals to curb union power (including the introduction of mandatory strike ballots and the establishment of a body to enforce settlements of disputes) before the threat of a split within the Labour Party resulted in its abandonment.¹⁷⁸

The Donovan proposals resurfaced in the Heath (Conservative) government's Industrial Relations Act 1971 (IRA 1971). It purported to overhaul policy towards the unions as part of a wider "prices and incomes" approach¹⁷⁹ and employed, according to Humphreys, a two-pronged approach that granted individual rights to employees while exerting control over trade unions' collective pursuits. Moreover, it provided that unions could become registered, enabling them to become 'corporate entities' as has historically been the case in Australia but rendering them liable too to judicial scrutiny of their rulebooks. Registration was not mandatory, but unions that chose to "comply" discovered that they would be "rewarded" with exclusive collective bargaining rights in respect of pay and conditions, bargaining information, tax benefits and (perhaps most crucially) immunity from any action in tort.¹⁸⁰ Collective agreements between employers and trade unions were presumed to be binding in the absence of an express clause to the contrary and employers could enforce its provisions in the National Industrial Relations Court (NIRC

Arguably the greatest significance of IRA 1971 is that, prior to the introduction of the Schedule A1 recognition scheme in ERA 1999, its enactment represented the only meaningful attempt by a UK government to introduce a "register" of trade unions. It failed, largely, because most trade unions remained unwilling to co-operate with its provisions and chose to resist the "inducements" on offer to them (to register) but there was also a "secondary issue"

¹⁷⁷ Cmnd 3888.

¹⁷⁸ BBC News, 'Barbara Castle: Labour's red queen' (BBC News, 3 May 2002) <http://news.bbc.co.uk/1/hi/uk_politics/932237.stm> accessed 31 July 2012

¹⁷⁹ Humphreys (143) 6.

¹⁸⁰ *ibid.*

of employers declining the opportunity that the legislation provided to seek recourse to the NIRC. Humphreys also emphasises that emergency powers conferred on the government to enable it to apply to the NIRC for “cooling-off orders” to counter the threat of industrial action in emergency situations had only been invoked in one case, *Secretary of State for Employment v ASLEF (No 2)*¹⁸¹, where a pay dispute on the railways had resulted in a workers’ overtime ban and a work-to-rule¹⁸²).

3.2.1 The ‘Social Contract’

The Wilson (Labour) government elected in 1974 sought to maintain stability in workplaces by introducing its ‘Social Contract’. This committed the government to seek to maintain full employment and provide certain social and employment benefits in return for the establishment of a prices and incomes policy, “backed” by a commitment from TUC that it would adopt a non-inflationary wage policy.¹⁸³ Intended largely to bring about a restoration of the law as it had existed before IRA 1971, the Trade Union and Labour Relations Act 1974 (TULRA 1974) became the first piece of legislation to be tabled “within” the Social Contract.¹⁸⁴ The blanket exemption in relation to trade union liability in tort was reintroduced¹⁸⁵, registration of unions was abolished¹⁸⁶ and collective agreements were once more presumed (in the absence of a clause in a written agreement to the contrary) to be non-legally binding.¹⁸⁷

¹⁸¹ [1972] ICR 19.

¹⁸² Humphreys (n143) 7. The cooling-off order was ultimately granted by the Court of Appeal, although a subsequent ballot confirmed that there was widespread support for the union leadership’s position and this in turn resulted a settlement that was favourable to the union.

¹⁸³ *ibid.*

¹⁸⁴ Roy Lewis, ‘The Historical Development of Labour Law’ (1976) 14(1) BJIR 1, 1.

¹⁸⁵ TULRA 1974 s14.

¹⁸⁶ TULRA 1974 s8.

¹⁸⁷ TULRA 1974 s18.

The Employment Protection Act 1975 (EPA 1975) represented a shift in the law's emphasis to reflect the economic and social upheaval of the time and a balance between collective and individual employment rights.¹⁸⁸ It established several important institutions, including the Advisory, Conciliation and Arbitration Service (ACAS)¹⁸⁹, the Certification Officer¹⁹⁰, the Central Arbitration Committee (CAC)¹⁹¹ and the Employment Appeal Tribunal (EAT)¹⁹² and specified that there should be compulsory arbitration in the case of disputes over trade union recognition¹⁹³, that employers had a duty to disclose bargaining information to recognised unions¹⁹⁴, that a trade union's members were entitled to participate in the actions of that union during working hours¹⁹⁵ and that officials of a trade union had the right to take time off work to enable them to carry out trade union duties¹⁹⁶ - all of which remain more or less intact today.¹⁹⁷ Unions continued, however, to submit "above the rate of inflation" pay claims. They attempted to counter criticisms of their actions with the argument that it was left to their members to determine the extent of their wage demands and pointed out that government had failed to meet the demand for more progressive social measures.

EPA 1975 itself proved only to a "partial success". A number of employers refused to co-operate with its provisions including the owners of Grunwick Film Processing Laboratories who, in a bitter dispute with their workforce over recognition that lasted from 1976 to 1978, refused to supply ACAS with workers' names and addresses with the consequence that it was prevented from carrying out its statutory duty to ascertain employees' views¹⁹⁸ and resulting

¹⁸⁸ Lewis (n191) 1.

¹⁸⁹ EPA 1975 ss1-6.

¹⁹⁰ EPA 1975 s7.

¹⁹¹ EPA 1975 s10.

¹⁹² EPA 1975 s87.

¹⁹³ EPA 1975 ss11-16.

¹⁹⁴ EPA 1975 ss17-21.

¹⁹⁵ EPA 1975 ss53-56.

¹⁹⁶ EPA 1975 ss57-58.

¹⁹⁷ Humphreys (n143) 8.

¹⁹⁸ EPA 1975 s14(1).

in the recognition process being frustrated. Inter-union disputes (where more than one union claimed recognition on behalf of a group of workers), practical problems encountered by ACAS regarding the definition of bargaining units and persistent problems of delays in the process and continuing attempts by employers to interfere in the outcomes of individual ballots also combined and helped to render the Act far less effective than had been envisaged by those who drafted it.¹⁹⁹

The Social Contract collapsed against the backdrop of a series of industrial disputes and strikes that combined to form the 1978-9 'Winter of Discontent'. Humphreys argues that the period of the Social Contract represented the "high-water mark of the protection afforded (to the unions)... by law: they were immune from liability in tort in respect of the consequences of industrial action organised by them (including against third parties) and they had no restrictions on their taking of industrial action (save for that contained within their union rulebooks)".²⁰⁰ Roy Lewis described the effect of conflicting changes introduced in the decade following the establishment of the Donovan Commission as one of "bewildering changes of pace and direction".²⁰¹ Anne Davies agrees that the true "legacy" of EPA 1975, together with other mid-1970s legislation that included measures designed to specifically target unfair dismissal and sex and race discrimination, represented a "redressing of the balance" away from collectivism towards individual employment rights even if she recognises that others, including (Lord) Bill Wedderburn, have looked upon these measures as having simply created a 'floor of rights' on which collective bargaining could build.²⁰²

¹⁹⁹ Malcolm Sargeant and David Lewis, *Employment Law* (5th edn, Longman 2010) 353.

²⁰⁰ *ibid.*

²⁰¹ Lewis (n191) 1.

²⁰² Davies (n158).

3.2.2 Curbs on Trade Unions from the 1980s

The Thatcher (Conservative) government elected in 1979 vowed that it would legislate to curb the unions' influence. Many Conservatives believed that trade unionists were a "corrupting effect on the operation of free markets, setting wage levels higher than they would be if left to negotiations between employers and individual employees".²⁰³ The new administration signalled its intent in the Employment Act 1980 (EA 1980). It provided that state funds could be made available to help pay the cost of union ballots²⁰⁴, that individual union members should have the right not to be unreasonably excluded or expelled from a trade union²⁰⁵, that immunity in tort for *secondary* picketing should be repealed²⁰⁶ and that certain trade union recognition machinery should also be repealed.²⁰⁷ The Employment Act 1982 (EA 1982) introduced further constraints, including deeming unlawful dismissals of employees who were not union members in a closed shop where the existence of that arrangement had not been approved during the preceding five years by means of a secret ballot of the workforce²⁰⁸, the outlawing of "trade union labour only contracts"²⁰⁹, removal of the immunities that existed in tort actions against trade unions whilst protecting union assets held in provident benefit and political funds, the placing of a cap on the amount of damages that could be awarded against a union found to have committed a tort²¹⁰ and a narrowing of the definition of what could lawfully constitute a 'trade dispute'.²¹¹

The Trade Union Act 1984 (TUA 1984) specified that "trade unions should be

²⁰³ Humphreys (n143) 8.

²⁰⁴ EA 1980 ss1-2.

²⁰⁵ EA 1980 ss4-5.

²⁰⁶ EA 1980 ss16-17.

²⁰⁷ EA 1980 s19.

²⁰⁸ EA 1982 ss2-9.

²⁰⁹ EA 1982 ss12-14.

²¹⁰ EA 1982 ss15-19.

²¹¹ EA 1982 s18.

democratic and exist for the benefit of their members”²¹². It included stringent balloting requirements in respect of the conduct of elections for leadership offices²¹³, the obligation to validate a call for industrial action by means of a ballot of the membership²¹⁴ and a requirement that retention of a union’s ‘political fund’ should be verified by a ballot of members²¹⁵. Next, the Employment Act 1988 (EA 1988) embodied the government’s response to issues that surfaced during the 1984/5 Miners’ Strike²¹⁶ and signified an acceleration of the Conservatives’ determination to restrict trade union operations. It provided that proposed industrial action would need to be backed by a majority of members voting in favour in a ballot.²¹⁷ Individual members were granted separate rights of access to the courts to challenge a union’s application of its rules²¹⁸ and not to be unjustifiably disciplined by their union.²¹⁹ They could also inspect the union’s accounts²²⁰ and control expenditure of funds by its trustees²²¹. Meanwhile, provisions contained in the Trade Union and Labour Relations (Amendment) Act 1976 (TULRAA 1976) relating to automatically unfair dismissals as a consequence of individual employers’ ‘closed shop’ policies were repealed.²²² Employees who could demonstrate that their employer had taken other discriminatory action short of dismissal against them on account of their union membership were granted a right of action²²³, while further detailed provisions in respect of certain union elections and ballots (on political funds and with regard to industrial action affecting different workplaces as well as the inclusion of a power to issue Codes of

²¹² Humphreys (n143) 8.

²¹³ TUA 1984 Part I.

²¹⁴ TUA 1984 Part II.

²¹⁵ TUA 1984 ss12-16.

²¹⁶ These primarily centred on former members of the NUM whose legal challenge to their national leadership’s decision not to hold a national ballot ultimately resulted in their formation of the breakaway Union of Democratic Mineworkers.

²¹⁷ EA 1988 s1.

²¹⁸ EA 1988 s2.

²¹⁹ EA 1988, ss3-5.

²²⁰ EA 1988, s6.

²²¹ EA 1988, ss8-9.

²²² EA 1988, s10.

²²³ EA 1988, s11.

Practice) were also set out.²²⁴

The Employment Act 1990 (EA 1990) stated that discrimination by employers against job applicants on the ground of membership or non-membership of a trade union was unlawful²²⁵ and amended still further the law on balloting for industrial action. It rendered trade unions vicariously liable for unlawful action of their officials where they (the unions) failed to condemn industrial action called by an official in the union's name without proper authority²²⁶ and extended the power of the Secretary of State to issue Codes of Practice.²²⁷ The by now "complex bundle of rights and obligations for trade unions, trade union members and employers alike"²²⁸ was consolidated by the Major government into the TULRCA 1992, including a right for individuals not to be unreasonably denied membership of a trade union.²²⁹

Summary

UK industrial relations were, throughout most of the 20th century, characterised by engagement between employers, employees (represented through trade unions) and the state through a 'tripartite' system. There existed, within that legal framework, a general consensus between politicians, employers and trade unions that endured right up until the late 1960s and which commanded that (save for circumstances of war or some other sustained national emergency) industrial relations and the law should not become intertwined. It was this sometimes complicated arrangement that Kahn-Freund sought to illustrate in his analysis of

²²⁴ EA 1988, ss12-18.

²²⁵ EA 1990, ss1-3.

²²⁶ EA 1990, ss4-9.

²²⁷ EA 1990, s12.

²²⁸ Humphreys (n143) 10.

²²⁹ TULRCA 1992, s174.

collective laissez-faire. The subsequent (if short-lived) inception of IRA 1971, the establishment of the 'Social Contract' and the tranche of hostile measures introduced in the UK after 1979 deviated from (it could be said, entirely undermined) Kahn-Freund's submissions.

Mechanisms for legal recognition of trade unions were perceived as a threat to trade union autonomy rather than support for collective bargaining and neither unions nor employers wholeheartedly embraced attempts at state regulation of collective bargaining. At the same time, the law shielded unions from legal challenges to their actions and this led Khan-Freund to alter his evaluation of union autonomy. He shifted his emphasis away from the need to permit collective negotiations and instead began to worry about who could protect the public interest within a laissez-faire system that afforded trade unions considerable freedom of action.

CHAPTER FOUR

RECOGNITION OF TRADE UNIONS IN AUSTRALIA

Introduction

The various models of trade union recognition that exist across the developed world reflect the cultures and histories of individual nations as much as the direct influence of each of their legal systems. Chapter One of this study examined some of the most significant influences on the UK's recognition model as it evolved throughout the 20th century, including Otto Kahn-Freund's 'abstentionist' theory and the wider establishment's enthusiasm for the 'laissez-faire' kind of approach to industrial relations that his philosophy would help to promote before it was punctuated briefly (during the 1970s) by the more "interventionist" 'Social Contract'. Government intervention and oversight was, by and large, constrained and employers and trade unions were left to operate more or less free of interference. Workers' pay and benefits were determined by collective bargaining and considerations of the economic market leaving the state "confined", usually, to the role of "arbiter" in relation to complaints regarding alleged breaches of rules and provider of a framework within which political funds could be maintained, mergers could take place and the independence of trade unions could be certified.

The Social Contract, favoured by the Wilson and Callaghan (Labour) governments from 1974 to 1978, took the form of a bi-partite agreement with trade unions and was designed to address the economic difficulties of the period. Described by some as "a high point of trade

union influence”²³⁰, it purported to control inflation through prices regulation, sought to implement industrial (stimulus) policies aimed at increasing employment levels and aimed to bring about improvements in the “social wage” through redistributive fiscal measures and a shift in public spending priorities. Improvements to welfare benefits and more stringent controls on food prices and housing rents were introduced but inflation continued to spiral, placing severe pressure on the voluntary policy of wage restraint. The economic crisis continued to deepen and the government withdrew the earlier subsidies. The Social Contract increasingly became looked upon by unions as another means of depressing their members’ incomes and the eventual consequence was the campaign of industrial action during 1978-79 that has popularly become known as the “winter of discontent”. From 1979, first Conservative and then Labour governments returned to the more traditional, “hands-off”, approach to industrial relations, albeit with differing policy objectives.

Chapter Three of this study considered how legislation, judicial decisions and academic theory combined to form the “character” of the UK’s approach to workplace industrial relations through to the post-Second World War period. Chapters Five and Six will analyse the legislative changes introduced by Labour governments from 1997 that impacted upon and “revised” the UK’s union recognition ‘model’. Other nations have, unsurprisingly, adopted different approaches to these kinds of issues. An appraisal of some of those alternative methodologies may, through means of comparison, help to inform our conclusions regarding the extent to which the UK has shown itself able to address the various issues surrounding union recognition during periods of both economic and political change. Chapter Four examines how Australia made recognition of trade unions an intrinsic component of its

²³⁰ EurWORK, ‘Labour standards’ (Eurofound, 12 March 2007) <<http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/labourstandards.htm>> accessed 27 November 2012

industrial relations beginning with the establishment of a nationwide conciliation and arbitration system around the turn of the 20th century. In so doing, it distinguished its approach from that taken by the UK, which conspicuously failed to include any provisions for union recognition in its employment legislation until the introduction of the Employment Relations Act 1999. Australia's recognition law serves as an obvious comparator to that in the UK because of its history as a settler colony of the British Empire and the longstanding similarities between the two jurisdictions before *and* after the advent of Australian independence around the turn of the 20th century.

4.1 Why Australia's Model?

The UK and Australian recognition models are natural comparators. The two countries' shared heritage dictated that both would adopt the 'Westminster' parliamentary system of government to manage their respective legislatures. A history of industrialisation helped to spawn workplace trade union activism in both countries and there have been parallels in the nature and effect of some of the changes in legislation that have been introduced in both countries over the last couple of decades. There are, however, also distinct and highly significant differences between the two systems. The right to representation by a trade union to an employer has remained integral within Australia's highly regulated industrial relations regime since 1904, while the UK model – prior, at least, to the election of the first of the Blair Labour governments in 1997 – was renowned for its adherence to its almost “anarchic” collective laissez- faire principles and failure to bestow upon unions any right of recognition that was enshrined in law. An analysis of both recognition models can assist in our comprehension of the common themes that endure within Australian and UK law, an

appreciation of the motivation and/or reasoning for the quite different approaches to the issues that legislators in both countries may have adopted – whether through choice or “necessity” – leading to greater overall understanding of the relative positions today of Australian and UK trade union organisations within their respective, wider employer-employee relationships.²³¹

The Australian establishment’s reluctance to sanction provision for freedom of association in the context of union organisation and the consequential obligation that this has placed on unions to seek ‘registered organisation’ status so that they can participate in the settlement of industrial disputes contrasts with the ‘collective laissez-faire’ system that developed in the UK. The basis for Australia’s modern-day guarantee of freedom of association for its trade unionists can be found in several international sources, ranging from the ICCPR and the ICESCR to the various ILO instruments that its government and employers are obliged to observe. Colin Fenwick suggests, however, that the Australian federal authorities’ concentration on the implementation of latter-day international legal obligations should not distract from the fact that none of those instruments have themselves exerted any meaningful influence over the substantive content of Australian recognition law and that the process through which Australia’s labour laws evolved actually began around the turn of the 20th century with the introduction by the Commonwealth Parliament of the Conciliation and Arbitration Act 1904 (Conciliation Act).²³²

Wilkinson, Bailey and Mourell point to the development by Australia of a “hybrid” industrial relations system characterised by the institution of minimum standards consequent

²³¹ See J Reitz, ‘How to Do Comparative Law’ (1998) 46(4) AJCL 617.

²³² Colin Fenwick, ‘Workers’ Human Rights in Australia’ in Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing 2010) 57. These include ILO Convention 87 (freedom of association and the right to organise) and 98 (the right to organise and collective bargaining) as well as the Declaration on Fundamental Principles and Rights at Work.

upon awards made by arbitrators. The creation of these “thresholds” afforded widespread protection to workers and enabled unions to participate in collective bargaining where they were able to wield sufficient “market power”.²³³ The evolution of Australian industrial relations regulation to 2007 could be separated into three distinct, historical phases. The first (and lengthiest) was the period that has become known as ‘the Australian settlement’, which lasted from 1904 to 1982. This was followed by an arguably more ‘quasi-corporatist’ kind of approach under federal Labor (ALP) administrations from 1983 to 1996 ahead, finally, of the implementation of increasingly neo-liberal policies by John Howard’s Liberal-National coalition government between 1996 and 2007.²³⁴ Further legislation would be introduced by the Kevin Rudd-led ALP government in the form of its Fair Work Act 2009 and the effects of that reform will also be assessed later in this chapter.

²³³ Adrian Wilkinson, Janis Bailey and Mark Mourell, ‘Editors’ introduction: Australian industrial relations in transition’ (2009) 40(5) IRJ 358, 358.

²³⁴ *ibid* 363.

4.2 20th Century Development of Australian Recognition Mechanisms

Jeff Shaw, a former New South Wales Attorney-General and Minister for Industrial Relations, argues that Australia's "traditional" approach to union recognition - founded on the premise that unions should be recognised simply by virtue of their registration under federal industrial relations legislation - has been much more straightforward than that adopted in the United Kingdom.²³⁵ The Commonwealth Parliament ushered in its 'arbitral model' in the Conciliation Act to form the basis for regulation of the employment relationship. It remained in place as the principal component of federal industrial relations legislation for more than 80 years until the enactment of the Industrial Relations Act 1988 (Cth) (IRA 1988), that would itself be supplanted by the Howard governments' Workplace Relations Act 1996 (Cth) and Workplace Relations Amendment Act 2005 (Cth) (commonly referred to as 'WorkChoices').

The Conciliation Act was introduced following a series of strikes and a severe economic depression during the 1890s. The response of many employers to these events was to refuse to recognise or bargain with unions while the state's common law continued to impose civil, and often criminal, penalties on participants in collective industrial action. Australia evolving through a process of political federation and its Constitution came into effect upon the country's independence from Britain in 1901. Domestic manufacturers lobbied for the imposition of tariffs to help bolster the recovering economy while trade unionists and liberal-minded lobbyists argued for increased social protection through the introduction of guaranteed wage thresholds and state-sponsored mechanisms to settle disputes. The basis for the

²³⁵ J Shaw, 'Observations on Trade Union Recognition in Britain and Australia' (2001) 24(1) UNSWLJ 214. It should be noted that the Australian federal government may only legislate with regard to those matters that are set out in the nation's Constitution and that in all other respects, power to make new laws is vested in individual States and Territories.

Conciliation Act (and the “arbitral model” that emerged from it) was the Australian Constitution’s ‘industrial relations power’, which was set out in Section 51(xxxv). This permitted the Federal Parliament to institute, through legislation, a system of public-sponsored conciliation and arbitration “for the prevention and settlement of industrial disputes extending beyond the limits of any one state”. Its primary objective was to encourage collective bargaining through voluntary agreements between employers and unions or, failing that, conciliated settlements through a compulsory arbitration mechanism. The legislation aimed to eliminate the possibility of strikes and lockouts and its architects hoped that collective groups of employers and employees would readily settle their differences by conciliation and agreement, probably on an industry-wide basis.²³⁶

A basic tenet of the Conciliation Act was that unions did not need to gain recognition from employers. They were instead recognised by the state through a system of registration, which meant that they could notify a dispute with an employer (or employer association) and then invoke the compulsory conciliation and arbitration mechanism. Unions could request the imposition of awards on employers by tribunals and registered unions were also able to make enforceable collective agreements with employers.²³⁷ The Conciliation Act introduced the rule of law in industrial relations for the whole nation through the establishment of the ‘Commonwealth Court of Conciliation and Arbitration’, which was vested with powers to prevent and settle disputes both as a provider of conciliation and mediation services designed to promote amicable agreements between the parties and act as an arbitrator in circumstances where such voluntary accords could not be reached. It was envisaged that the Court would also adjudicate on any disputes that were referred to it by individual states and that both it and the

²³⁶ See for example, Andrew Frazer, ‘Individualism and Collectivism in Agreement-making under Australian Labour Law’ in *Studies in Employment and Social Policy: Collective Agreements and Individual Contracts of Employment* (Kluwer Law Publishing 2003) 49.

²³⁷ *ibid.*

various state industrial authorities that were in existence would co-operate with (and support) each other. Minimum standards in employment and improvements to them that were more usually subject to collective bargaining in other countries tended to be determined by an evolving regime of tribunals both at the federal level and in individual states.²³⁸

One of the most significant consequences arising from the formation of federal Australia was that state customs barriers were abolished, resulting in the transportation of large amounts of subsidised coal from New South Wales (NSW) to Victoria.²³⁹ Victorian coal mining companies located at Jumbunna and Outtrim gave notice that they intended to reduce wages in order that they could remain competitive with the cheaper NSW coal. This inspired the workforce to form the Victorian Coal Miners' Association (VCMA) and begin a recognition strike that lasted for 70 weeks. The employer mining companies refused to recognise the VCMA and the defeated strikers eventually returned to work, whereupon they were subjected to harassment and/or dismissal simply because of their union membership. The VCMA applied to the Industrial Registrar of the Conciliation and Arbitration Commission for registration as a federal organisation with the expectation that it would be able to use registered status to obtain "federal award coverage" to protect its members pay rates and invoke provisions in the Conciliation Act designed to prevent victimisation of employees who were members of trade unions. The employers challenged the registration provisions in *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association* ('*Jumbunna*').²⁴⁰ The company owners argued that Parliament had exceeded its powers by conferring the status of corporations on registered associations, which invested them with the power to hold property and to sue for fees and contributions. They also submitted that these incidents and powers were inseparable from the

²³⁸ Wilkinson, Bailey and Mourell (n240) 359.

²³⁹ Shaw (n242).

²⁴⁰ [1908] 6 CLR 309.

scheme of registration and that as this was such a vital part of the Conciliation Act, then the whole enactment was unconstitutional and void. The *Jumbunna* case effectively became a test of whether Australian workers had the right to be represented by a trade union during industrial disputes and therefore assumed huge significance.

The employers' arguments in *Jumbunna* were rejected by the High Court, which decided that unions and employer organisations had the right to register under this federal legislation *specifically* for the purpose of becoming the recognised representatives of their members' interests. The presiding judge, Justice O'Connor, stressed that for the Commonwealth's conciliation and arbitration power to be effective in bringing about the settlement of disputes, representative bodies purporting to represent groups of workers (and not individuals) needed to enjoy standing.²⁴¹ Accordingly, he held that:

“The end aimed at by the Act in question here is the prevention and settlement of industrial disputes extending beyond any one state by conciliation and arbitration. It may well be conceded that there is no general power to prevent and settle industrial disputes by any means that the legislature may think fit to adopt. The power is restricted to prevention and settlement by conciliation and arbitration. Any attempt to effectively prevent and settle industrial disputes by either of these means would be idle if individual workmen and employees only could be dealt with. The application of the ‘principle of collective bargaining’ not long in use at the time of the passing of the Constitution, is essential to bind the body of workers in a trade and to ensure anything like permanence in settlement. Some system was therefore essential by which powers of the Act could be made to operate on representatives of workmen, and on bodies of workmen, instead of individuals only. But if such representatives were merely chosen for the occasion without any permanent status before the court, it is difficult to see how the permanency of any such settlement of a dispute could be assured. Even when the dispute is at the stage when it may be prevented or settled by conciliation, the representative body must have the right to bind and the power to persuade not only the individuals with whom the dispute has arisen, but the ever changing body of workmen that constitute the trade.”²⁴²

Shaw has suggested that the High Court's affirmation of the registration provisions within the Conciliation Act represented the acknowledgement of a “unique status” conferred on unions within the conciliation and arbitration system as successful registration resulted in automatic recognition (by employers) and the capacity to operate meaningfully within the Australian

²⁴¹ *ibid* 360.

²⁴² *ibid* 358-9.

industrial relations system. Some of these arguments were developed further many years later by Justice Fullagar in *Williams v Hursey*.²⁴³ He held that successful registration by a trade union as an “organisation” under the Conciliation Act conferred upon it “a corporate character” and “an independent existence as a legal person”. He emphasised that this “(legal) personality” was something that was quite distinct from the all or any members of the union and that it remained constant irrespective of any changes in membership that might take place over time. The extent to which Australian unions were able to use their registered status to protect and enhance the working conditions of their members was discussed in *Burwood Cinema Limited v Australian Theatrical and Amusement Employees Association*²⁴⁴, where it was held that an industrial relationship could exist between a federally registered union and employers who did not employ members of the union when the demands made by the union concerned the relations between its members, present and future, and those employers (who could not refuse to recognise unions or by-pass the federal award system simply by refusing to employ union members). Further, in *Metal Trades Employers Association v Amalgamated Engineering Union*²⁴⁵, the High Court held that a union could validly create an industrial dispute in respect of the working conditions of employees who were not its members. Shaw has concluded that the registration process effectively served to ensure that Australia’s unions had become an integral part of the industrial relations system and were “recognised as being much more than merely agents of their members in that they (stood) in the place of their members and (acted) on their behalf.”²⁴⁶

Breen Creighton argues that the “registration system became “deeply embedded in the national psyche” to such an extent that by early as 1945, the vast majority of workers found

²⁴³ [1959] 103 CLR 30, 52.

²⁴⁴ [1925] 35 CLR 528.

²⁴⁵ [1935] 54 CLR 387.

²⁴⁶ *ibid.*

that their basic terms and conditions were regulated by the federal and state authorities' industrial tribunals.²⁴⁷ However, he also stresses that the essence of the Australian model was that there were no lawful means whatsoever through which unions could take industrial action until 1929 (when blanket prohibitions of strikes and lockouts were removed). Although unions remained both liable under the common law and subject to the numerous statutory provisions that continued to render virtually all industrial action unlawful, such behaviour did become more commonplace but legal sanctions were rarely invoked.²⁴⁸ The system of conciliation and arbitration established through the Conciliation Act (and corresponding legislation in the individual States) continued in operation until well into the 1980s, but Creighton concludes that what largely became a reliance upon tribunal awards (following referral of disputes by either of the parties involved in a dispute) ultimately served to undermine the development of collective bargaining through the kind of 'joint regulation (as between the parties)' or "collective laissez-faire" kind of approach traditionally practised in countries such as the UK.²⁴⁹

4.3 Federal Labor's 'Third Way' Approach (1983-96)

Whether by "accident" or design, arguably the first manifestation of what became known as the 'third way' occurred in Australia in 1983 when a new ALP government was elected.²⁵⁰ Having concluded a 'Prices and Incomes Accord' with the Australian Council of Trade Unions (ACTU) with the specific aim of assuaging more voters' concerns before the election, ALP

²⁴⁷ Breen Creighton, 'A Retreat from Individualism? The Fair Work Act 2009 and the Re-Collectivism of Australian Labour Law' (2011) 40(2) ILJ 116, 117.

²⁴⁸ *ibid.* 118.

²⁴⁹ *ibid.*

²⁵⁰ Christopher Pierson and Francis Castles, *Australian Antecedents of the Third Way* (2002), Political Studies, 50(4) 683, 686.

ministers sought to implement structural economic reforms and began to more openly embrace the use of “market mechanisms” in their industrial policy.²⁵¹ Creighton believes that the conciliation and arbitration system had, by that point in time, become over-centralised. Terms and conditions had largely become determined by ‘over-award’ bargaining (where arbitrated awards were used as a starting point for negotiation of additional benefits) and the business lobby had been pressing for “greater flexibility”.²⁵²

ALP governments from 1983 (led first by Bob Hawke and then by Paul Keating) sought to shift the focus away from centralised awards to collective bargaining at the “enterprise level” although the system of awards was maintained in the form of a ‘no-disadvantage test’, which decreed that enterprise agreements would only have effect if their terms were at least as advantageous for employees as those of any otherwise applicable award.²⁵³ The Hawke government finally replaced the Conciliation Act with IRA 1988 and the Keating administration then accelerated the process through the introduction of the Industrial Relations Legislation Amendment Act 1992 and the Industrial Relations Reform Act 1993 (IRRA 1993). In addition to a simplification of the negotiation process for employers and unions, IRRA 1993 provided legal protection for industrial action during negotiations. However, it also enabled employers to conclude non-union collective agreements known as Enterprise Flexibility Agreements (EFAs) with employees for the first time (it should be emphasised though that some means of participation remained as employers were required to notify all ‘eligible unions’ that they intended to conclude an EFA, and that a union could then play an active role if one or more employees were members or any other employees indicated that they wished it to represent them²⁵⁴). IRRA 1993 also introduced into IRA 1988, the power for the Australian

²⁵¹ Wilkinson, Bailey and Mourell (n240) 361.

²⁵² Creighton (n254) 120.

²⁵³ *ibid.*

²⁵⁴ Rae Cooper and Chris Briggs, “Trojan Horse’ or ‘Vehicle for Organizing’? Non-Union Collective

Industrial Relations Commission (AIRC) to make orders “for the purpose of ensuring that the parties negotiating an agreement do so in good faith”.²⁵⁵ These intervention powers appeared to be wide-ranging, but the AIRC itself held in both *Public Sector, Professional, Scientific Research, Technical, Communications, Aviation and Broadcasting Union v Australian Broadcasting Commission (ABC Case)*²⁵⁶ and *Asahi Diamond Industrial Australia Pty Ltd v Automotive, Food, Metals and Engineering Union*²⁵⁷ that any the authority was merely “facilitative” and that while it could order parties to meet and confer, they could not be compelled to bargain.

One interpretation of the effect of what Wilkinson et al describe as the “hybrid quasi-corporatism” practised under the Hawke and Keating governments²⁵⁸ is that the award structure, for so long the foundation of federal industrial relations, was relegated to become little more than a “safety net”.²⁵⁹ Meanwhile, some state governments were framing legislation which enabled employers within those jurisdictions to bargain with individual employees and so avoid established collective “routes”.²⁶⁰ The first of John Howard’s Liberal/National Party coalitions resolved that it would make EFAs and certain initiatives that had already been taken in some states centrepieces of its legislative programme following its 1996 federal election victory.

Agreement Making and Trade Unions in Australia’ (2009) 30 (1) EID 93, 100.

²⁵⁵ IRA 1988 s170QK.

²⁵⁶ ('ABC Case') [1994] 36 AILR 372.

²⁵⁷ [1995] 59 IR 385.

²⁵⁸ Wilkinson, Bailey and Mourell (n240) 361.

²⁵⁹ *ibid* 362.

²⁶⁰ Employee Relations Act 1992 (Vic); Workplace Agreements Act 1993 (WA).

4.4 Pro-Employer Legislation under ‘Howard Governments’

The earliest and most significant legislative enactment by first Howard government was the Workplace Relations Act 1996 (WRA 1996). It was the first piece of legislation to make significant use of the Constitution’s ‘Section 51(xx)’ “corporations power”²⁶¹ and it sought to attach stricter conditions to union recognition rights. Supported by the Workplace Relations Regulations 1996 (the legislative instrument necessary for its effective operation), it set out a more rigorous process that trade unions would need to follow if they were to secure representative capacity. A union would first need to file an application for registration.²⁶² Notice of the application would be published and circulated to interested parties²⁶³, who could then object to the registration.²⁶⁴ Only then might formal registration (by the AIRC) take place.²⁶⁵ Other measures introduced by WRA 1996 included:

- Provision for individual contracting in the form of ‘Australian Workplace Agreements (AWAs);
- the creation of an Office of the Employment Advocate (OEA) to scrutinise and register agreements;
- a reduction in the AIRC’s influence, so that it became merely *one* means through which disputes could be resolved;
- simplification of awards through an ‘Award Simplification Taskforce’; and
- restrictions on unions’ right of entry into workplaces as well as tighter constraints governing their internal rules and procedures.

Arguably the most controversial measure (and the one which struck right at the heart of recognised trade unionism) was the AWA, the formal instrument designed specifically to exclude Australia’s trade unions from the bargaining process.²⁶⁶ While its stated aim may have been to “provide more effective choice and flexibility for employers and employees in reaching

²⁶¹ Wilkinson, Bailey and Mourell (n240) 363.

²⁶² Workplace Relations Regulations 1996 (Cth) reg 33.

²⁶³ Workplace Relations Regulations 1996 (Cth) reg 35.

²⁶⁴ Workplace Relations Regulations 1996 (Cth) reg 36.

²⁶⁵ Workplace Relations Act 1996 (Cth), s191.

²⁶⁶ Workplace Relations Act 1996 (Cth) Sch11.

agreements”²⁶⁷, the threat that it presented to trade unions was obvious. Negotiations were permitted either on an individual or a collective basis but once these were completed, each employee was deemed to have made (and was required to sign) an individual written agreement with the employer, which was then registered with the OEA. AWAs specified terms and conditions of employment and were required to include a dispute resolution procedure. Each one also had to pass a ‘no disadvantage test’ (which involved a comparison with some relevant other award registered with the OEA). Terms contained within individual AWAs could take precedence over conditions of employment set out in state or territory legislation save for any provisions which had been made with regard to occupational health and safety, workers’ compensation or training arrangements. Each one was to have a maximum duration of three years and participation in industrial action in respect of any matter contained in each agreement was forbidden throughout its entire lifetime.

WRA 1996 restricted the role of the AIRC so that it could only arbitrate to solve a dispute in circumstances where industrial action posed a significant threat to the national economy or the community’s health and safety or to prevent industrial action outside a bargaining “window”. It was also put in charge of the award simplification process and the content of awards was limited to 20 ‘allowable matters’ (or core employment conditions) including leave, working hours and pay. Only *minimum* wage rates could be specified in new awards. The effect of all of these changes was that the AIRC’s arbitral powers were clearly and significantly weakened²⁶⁸ while severe constraints were placed on union activities and collective bargaining processes (which were restricted through the imposition of limits on union right of entry into workplaces and by allowing employers to refuse to negotiate with union representatives). Mirroring measures similar to those introduced by the UK’s Conservative governments during

²⁶⁷ Workplace Relations Act 1996 (Cth) Sch11, s11.1.

²⁶⁸ Shaw (n242).

the 1980s, WRA 1996 exposed unions and their members to fines in the event that they failed to comply with more restrictive strike balloting procedures or give the requisite length of notice to employers ahead of any industrial action, while participation in secondary boycotts and strikes was also made unlawful. Awards could not include any matter that enabled union activity to take place and employers were given additional powers to lock out employees as a means of pressuring them into signing individual agreements.²⁶⁹ Opposition to the government's reform programme mounted including the 1998 'Waterfront Dispute' (described by Wilkinson et al as "the most significant dispute in many decades"²⁷⁰) arose when Patrick Stevedores, the largest employer on the Australian waterfront, attempted to de-unionise its workforce through means of dismissal and a lockout. In *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia*²⁷¹, the union fought a largely successful High Court action against the company resulting in the eventual conclusion of a negotiated settlement. The government was more successful though in a series of cases affecting unions in other sectors of the economy including banking, telecommunications and the public sector. This led to a further decline both in union membership and in days lost to the economy through industrial action.

4.5 'WorkChoices'

The Liberal-National coalition government led by John Howard was re-elected for a fourth term in 2004. Federal ministers promptly commissioned a further review of the country's industrial relations laws leading to the publication of further highly contentious

²⁶⁹ Wilkinson, Bailey and Mourell (n240) 364.

²⁷⁰ *ibid* 365.

²⁷¹ [1998] 195 CLR 1; [1998] HCA 30.

proposals designed to restrict collective bargaining and unions' ability to organise in workplaces. WRA 1996 as amended by the Workplace Relations Amendment Act 2005 (known as 'WorkChoices') became the new cornerstone of Australian federal industrial relations legislation. The Workplace Relations Regulations 2006, required to ensure that WorkChoices could function effectively, repealed their 1996 predecessors although many of them actually replicated, with amendments, some of those redundant provisions. WorkChoices sought to implement the government's objective of moving towards a single national system of regulation, first through the expansion of the federal system to cover most employers and then by ensuring that those employers were not subject to state awards or agreements and certain other state employment laws. It has been criticised by Mary Gardiner as having been "introduced in haste"²⁷² and for being "a curious mixture of government retreat from the labour market and government intervention"²⁷³ and by Andrew Stewart on account of its apparent inconsistencies and shortcomings in content.²⁷⁴ Richard Hall suggests that its passing (in December 2005) represented "the most fundamental revolution in industrial relations since federation."²⁷⁵

The amendments introduced by WorkChoices included:

- The replacement, for 'federal system' employers, of the separate State and federal industrial relations systems with a single *national* system;
- the establishment of a new Australian Fair Pay Commission (AFPC) to take on the responsibility for determination of minimum wage levels that had until then been exercised by the AIRC;
- the process through which Certified Agreements (between employers and trade unions acting on behalf of employees) and AWAs was simplified;
- responsibility for supervision of the certification process was transferred from the AIRC to a new statutory agency, the Workplace Authority;

²⁷² Mary Gardiner, 'His Master's Voice? Work Choices as a Return to Master and Servant Concepts' (2009) 31(1) SLR 53, 54.

²⁷³ *ibid* 55.

²⁷⁴ Richard Hall, 'Australian Industrial Relations in 2005 – The WorkChoices Revolution' (2006) 48(3) JIR 291, 292.

²⁷⁵ Andrew Stewart, 'Work Choices in Overview: Big Bang or Slow Burn?' (2006) 16(2) ELRR 25.

- the maximum duration of Certified Agreements and AWAs was increased from three to five years;
- abolition of the ‘no disadvantage test’ introduced by the Keating government and already amended by WRA 1996;
- unfair dismissal protections were weakened on the ground of “business need” and an exemption was introduced for companies employing fewer than 101 workers;
- further restrictions were placed on employees’ ability to take allowable industrial action;
- the introduction of compulsory secret ballots for industrial action;
- the introduction of a prohibition on ‘pattern bargaining’ (where unions were able to conclude an enhanced settlement with one employer and use it as a benchmark to negotiate similar or improved agreements with other employers) and industry-wide industrial action.

The transfer of responsibility for agreement certification to the new Workplace Authority raised concerns that more restrictions would be placed upon unions who sought to object to “unsatisfactory” content in agreements. Employers were no longer obliged to negotiate new *collective* agreements with employees or their representatives, regardless of the number of union members in a workplace or bargaining unit and/or those members’ preference for such an agreement. The simplification of the process leading to the establishment of Certified Agreements and AWAs and the decision to increase their respective maximum durations provoked a furious reaction from the ACTU and its allies. It complained that the AWA was a thinly veiled attack on employees’ conditions of service and that it was designed to destroy the unions’ ability to participate in collective bargaining. Trade unions maintained that individual employees could not raise the necessary bargaining strength to ensure fair treatment by their employer and that the safeguards offered by existing laws in respect of equity in bargaining and minimum standards in employment offered only scant consolation when set against the entrenched disadvantages for employees that inevitably arose out of the AWAs. Individual unions reminded members that the new laws did not compel workers to accept individual contracts or AWAs and urged anyone who had been offered one by the employer to seek advice

with a view to appointing the union as his or her bargaining agent.²⁷⁶

The ACTU and its allies responded to WorkChoices with a vigorous and highly effective public campaign of opposition under the banner, ‘Your Rights at Work’.²⁷⁷ Spread over several months, it included a series of rallies, marches and demonstrations as well as television and radio advertisements, legal challenges and extensive use of the internet. The campaigners seized upon a comment by Howard himself (Alison Barnes refers to it as a “telling slip”²⁷⁸) who, when interviewed on 7 July 2005, had said, “We’re not governing for the unions, we’re governing for the employers”. The government pressed ahead with its introduction of its Workplace Relations Amendment (Work Choices) Bill 2005 (Cth) into Parliament at the beginning of November 2005. Although the ACTU resolved that it would campaign against WorkChoices for as long as proved necessary to overturn the new laws²⁷⁹, the Bill passed quickly through the House of Representatives and the Senate and received the Royal Assent on 14 December 2005. In seeking to create its national system of regulation, the federal government knew that it was able to override legislation passed by the Northern Territory or Australian Capital Territory (ACT) Parliaments, but its ability to so act with regard to laws passed by states was restricted to matters that could truly be said to be “national concerns”. It therefore used Section 51(xx) (the “corporations power”) of the Constitution as its authority to extend the range of the federal industrial relations system²⁸⁰, causing consternation in the state Labor governments throughout the country. The introduction of the WorkChoices bill in Canberra had prompted the State Premier of Queensland, Peter Beattie to say, “Industrial

²⁷⁶ See for example, the Australian Services Union’s advice to members employed at Qantas: Australian Services Union, ‘Seven things you need to know about the new IR laws at Qantas Staff Credit Union’ (ASU National Office, 2007) <http://www.asu.asn.au/media/airlines_qantas/20070331_qscu.html> accessed 10 December 2011

²⁷⁷ Alison Barnes, ‘Trade Unionism in 2005’ (2006) 48(3) JIR 369, 370.

²⁷⁸ *ibid* 369.

²⁷⁹ ABC News, ‘Parliament House in uproar over industrial relations changes’ (ABC News, 2 November 2005) <<http://www.abc.net.au/pm/content/2005/s1496413.htm>> accessed 20 June 2010

²⁸⁰ Stewart (n282).

relations and a sensible state system has helped to give us... stability, we don't want a federal system that will wreck it. Under those circumstances, unless the legal advice advises otherwise, we will challenge it in the High Court.”²⁸¹ Despite widespread objections, the new legislation came into force on 27 March 2006 and the states’ challenge to the constitutional legitimacy of WorkChoices was eventually rejected by the High Court in *NSW v Commonwealth*²⁸², where it was held that the Constitution’s Section 51(xx) did indeed provide a sound legal basis for the legislation.

Mary Gardiner has argued that as an attempt by Howard’s ministers to “micro-manage industrial relations”, WorkChoices proved toxic not only to the unions, state Labor governments, academics, and church and community groups who resented its “blatant anti-employee bias”, but also to neo-liberal groups who abhorred the government’s decision to go back on earlier promises that any legislation would signify a complete withdrawal from the workplace and leave employers and employees to organise “without interference”.²⁸³ She argues that the overriding purpose of WorkChoices may have been to strengthen the hand of employers with each one of its amendments handing more power to them at the expense of employees, but the extent to which it compelled them to disadvantage the unions and individual employees in workplace agreements alienated many of those who perhaps ought to have been amongst its most fervent supporters. The almost complete lack of consensus undoubtedly undermined WorkChoices’ prospects of success in the longer term²⁸⁴ and its insistence that collective bargaining between employers and trade unions should be prohibited created many practical problems. Even employers who believed that they enjoyed good relations with relevant unions and wanted to include union-related provisions (including the entitlement to

²⁸¹ Barnes (n284).

²⁸² [2006] HCA 52.

²⁸³ Gardiner (n279) 56.

²⁸⁴ *ibid.*

facility time, the right of entry and the payroll deduction of subscriptions) in a workplace agreement were prevented from doing so by the legislation.

WorkChoices retained the process of registration (which had proved so crucial to the fortunes of Australian unions and *the* means through which they secured their original entitlement to recognition around the time of federation) in the Registration and Accountability of Organisations Schedule that formed Schedule 1 of WRA 1996 but unions who sought to register now had to satisfy one of two criteria. Employer associations were required to have a majority of members who were federal system employers, while the unions had to have a majority of members who were employed (or engaged) by those employers. In the event that this membership requirement could not be satisfied, a second opportunity was available if the association or union could demonstrate that it was a constitutional corporation (which would require it to have lawfully acquired corporate status) and that it could be characterised as a ‘trading’ or ‘financial’ corporation. The new measures inevitably called the ability of unions to retain their registrations into serious question²⁸⁵, in part because the question of whether a union could be a trading corporation had been raised but had not then been decided in *Rowe v TWU*²⁸⁶ some years earlier. Finally, WorkChoices sought to increase opportunities for ‘constituent parts’ of an amalgamated organisation to seek to withdraw from the amalgamation²⁸⁷ with disaffected branches or sections being given three years (in the case of pre-1997 amalgamations) or five years (for those that had occurred later than that) to apply to the Industrial Relations Commission for a withdrawal ballot.

²⁸⁵ Stewart (n282).

²⁸⁶ [1998] 160 ALR 6.

²⁸⁷ WRA 1996, Schedule 1 (Chapter 3, Part 3).

4.5.1 From 'WorkChoices' to the Fair Work System

The campaign mounted by the ALP and ACTU proved so effective that the Howard administration decided to abandon its "WorkChoices" branding in May 2007. The ACTU retorted that the WorkChoices laws themselves remained virtually unchanged²⁸⁸ and it continued to campaign on the issue through to the federal election later that year.²⁸⁹ The ALP's industrial relations manifesto document, 'Forward with Fairness', had been launched during April 2007 and had too received a cool reception from trade unionists. Many felt that its aims were too modest and failed to meet the aspirations of the swathes who had opposed WorkChoices. The ALP nevertheless won the election under Kevin Rudd's leadership. Although they had opposed WorkChoices before the election, ALP ministers now said that they would retain a federal industrial relations regime and maintain restrictions on unions' right of entry (to workplaces), secret strike ballots and controls on 'pattern bargaining'. The government did, however, pledge:

- To phase out AWAs over a period of 5 years;
- to establish 10 minimum workplace standards in respect of working hours, a right to request flexible working patterns, (parental, annual and long-service) leave, notice of termination and redundancy pay;
- to introduce a more comprehensive version of the 'no-disadvantage test' for use as a benchmark for all future agreements;
- to re-instate unfair dismissal protection for all employees (although significant concessions were proposed for businesses employing fewer than 15 employees);
- to permit single- or multi-enterprise agreements between employers and employees, subject to new obligations to 'bargain in good faith', supported by a degree of residual arbitration.

First, the Rudd administration enacted the Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008 (WRATFF 2008). This, amongst other measures,

²⁸⁸ Wilkinson, Bailey and Mourell (n240) 366; See also Australian Council of Trade Unions, 'New name – same old IR laws: Govt move to ban references to 'WorkChoices' is a cover-up' (ACTU, 17 May 2007) <<http://web.archive.org/web/20070523100237/http://www.actu.asn.au/Campaigns/YourRightsatWork/YourRightsatWorknews/NewnamesameoldIRlawsGovtmovetobanreferencestoWorkChoicesisacoverup.aspx>> accessed 20 June 2010

²⁸⁹ Damian Oliver, 'Australian Unions in 2007' (2008) 50(3) JIR 447, 452.

prevented the formulation of new AWAs and instead created temporary Individual Transitional Employment Agreements (ITEAs) for use during the transition to a new workplace system.²⁹⁰ ITEAs and collective agreements would both have to pass a revived no-disadvantage test. *Existing* AWAs (which covered an estimated 5-7% of the workforce)²⁹¹, however, would be allowed not only to complete their full term of up to five years, but also to continue indefinitely beyond that point unless or until they were terminated or replaced. Creighton argues that while the total number of AWAs may have appeared small, the fact that they existed at all was “indicative of an important cultural shift... away from the traditional system, centred on unions, awards and the industrial tribunal, towards a more de-collectivised model” and something that the Rudd government exploited as it assembled the second, more substantive element of its legislative programme, the Fair Work Act 2009 (FWA 2009).²⁹²

FWA 2009 abolished the AFPC, the Workplace Authority, the Workplace Ombudsman and the AIRC and replaced them with a new statutory body called Fair Work Australia (FWA), which became effective on 1 July 2009. The new workplace system came into effect on 1 January 2010 and applied to all ‘federal system’ employees. Under FWA 2009, as under WorkChoices, employers, employees and their unions in most of the public sector and in unincorporated private sector concerns remain the responsibility of the states unless they choose to cede their industrial relations powers (in practice, only Western Australia has refused to do so).²⁹³ The effect of this is that WorkChoices’ aim that a single national industrial relations system should be established has (more or less) been realised under FWA 2009.

FWA 2009 has, however, also restored a “safety net” for employees in the form of 10

²⁹⁰ ABC News, ‘House of Reps seals ‘death’ of WorkChoices’ (ABC News, 19 March 2008) <<http://www.abc.net.au/news/stories/2008/03/19/2193974.htm>> accessed 21 June 2010

²⁹¹ Creighton (n254) 123.

²⁹² *ibid.*

²⁹³ Wilkinson, Bailey and Mourell (n240) 367.

National Employment Standards (NES), covering areas including maximum working hours, leave, public holidays, notice of termination, redundancy and flexible working, together with additional occupation- or industry-specific conditions through new “Modern Awards” designed to simplify and streamline award making across the piece. While entitlements under NESs and Modern Awards are “essentially individualistic in character”, unions have been encouraged to become instrumental in the setting of standards and monitoring them to ensure that they remain fit for purpose.²⁹⁴ Meanwhile, the legal provisions that regulate trade unions are now found in the Fair Work (Registered Organisations) Act 2009. Amongst its most fundamental requirements are that an applicant association (union) must be “genuine”, free of employer control and able to provide evidence that it has a minimum of 50 members.

‘Good faith collective bargaining’ between employers and employees at the enterprise level purports to lie at the heart of the new system. The parties are required to “make a sincere effort” in negotiations and refrain from any activity which might undermine the principles that underpin freedom of association and collective bargaining.²⁹⁵ Provision is also made for the conclusion of ‘greenfields agreements’, but FWA must first be satisfied that any trade union that is to be covered by the agreement is entitled to represent a majority of the prospective employees to whom it will apply. If a union can demonstrate that a majority of workers in a particular workplace favour collective bargaining, then FWA (if satisfied that it is in the public interest to proceed) has the power to issue a ‘Majority Support Determination’ (MSD), compelling the employer to engage in collective bargaining with his or her employees and their representatives (it should also be noted that it has now been established that employees and their unions can take protected industrial action in an attempt to force an employer to bargain

²⁹⁴ Creighton (n254) 125.

²⁹⁵ The parties are not required to lodge any formal notification before they commence a bargaining process with the norm being that they can simply agree to negotiate with each other in order to create an enterprise agreement.

with them *without* the need first to obtain a MSD²⁹⁶). Employees can also now appoint a bargaining agent to represent them, with a presumption that trade union members will be represented by their union *unless* they specifically nominate another agent. Where a workplace consists of employees who are members of more than one union, then “multiple” unions may participate in the negotiations and can become covered by a single agreement. It should be noted that ‘good faith’ does not oblige a bargaining representative either to make concessions or to reach an actual agreement. It is part of FWA’s wide-ranging role to ensure that this “philosophical change” is encouraged and embraced by the parties.

The reception for the Rudd government’s FWA 2009 appeared almost to mirror reaction in the UK (a decade earlier) to the first Blair government’s introduction of its ERA 1999, where initial trade union celebration of a centre-left election victory soon gave way to the realisation that the desire of the newly-elected administration was simply to adopt a more “even-handed” approach to employment legislation. Mary Gardiner has argued that WorkChoices regarded the relationship between the employer and a collective group of employees as “entirely negative”²⁹⁷ and that it had shown itself to be “an old model of work” in which employers acted “unilaterally and coercively” and where “managerial prerogative ruled, not as a means to greater prosperity, but as an end.”²⁹⁸ It was a flawed (and almost prehistoric) attempt to curtail the influence of trade unions that she considers was designed purely to meet the aspirations of its sponsors as they sought to re-create the kind of “natural order” that they believed had existed during the period when labour laws had been framed around the principles of ‘master and servant’.²⁹⁹ She acknowledges that the Rudd government “initially moved quickly” to remove what she describes as WorkChoices’ “most coercive and contentious provisions” and

²⁹⁶ *JJ Richards Pty Ltd v Transport Workers' Union of Australia* [2011] FWAFB 1329.

²⁹⁷ Gardiner (n279) 76.

²⁹⁸ *ibid* 78.

²⁹⁹ *ibid*.

recognises that FWA 2009 did prove effective in restoring many of the protections and rights that had been taken away by WorkChoices, but is quick to point out that the new government's proposals in no way signified a return to the system that was in place "pre-WorkChoices". She welcomes the demise of the "enfeebled" AIRC by the more powerful FWA but notes that the "corporations power" remained the primary constitutional power under both Rudd's leadership and that of his (ALP) successor, Julia Gillard. Union rights of entry were restored, but were subject to continuing restrictions. The "footprint of WorkChoices" remained intact within FWA 2009³⁰⁰ but it is clear that this did not prevent ALP politicians from successfully "tapping in" to voter disillusionment with WorkChoices. She concludes that neither WRATFF 2008 nor the Fair Work Bill 2008 (which later became FWA 2009) were actually "(anywhere) near as oppressive or internally incoherent as WorkChoices", which suggests that the new government had rejected at least some of the assumptions on which WorkChoices was based.³⁰¹

Breen Creighton argues that FWA 2009, while purporting to be "collectivist in nature", does not contemplate collective agreements between employers and unions except in circumstances where 'greenfields agreements' might apply.³⁰² On the other hand, it treats unions as default bargaining representatives for their members, who may elect to become covered by an agreement in relation to which a union acted as a bargaining representative. Practically (and potentially significantly), he is unaware of any case where an applicant to FWA for a MSD has not been a trade union. He considers that this is "an attenuated form" of 'majoritarianism', but argues that it is not itself a necessary condition of bargaining (most of which commences without any suggestion that there should be an MSD). Creighton believes that despite "the rather peculiar way in which the legislation is framed" – and despite its formal

³⁰⁰ *ibid* 54.

³⁰¹ *ibid* 81.

³⁰² Creighton (n254) 126.

emphasis upon “employers and employees” - the process of collective bargaining remains “overwhelmingly” driven by trade unions.

Creighton’s (and some others’) observation that the current legislation appears “quite well-balanced” and conducive to the maintenance of collective bargaining suggests that the introduction of a statutory recognition scheme more in keeping with many trade unionists’ aspirations remains unlikely, certainly in the foreseeable future.³⁰³ Others may, of course, prefer the less complicated finding by Wilkinson et al that the Rudd administration, while elected on a manifesto committed to rolling back WorkChoices, introduced a series of compromise reforms that did not go as far as many trade unionists had expected but which extended further than most employers would have wanted.³⁰⁴ Political ideology and at least some reference to manifesto promises by the government of the day will, inevitably, continue to be determinant the nature of further reform. Members of Australia’s current federal administration, the Liberal/National Party coalition elected in September 2013, appear content not to embark upon further workplace law reform during the current Parliamentary session. The Prime Minister, Tony Abbott, has indicated however that any new ‘Lib/Nat’ government elected between now and January 2017 will almost certainly propose new legislation that will place restrictions on unions’ ability to participate in collective bargaining on behalf of their members. Should this become a reality, then comparisons with WorkChoices and a re-opening of the kind of hostilities and campaigning that surrounded its introduction are certain to follow.³⁰⁵

³⁰³ E-mail from B Creighton to R Crosby (21 December 2011).

³⁰⁴ Wilkinson, Bailey and Mourell (n240) 358.

³⁰⁵ Nick Toscano and James Massola, ‘WorkChoices 2.0’: Unions vow to mobilise over sweeping workplace review’ (The Sydney Morning Herald, 23 January 2015) <<http://www.smh.com.au/federal-politics/political-news/workchoices-20-unions-vow-to-mobilise-over-sweeping-workplace-review-20150123-12wk2o.html>> accessed 8 June 2015

Summary

The Australian approach to industrial relations regulation has differed sharply to that espoused in Kahn-Freund's work. Consistently subjected to more intense, "hands on", regulation by the state, Australia's federal industrial relations system began with an 'arbitral' model underpinned by the Constitution and that set minimum standards through a system of awards. This continued pretty much until the 1980s and 1990s when federal ALP administrations led by Bob Hawke and Paul Keating embarked on a process designed to move away from centralised award-making to more of an 'enterprise bargaining' approach.

The subsequent election of successive Liberal/National coalition governments led by John Howard ushered in further, controversial reforms that built upon the Hawke/Keating legislation but which also installed a regime which was generally and quite comprehensively hostile to union participation. The advent of WorkChoices signified one of the most divisive periods in Australian employment law history, Wilkinson has claimed that "the history of Australia's industrial relations system is a history of the rise and fall of Australia's arbitration system" and that it is "the state's institutional (industrial relations) architecture that has altered most dramatically... while the roles of unions, large employers and employer associations have undergone "evolutionary but not so startling" change.³⁰⁶

Australia's history of legal recognition of trade unions and the role of recognition in the facilitation of the use of rights of association and practice of collective bargaining contrasts

³⁰⁶ Adrian Wilkinson, 'IRJ Introductory Paper 59326_1'
<http://www98.griffith.edu.au/dspace/bitstream/handle/10072/31465/59326_1.pdf?sequence=1> accessed 8 June 2013

clearly with the UK's experience. Employers and unions acknowledged the legitimate role of federal and state authorities at an early stage and recognition rights became the foundation for association and collective bargaining. The Australian trade union movement never needed to assert a combative and reformist attitude to the law because it actually facilitated union action. The cost that Australian unions paid for this lay in the restrictions that were placed on their ability to exercise the "freedom of action" enjoyed by their UK counterparts. If the laissez-faire model described by Kahn-Freund could be said to represent one end of a spectrum, then the narrower freedom of action for unions and employers inherent in the Australian system placed it much more on the state supervision and control end (if still far from at its extremity). Now, as the UK authorities have moved - probably quite accidentally - towards a regime that displays at least some characteristics reminiscent of those traditionally found in Australia's model, Australian politicians appear to have settled on a kind of "consensus" that there should be some "relaxation" of their, historically quite regimented, system.

CHAPTER FIVE

THE ‘THIRD WAY’, ‘FAIRNESS AT WORK’ AND STATUTORY RECOGNITION IN THE UK FROM 1997

Introduction

The first three chapters of this study examined Kahn-Freund’s conception of a form of ‘collective laissez-faire’ that he believed characterised the UK’s industrial relations and regulated the bargaining relationship between employers and trade unions, considered the development of the series of international treaties, conventions and labour standards that have combined to form many of the “norms” that help to define a legitimate role for trade unions in the modern free world and summarised how the UK’s trade union law evolved through to the latter part of the 20th century. Chapter Four introduced and analysed the particular ‘model’ of union recognition that Australia has adopted as an independent country to demonstrate how differently a jurisdiction that remains so “closely-related” to the UK has approached and treated the issues that Kahn-Freund identified in his work.

The next step is to consider the context within which Labour governments elected in the UK from 1997 sought to stimulate some degree of collective representation and negotiation of employee interests, culminating in the establishment of a procedure allowing for ‘statutory recognition’ of trade unions in workplaces. Labour Party policy from Tony Blair’s election as its leader in 1994 through to 1999 would be inspired by a combination of some of the “edicts” issued by the International Labour Organisation against UK ministers during the Conservatives’ 18-year period in office prior to 1997 and ‘Third Way’ thinking as practised by past centre-left governments (principally in Australia and the United States) from 1981. An

examination of those significant earlier manifestations of the ‘Third Way’ follows this introduction.

The main purpose, then, of Chapter Five is to consider the rationale for – and some of the key themes within - the 1998 White Paper, ‘Fairness at Work’³⁰⁷ and assess the resulting provision for statutory recognition that was introduced in the Employment Rights Act 1999 (ERA 1999) and revised in the Employment Rights Act 2004 (ERA 2004). It will include an evaluation of the extent to which the architects of the new statutory ‘scheme’ proved able to realise their objective of satisfying trade unionists’ demands for enhanced ‘collective rights’ within a broader programme of “socially progressive” changes to employment law focused on (and designed to appeal to) individual employees. The finer points of the scheme - including the insertion of a ‘Small Business Exclusion’ - will be discussed, as will the role of the Central Arbitration Committee (CAC), the statutory body responsible for adjudicating on applications relating to statutory recognition and de-recognition of trade unions.

³⁰⁷ Cm 3968.

5.1 The Context for Reform and ‘Third Way’ Thinking

The programme of anti-trade union measures implemented by Conservative governments during the 1980s and 1990s appeared to have had a particularly damaging effect on recognition of trade unions in businesses that were established after 1979.³⁰⁸ Labour ministers elected in 1997 insisted that they would depart radically from the overtly anti-trade union stance favoured by their predecessors and would adopt a far more “even-handed” approach to industrial relations.³⁰⁹ They resolved to construct a new labour relations framework that would not only accommodate the TUC’s clamour for a significant enhancement of “collective rights” and address the ILO’s persistent criticisms of UK’s breaches of its Conventions³¹⁰ but would also avoid industrial unrest and continue to encourage business investment. The new government explicitly stated that it would not repeal the raft of trade union legislation introduced by the Conservatives from 1979 and maintained that its overriding commitment would be to establish “basic minimum rights for the individual at the workplace, where our aim is partnership not conflict between employers and employees”³¹¹.

The ILO had issued numerous reprimands to Conservative ministers in respect of the UK’s failure to fulfil its obligations under Conventions 87 and 98 throughout their 18 years in office, but the agency’s inability to attach effective sanctions to its criticisms meant that most of the recommendations made by its Committee of Experts on the Application of Conventions and its Governing Body’s Committee on Freedom of Association (CFA) were simply

³⁰⁸ Jo Blanden, Stephen Machin and John Van Reenen, ‘Have Unions Turned the Corner? New Evidence on Recent Trends in Union Recognition in UK Firms’ (2006) 44(2) BJIR 169, 170.

³⁰⁹ Trevor Colling, ‘What space for unions on the floor of rights? Trade unions and the enforcement of statutory individual employment rights’ (2006) 35(2) ILJ 140, 143.

³¹⁰ Tonia Novitz, ‘Freedom of Association and ‘Fairness at Work’ - An Assessment of the Impact and Relevance of ILO Convention No. 87 on its Fiftieth Anniversary’ (1998) 27(3) ILJ 169, 173-4.

³¹¹ BBC News, ‘The Labour Party’s Manifesto 1997’ (BBC News, May 1997)

<<http://www.bbc.co.uk/election97/background/parties/manlab/4labmanecon.html>> accessed 7 February 2012

ignored.³¹² Unsurprisingly then, the ILO Conference Committee welcomed the Labour government's prompt reinstatement of the right of workers at the Government Communication Headquarters (GCHQ) in Cheltenham to join a trade union³¹³ that the Thatcher government had removed in 1984 and which had been found by the CFA to contravene Article 2 of Convention 87.³¹⁴ Wider trade union membership had, however, substantially declined during from 1979 to 1997 and the employer lobby generally felt that it retained the upper hand in workplace bargaining.³¹⁵ The Labour Party leadership's response to this changed social and political landscape was to commission a series of reviews of economic and employment policies. It publicly embraced the ideology of the 'Third Way'³¹⁶ and promised that the new government would devise a programme of legislation that could be applied successfully to the "British political economy."

Howell believes that the term 'Third Way' represents a shorthand for the approach taken by a number of modern-day centre-left governments both when critiquing what they believe to be the essential tenets of post-Second World War social democracy (namely, the objective of full employment, the existence of an extensive and universal welfare state, a leading role for the public sector in the management of the economy and a 'corporatist' relationship with organised labour) and in their attempts to formulate what they consider to be more sustainable forms of those "structures" within the constraints of 'international' capitalism.³¹⁷ Proponents of Third Way theory have tended to argue that a more even distribution of skills and production capacity offers a much better prospect of bringing into effect a more egalitarian society than

³¹² Novitz (n310) 173.

³¹³ See ILO *Record of Proceedings* (1997) ILC, 85th Session, 19/100.

³¹⁴ Novitz (n310) 174.

³¹⁵ Tonia Novitz and Paul Skidmore, *Fairness at Work – A Critical Analysis of the Employment Relations Act 1999 and its Treatment of Collective Rights* (Hart Publishing 2001) 6.

³¹⁶ See BBC News, 'What is the Third Way?' (BBC News, 27 September 1999)

<<http://news.bbc.co.uk/1/hi/458626.stm>> accessed 7 February 2012

³¹⁷ Chris Howell, 'Is There a Third Way for Industrial Relations?' (2004) 42(1) BJIR 1, 2.

say, simple “income redistribution”. They have emphasised the need for “responsible budgeting”, recommended that increased equal opportunities should be intertwined with increased personal responsibility, stressed the importance of increased co-operation between the public and private sectors and argued for the introduction of measures to improve the supply of labour as well as increased investment in human development, public infrastructure and protection of the environment. Third Way supporters argue that it rejects “traditional neo-liberalism” as much as it does ‘top-down socialism’ (unlike neo-liberalists, they reason that the state has a central role to play in realising many or all of their aims). Its opponents often claim, however, that its real purpose is to attempt to construct an unlikely (some might argue a “bogus”) ‘coalition’ between the competing priorities of capital and labour and involving offers by government of certain “guarantees” to business groups regarding the safeguarding of their own parochial interests as well as wider economic prosperity while simultaneously making pledges to citizens that it will pursue policies designed to increase personal living standards and counter injustice.³¹⁸

Arguably the most problematic aspect of Third Way thinking is the apparent ease with which it may appear to ignore societal power relations. The traditional ‘laissez-faire’ industrial relations system afforded the parties within these relationships space to negotiate and conclude collective agreements. Unionised workers protected their own working conditions through their collective associations. The Third Way assumed that a right was granted by law. A union-negotiated right was effectively “reduced” to one of mere equivalence with the overall effect that enshrinement in law of individual worker’s rights “supplanted” the collective negotiation process. This, however, ignores issues of enforcement in workplaces. Third Way advocacy assumes that compliance can be obtained through legal structures and that substitution of the

³¹⁸ *ibid.*

state as the provider of rights in the workplace will not undermine workers' own organisations as providers of rights at work. Thus, it can be argued that it operates "blind" to the effects of power in each direction – namely, the power of the employer in the workplace and the nature of the powerbase of the trade unions as negotiators and defenders of workplace rights. This, in turn, raises the question of whether the recognition provisions have similar unarticulated impacts upon the legitimacy and efficacy of workplace associations. Champions of the Third Way tend to argue that it has somehow been "non-ideological" in its conception. Scepticism has, however also increased – including from those who may previously have been sympathetic to the theory in its conception - that the effects of globalisation and (more recently) the pursuance of post-'Crash' austerity policies in the UK and other Western economies have cemented inequality across society (including in employment relations) that the Third Way fails to address satisfactorily.³¹⁹

The Blair government claimed to draw much of its inspiration from arguably the earliest exponents of "a variant" of Third Way social democracy, the Hawke and Keating (ALP) governments that held office in Australia from 1983 to 1996.³²⁰ Those governments had legislated to expand the 'social wage' of benefits (ranging from the introduction of compulsory employer contributions to private pensions to increased funding for childcare) while encouraging, to the disapproval of many in the union movement, a policy of wage restraint.³²¹ Australian federal government had worked to integrate employer actions in "structural arrangements to oversee the rollout of macro- and micro-economic changes" and while the wider business community might not have considered itself a fully-fledged "partner" in the

³¹⁹ See BBC News, 'Balls claims Blair's 'third way' has failed' (BBC News, 30 June 2014) <<http://www.bbc.co.uk/news/uk-politics-28086961>> accessed 10 June 2016

³²⁰ Wilkinson, Bailey and Mourell (n240) 361.

³²¹ See also for example, Button J and Murphy K, 'How the British came, saw and helped Rudd' (The Age, 17 December 2007) <<http://www.theage.com.au/news/national/how-the-british-came-saw-and-helped-rudd/2007/12/16/1197740090746.html>> accessed 7 February 2012

government's agenda, larger employer associations undoubtedly wielded significant influence over those administrations during their early years.³²²

Crouch suggests that the UK Labour Party persevered with the neoliberal approach favoured by their Conservative predecessors, albeit with some concessions to the trade unions and "social-democratic preferences". He disputes the notion that industrial policies can be labelled as 'Third Way' simply because they either occupy a mid-point between post-War social democracy and neoliberalism (or combine elements of both) and argues that they should encompass measures designed specifically to encourage and stimulate industrial relations, quite distinct from prior forms of class relations regulation.³²³ Smith and Morton agree that the UK politicians' understanding of the Third Way led them simply to settle on an "accommodation with neoliberalism and (a) modified acceptance of the Thatcherite landscape".³²⁴ Howell maintains that it is a mistake to believe that the theory must always be viewed as "a coherent... model of industrial relations". He argues that the situation is necessarily more complex, not least because many governmental initiatives tend to be borne out of more short term "political" calculation. He concludes that the "logic" of the Labour government's Third Way industrial relations regulation reform should be regarded as more significant than the motives of those who initiated it.³²⁵

5.1.1 The *Wilson and Palmer* Cases

³²² Wilkinson, Bailey and Mourell (n327).

³²³ Colin Crouch, 'A Third Way in industrial relations?' in Stuart White (ed), *New Labour: The Progressive Future?* (Palgrave MacMillan 2001) 104.

³²⁴ John McIlroy, 'The Enduring Alliance? Trade Unions and the Making of New Labour, 1994- 1997' (1998) 36(4) BJIR 537, 558.

³²⁵ Howell (n324) 3.

Jeff Shaw QC (the former Attorney-General of New South Wales)³²⁶ and others have indicated that another “sub-text” to FAW was the desire to rectify the “unjust” verdicts reached in two separate cases, *Associated Newspapers Limited v Wilson*³²⁷ and *Associated British Ports v Palmer*³²⁸, which would later be “combined” and referred to simply as *Wilson and Palmer*.³²⁹

Wilson and Palmer began in 1989 when an employee received written notification from his employer (the owners of the *Daily Mail* newspaper) that it had decided not to renew its recognition agreement with his trade union, the National Union of Journalists (NUJ). The letter also stated that the company would pay a 4.5% wage increase, backdated for three months, to any employee who opted to sign a new personal contract with the company prior to the expiry of the recognition agreement. Wilson, then a NUJ lay official, refused to sign the new contract and did not receive the wage increase. He complained to an industrial tribunal, which held that the employer had breached section 23 of the Employment Protection (Consolidation) Act 1978 (EPCA 1978). This provided that every employee had the right not to be subjected to action short of dismissal for the purpose of preventing or deterring membership of an independent trade union or to be penalised for doing so.³³⁰

The industrial tribunal’s decision was first overturned by the Employment Appeal Tribunal (EAT) but then reinstated by the Court of Appeal³³¹ where Dillon LJ specifically refused to accept the employer’s argument that any distinction could be drawn between membership of a trade union membership and participation in the collective bargaining

³²⁶ Shaw (n242).

³²⁷ [1993] IRLR 336 (CA).

³²⁸ [1995] IRLR 258 (HL).

³²⁹ [2002] IRLR 128.

³³⁰ The corresponding provisions have now been incorporated into TULRCA 1992 s146.

³³¹ Contrary to TULRCA 1992 s146(1).

undertaken by that union.³³² The case also restored an industrial tribunal decision in favour of members of the National Union of Rail, Maritime and Transport Workers (RMT), including Palmer, who had similarly been denied pay increases by their employers after they had rejected financial inducements in return for surrender of their collective bargaining rights. Conservative ministers believed that the decision undermined their policy of encouraging employers to offer individual contracts and they moved quickly to introduce what became known as “the Ullswater amendment”³³³ to the Trade Union Reform and Employment Rights Bill 1993. This specified that where an employer wished to “further a change in his relationship with all or any class of his employees”, any complaint (against him or her) of action short of dismissal would be excluded unless “the action was such as no reasonable employer would take”. The amendment sought to neutralise the effect of the Court of Appeal’s judgement by redefining what could constitute discrimination against members of trade union members but was ultimately rendered unnecessary when, following an appeal by the respective employers in the two cases, the House of Lords overturned the Court of Appeal’s ruling and restored the decisions of the EAT. The majority of their Lordships ruled that refusal to award a pay increase to employees who had chosen to retain their collectively bargained terms and conditions merely constituted an omission, that such conduct did not fall within the definition of “action short of dismissal” and that there had therefore been no breach of EPCA 1978, s23 in either case.

The extent to which collective bargaining constitutes a central feature of union membership forms the subject of continuing debate. The Law Lords unanimously held in

³³² The industrial dispute between British Airways and the ‘Unite’ trade union, representing striking cabin crew, provided the opportunity for the re-opening of a discussion of the issues that had been considered by the Court of Appeal when the airline’s Chief Executive, Willie Walsh, announced that he would permanently strip those staff who took part in strikes of their travel perks. Although the company maintained that the perks were “non-contractual” and could be withdrawn at any time, Unite declared that the company’s move was “vindictive” and vowed to challenge it. See BBC News, ‘BA strikers to forfeit cheap travel perks’ (BBC News, 24 March 2010) <<http://news.bbc.co.uk/1/hi/business/8584720.stm>> accessed 24 March 2010

³³³ This became TULRCA 1992 s148(3).

Wilson and Palmer that collective bargaining was not a crucial element of union membership and emphasised that unions unable to so negotiate on behalf of groups of members could nevertheless offer them a range of other worthwhile services. Novitz and Skidmore believe that the decision in *Wilson and Palmer* reflected a lack of ‘public policy’ support for trade unionism and that their Lordships’ “individualised view of trade unionism” (in which unions could find themselves excluded from collective bargaining and certain employer actions could be designated as “omissions”) threatened to undermine potential future claims of discrimination due to membership of a union. Not only did an employer have to take “positive steps” against an employee before such protection could be activated, but he or she could also selectively offer inducements to any employees who were willing to assist in the dismantling of arrangements for collective bargaining.³³⁴ These “defects” placed the UK in breach of Article 1 of ILO Convention 98, which prohibits discrimination on grounds of membership of trade unions.³³⁵ The first Blair government partially addressed the issue in ERA 1999, which replaced the words “action short of dismissal” with “subjecting an individual to a detriment” where this included a deliberate failure to act.³³⁶ As has already been discussed in Chapter Two of this dissertation³³⁷, the ECtHR subsequently ruled in *Demir and Baykara v Turkey*³³⁸ that the ability to participate in collective bargaining formed an essential element within individuals’ exercise of their rights under Article 11 of the ECHR.

³³⁴ *ibid.*

³³⁵ Case No 1730 (UK) 294th *Report of the ILO Committee on Freedom of Association* (1994), para 162 at para 202.

³³⁶ TULRCA 1992 s146 as amended.

³³⁷ pp 25-26 above.

³³⁸ [2008] ECHR 1345.

5.2 'FAW' and ERA 1999

A persistent claim made by members of the Thatcher and Major governments from 1979 was that the Wilson and Callaghan governments had allowed unions to become too powerful and that this had culminated in the series of mainly public sector strikes during late 1978 and early 1979 known as the “Winter of Discontent.”³³⁹ Conservative politicians now argued that FAW signalled “a journey back to strife.”³⁴⁰ The government, however, re-iterated its intention not to embark on wholesale repeal of existing legislation. Simultaneously, there appeared to be a significant ‘bias’ in the number of “business people” who were being recruited into government positions compared to those who possessed a union background. Union leaders who had previously enjoyed more “direct access” to Labour policy-making became increasingly reliant on more informal contact and the maintenance of constructive relations with individual (often junior) ministers to retain some influence.³⁴¹ Notwithstanding these developments, expectations persisted amongst trade unions and employer associations that forthcoming legislation would reflect “Labour’s longstanding intention to establish a statutory mechanism for gaining union recognition where majority support existed amongst the workforce.”³⁴²

The government resolved that it would “steer a way between the absence of minimum standards of protection at the workplace, and a return to the laws of the past.” It acknowledged the imbalance in bargaining power between employers and individual employees that favoured the former and proposed a “dual-pronged” approach to employment relations. This included

³³⁹ Novitz and Skidmore (n315) 7.

³⁴⁰ House of Commons Hansard, 21 May 1998; col 1106, per Mr Redwood.

³⁴¹ Howell (n324) 5.

³⁴² Gregor Gall, ‘Trade union recognition in Britain, 1995–2002: turning a corner?’ (2004) 35(3) ILJ 249, 249. Gall suggests that work on the generality of the provisions that would be included in any proposed statutory recognition scheme was known to have been in progress from 1995 at the latest.

an enhancement of some individual employment rights (such as the reduction of the qualifying period for unfair dismissal claims from two years' service to one) that each employee could then exercise either on his or her own *or* with others³⁴³ and increased opportunities for unions to bargain collectively. There would be more emphasis on collective representation in workplaces to help ensure that workers were treated fairly and it was proposed that individuals should have a legal right to be accompanied by a work colleague or union representative during grievance and disciplinary proceedings even if that union was not recognised by the employer for the purpose of collective bargaining.³⁴⁴

FAW addressed the issues surrounding the proposed implementation of a statutory recognition scheme through reference to three objectives that ministers had determined would need to be satisfied by any new regulatory system. The first stated that there was a need “to provide for representation and recognition where a majority of the relevant workforce wants it”.³⁴⁵ The second (which they indicated would be necessary in order to give effect to the first) specified that only a procedure that could prove practicable would suffice.³⁴⁶ The third - and as this chapter will also emphasise, almost certainly the most significant – of the aims was that the parties should be encouraged to reach voluntary agreements wherever possible.³⁴⁷

FAW's Foreword repeated that there would be no wholesale repeal of the post-1979 programme of trade union legislation and that strikes without ballots, mass picketing, the closed shop and secondary action would all continue to be outlawed. “Employability” and “flexibility” were identified as the principal determinants of efficiency and fairness in the

³⁴³ FAW, Foreword (p2).

³⁴⁴ ERA 1999 ss1-6.

³⁴⁵ FAW para 4.11.

³⁴⁶ FAW para 4.17.

³⁴⁷ FAW para 4.18.

labour market and were to be supported by “a labour market culture and legislative framework that would (together) promote economic growth, enhance competitiveness, encourage entrepreneurship and foster job creation.”³⁴⁸ This would prove to be a stiff challenge to a government intent on balancing the competing demands of the unions and a sceptical business lobby and ministers strove to appeal to the latter by claiming that the UK would retain “the most lightly regulated labour market of any leading economy in the world.”³⁴⁹ The government envisaged the abandonment of any notion of conflicting employer and employee interest in favour of a heightened sense of “partnership” in workplaces³⁵⁰ that would result in more effective communication between the parties and improved overall business performance.³⁵¹ Oxenbridge et al identify this “promotion of partnership” as FAW’s central theme.³⁵²

Ministers also pronounced that any calls to reinstate Schedule 11 of EPA 1975 (which sought to sustain collective bargaining) would be resisted.³⁵³ Novitz and Skidmore argue that this rendered the “partnership” so revered in FAW little more than a mask for a wholly “alternative vision” of the trade union function. Unions were expected to subordinate themselves within a “primary relationship” that ministers believed should exist between the employer and the individual worker even if this compromised their ability to defend their members’ collective interests. Lay representatives and paid officials alike faced the prospect of being relegated to a role as “tools” that managers – or, for that matter, individual workers - might call upon occasionally to assist in mediation or act as “conduits for information and consultation” with the consequence that they might lose their workplace presence unless they

³⁴⁸ *ibid* para 2.13.

³⁴⁹ *ibid* Foreword.

³⁵⁰ *ibid* para 2.5.

³⁵¹ *ibid* paras 4.2-4.3.

³⁵² *ibid*.

³⁵³ *ibid*.

could demonstrate that they added “value” to the enterprise.³⁵⁴ ERA 1999 finally came into force in the UK on 6 June 2000 and included measures that would enable a trade union seeking to be recognised by an employer for the purpose of representing a bargaining unit of employees to submit an application for recognition and outlined the various hurdles that successful applicant unions would be required to overcome.

5.2.1 Trade Union Recognition through the Schedule A1 Procedure

The purpose of ERA 1999 and ERA 2004 appears to have been to establish a recognition system (Schedule A1) based on a ‘Wagner (North American)-like’ form of “statutory union certification within which unions and employers are forced to compete for workers’ votes resulting in an allocation of “brokering” rights based upon specified threshold levels of worker support in bargaining units that amount to a ‘majority’ in support.³⁵⁵ FAW reasoned that the impact of collective bargaining on all employees (including those who choose not make a claim for union representation) can be such that recognition (including statutory recognition) should only be granted in circumstances where demonstrable, “substantial” support for it exists.³⁵⁶ While the government may have favoured relatively “limited” forms of consultation prior to the introduction of most of its “other” legislation, it decided that a different approach needed to be adopted in respect of its employment and trade union law reforms. Ministers sought to “de-politicise” their proposed changes in the law through the use of continuing dialogue that involved employers’ groups³⁵⁷ as well as the TUC. Periodic “concessions” were offered to

³⁵⁴ Novitz (n310) 174.

³⁵⁵ Dukes (n8) 246.

³⁵⁶ FAW para 4.16.

³⁵⁷ Tony Blair recalled, while giving evidence to the Leveson Inquiry on 28 May 2012, the example of News International representatives’ intense lobbying of the government. The company had, during the mid-1980s, been embroiled in a bitter dispute with the print unions in respect of its move to Wapping and its executives

both sides in the hope that they could negotiate an agreement that would be capable of being enshrined in legislation.³⁵⁸

Formal arrangements for the statutory recognition scheme were finally set out in ERA 1999, Section 1³⁵⁹ and Schedule 1. They amended TULRCA 1992 through the insertion of a new Section 70A and a Schedule A1 that set out the new procedure in detail. Schedule A1 explicitly stated that employers and trade unions should be encouraged, wherever possible, to reach voluntary agreements occasioning the recognition of the latter by the former in workplaces for the purpose of representing employees' interests. Recourse to "forced" statutory recognition would be available to the union (or unions) concerned in circumstances where all efforts to reach a voluntary agreement had proved unsuccessful. Schedule A1 was distinguishable from earlier, ostensibly "comparable" legislation (including IRA 1971) because its function was not so much to actively promote recognition as emphasise the importance of "choice" in industrial relations. Thus, the procedure could only be activated where a majority of workers indicated their desire that a union (or unions) should be recognised.³⁶⁰ A further restriction was then added in the form of the 'Small Business Exclusion'. This determined that the statutory scheme would not have any application in enterprises comprising fewer than 21 employees³⁶¹, the effects of which have proved to be highly significant.

5.2.2 The Union's Request, Bargaining Units and the Employer's Response

remained steadfast in its opposition to proposals for a statutory recognition scheme. See Leveson Inquiry, 'Transcript of Morning Hearing 28 May 2012' (The Leveson Inquiry, 28 May 2012) <<http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Morning-Hearing-28-May-2012.pdf>> accessed 14 August 2013

³⁵⁸ Howell (n324) 9.

³⁵⁹ ERA 1999, s1(2).

³⁶⁰ Dukes (n8) 236.

³⁶¹ TULRCA 1992 Schedule A1: Part 1, para 7.

Trade unions choosing to invoke the statutory procedure were required to submit a formal request for recognition to the employer.³⁶² Valid requests had to be written and include an explicit statement that recognition was being sought under Schedule A1 of TULRCA 1992. The applicant union (or unions) had to be identified and appropriate certificates of verification included in the submission.³⁶³ The parameters of the proposed ‘bargaining unit’ had to be made clear and remain the same in any subsequent application that might be made to the CAC³⁶⁴ (all subject to the requirement that the employer employed at least 21 employees on the date of receipt of the union’s request *or* that an average of at least 21 workers had been so employed during the 13 week period ending on that day³⁶⁵) and the request had to be received by the employer.³⁶⁶ If the parties agreed both the constitution of a bargaining unit and that the applicant should be recognised to conduct collective bargaining on behalf of the workers “contained” within it, then the statutory recognition procedure would come to an end.³⁶⁷ If, however, the employer chose to reject the request or failed to respond to it within a period of 10 days, the union had the option of referring the case to the CAC.

Valid applications to the CAC also needed to be in writing and again, the employer from whom recognition was sought had either to have at least 21 ‘workers’ in his or her employment on the day of the request *or* have employed the same number, on average, during the course of the previous 13 weeks (this did not mean that there had to be at least 21 workers within the proposed bargaining unit). Criteria for acceptance of applications under the Schedule A1 procedure appeared stricter than those contained in the earlier ‘EPA 1975 scheme’. An

³⁶² TULRCA 1992 Schedule A1: Part 1, para 4.

³⁶³ TULRCA 1992 Schedule A1: Part 1, para 6.

³⁶⁴ TULRCA 1992 Schedule A1: Part 1, para 2(3).

³⁶⁵ TULRCA 1992 Schedule A1: Part 1, para 7(1).

³⁶⁶ TULRCA 1992 Schedule A1: Part 1, para 5.

³⁶⁷ ERA 1999 s1(2).

application could only succeed in circumstances where a minimum of 10% of employees were union members, there was no existing collective bargaining agreement covering some or all of the workers in the proposed bargaining unit and if the CAC was satisfied that a majority of the workers in the bargaining unit would be likely to support recognition.

Following acceptance of the application, the employer and union then had 20 days to agree the details of the bargaining unit. If they could not reach an agreement, then the CAC would intervene to determine appropriate parameters. The CAC's principal concern – consistent with the central theme of FAW - was that the bargaining unit should be “compatible” with effective management of the employer's business but other factors including the views of the employer and the union, any existing national and local bargaining arrangements, the advantages inherent in avoiding small or fragmented bargaining units and the characteristics and location of the workforce could also be taken into account. If the union could demonstrate that a majority of workers in the defined ‘bargaining unit’ were union members, then the CAC could grant recognition without the need for a ballot.³⁶⁸ The CAC would, however, order a ballot if a majority of employees in the bargaining unit were not union members and it had discretion to do so if:

- a) it was satisfied that the ballot should be held in the interests of good relations;
- b) it had evidence, which it considered to be credible, from a significant number of union members within the bargaining unit that they did not want the union (or unions) to conduct collective bargaining on their behalf;
- c) evidence was presented to it that led it to doubt that a significant number of union members within the bargaining unit wanted the union (or unions) to bargain on their behalf.

Where an employer indicated a willingness to negotiate, the parties then had a further 20 days to reach a settlement with scope for further extension by agreement.³⁶⁹ If the negotiations failed, the union could then apply to the CAC³⁷⁰ unless the union had rejected an earlier request

³⁶⁸ TULRCA 1992 Schedule A1: Part 1, para 22(4).

³⁶⁹ TULRCA 1992 Schedule A1: Part 1, para 10(7).

³⁷⁰ TULRCA 1992 Schedule A1: Part 1, para 12.

from the employer to solicit the assistance of the Advisory, Conciliation and Arbitration Service during the negotiations.³⁷¹ Where a ballot was held, the applicant union could campaign for a ‘yes’ vote amongst employees³⁷² and the employer was obliged to co-operate in the process.³⁷³ A majority of votes in favour *and* the support of at least 40 per cent of the workers in the bargaining unit were needed to secure recognition and “victor” unions were then expected to reach agreements with employers regarding the means through which they would conduct collective bargaining.³⁷⁴ If agreement could not be reached, then the CAC could intervene³⁷⁵ and impose a legally enforceable bargaining procedure on the parties confined to pay, working hours and holidays³⁷⁶ (compliance with which was enforceable through an order of specific performance³⁷⁷). It could also order variations to collective bargaining arrangements where either of the parties could demonstrate that the original bargaining unit was no longer appropriate due to some alteration in the organisation or business activities of the enterprise or following a substantial change to the number of workers who formed the original bargaining unit.³⁷⁸

5.2.3 Provision for De-Recognition

ERA 1999 enabled employers to “de-recognise” unions that had secured recognition via Schedule A1, but *only* once a period of at least three years had elapsed following the CAC’s earlier declaration of recognition.³⁷⁹ De-recognition could also be authorised by the CAC if

³⁷¹ TULRCA 1992 Schedule A1: Part 1, para 12(5).

³⁷² TULRCA 1992 Schedule A1: Part 1, para 26(3).

³⁷³ TULRCA 1992 Schedule A1: Part 1, para 26.

³⁷⁴ TULRCA 1992 Schedule A1: Part 1, para 30(2).

³⁷⁵ TULRCA 1992 Schedule A1: Part 1, paras 30(3), 31(2) .

³⁷⁶ TULRCA 1992 Schedule A1: Part 1, para 31(3).

³⁷⁷ TULRCA 1992 Schedule A1: Part 1, para 31(6).

³⁷⁸ TULRCA 1992 Schedule A1: Part 3, para 66

³⁷⁹ TULRCA 1992 Schedule A1: Part 4, paras 96-97.

the number of workers employed in the enterprise fell below 21³⁸⁰ or where the majority of the bargaining unit supported de-recognition in an employer- or employee-initiated ballot.³⁸¹

5.3 The New Legislation in Practice

If ministers' primary objective was that their "unbiased approach" to recognition³⁸² might help to institute a fresh culture of co-operation within industrial relations, then the early indications were positive. They had calculated that the mere suggestion that an applicant union seeking recognition might invoke the statutory scheme would prompt many employers to seek negotiation of voluntary agreements to avoid the alternative of state-imposed recognition appeared well-founded as several actually concluded voluntary agreements³⁸³ with by now re-enthused unions³⁸⁴ in the period leading up to ERA 1999 becoming effective.

The government had stipulated that the legislation should include scope for the employers and unions to conclude voluntary outcomes wherever possible³⁸⁵ and closer examination of Schedule A1 had revealed that either party could, at any stage, obviate the need for a CAC determination simply by choosing to enter into negotiations with the other.³⁸⁶ This suggests that active promotion of recognition had *never* actually been the government's objective at all and that ministers' keenness not to be seen to be "taking sides" had seen them prioritise the maintenance of "choice" in industrial relations above all other considerations.

³⁸⁰ TULRCA 1992 Schedule A1: Part 4, para 99.

³⁸¹ TULRCA 1992 Schedule A1: Part 4, para 117.

³⁸² Dukes (n8) 251.

³⁸³ Sarah Oxenbridge and others, 'Initial Responses to the Statutory Recognition Provisions of the Employment Relations Act 1999' (2003) 41(2) BJIR 315, 316.

³⁸⁴ Gall (n350) 254.

³⁸⁵ Michael Wills, Hansard (HC) Standing Committee E, 16 March 1999, c. 348.

³⁸⁶ *ibid.*

FAW's proponents resolved that they would strive to avoid a repeat of the blighted attempts to expand recognition that had been made through EPA 1975, the pertinent provisions of which were repealed by the Conservatives in 1980 following a string of intractable operational difficulties. Within that earlier "scheme", ACAS's tripartite Council (which had been handed responsibility for the handling of recognition claims) had proved unable to agree clear criteria in respect of specific measures such as the level of employee support that should be required in order to succeed in any recognition claim and the suitability of the claimed bargaining unit. "Inter-union competition" had often given rise to protracted litigation involving both rival unions and some employers, many of whom chose also to seek to obstruct the process through means of time-wasting and other forms of non-cooperation. There were frequent delays in the processing of recognition claims, while the enforcement procedure contained in the Act (which provided for unilateral recourse to arbitration in respect of a union claim for improved terms and conditions) offered little in the way of any incentive to hostile employers to bargain once it had been recommended that recognition should be granted.³⁸⁷ Schedule A1 strove therefore to define employers' responsibilities before and during employee ballots much more strictly. They also undertook to restrict the scope for judicial review of CAC decisions that had arisen from the discretion conferred by EPA 1975 on ACAS to adjudicate on recognition matters. Efforts were made to anticipate all conceivable contingencies and render more prescriptive the action to be taken in the event of non-compliance.³⁸⁸ The inevitable outcome was a procedure that was lengthier and more complex

³⁸⁷ EurWORK, 'Trade union recognition and the Employment Relations Bill' (Eurofound, 27 March 1999) <<http://www.eurofound.europa.eu/observatories/eurwork/articles/industrial-relations/trade-union-recognition-and-the-employment-relations-bill>> accessed 3 April 2016

³⁸⁸ Michael Wills MP, Hansard (HC) Standing Committee E, 16 March 1999, 10.30 am: "We want to give clear guidance to employers, trade unions, workers and the Central Arbitration Committee on every aspect of what the law requires and allows."

in form than its predecessors.³⁸⁹

The effects of “voluntarism” aside, the introduction of a statutory procedure created a mechanism through which unions could “forcibly” achieve their aim. The essential prerequisite for a successful application is, of course, that a majority of workers in the bargaining unit should support recognition. The CAC determined, through a series of decisions, that such a level of support can be established by reference to majority membership decisions, a straw poll and signed statements by employees that express their support for collective bargaining.³⁹⁰ From the outset, the CAC reserved the right to maintain a flexible approach when adjudicating on whether such measures as a “given level” of current membership could be said to signify support for collective bargaining. In *GMB and Trafford Park Bakery*³⁹¹, the CAC rejected the application because while the level of membership was shown to be 67% and 10 out of a bargaining unit of 15 were union members, 7 employees had written opposing recognition for the purpose of collective bargaining. That said, the CAC also showed itself willing to make some allowance to unions in respect of the practical problems that they faced when seeking to gain access to the workforce to gather information relevant to an application. In *AEEU and GE Caledonian Ltd*³⁹², it decided that employees’ expression of 43.8% support for recognition had been affected by unfair practises that the employer had carried out to “extreme lengths”.

While the CAC is prepared to consider “contrary evidence” submitted by employers, it has determined that counter-petitions that some employers have sought to organise may not be considered so compelling as their trade union equivalents. For example, in *Unite the Union v*

³⁸⁹ Dukes (n8) 246.

³⁹⁰ Hugh Collins, Keith Ewing and Aileen McColgan, *Labour Law* (Cambridge University Press 2012) 562.

³⁹¹ TUR1/153/[2002].

³⁹² TUR1/120/[2001].

*Stephens and George Ltd*³⁹³, the panel refused to deduct all of those signatories from the union's petition who had also signed the employer's document. *GMB v Capital Aluminium Extrusions Limited*³⁹⁴ is an example of an instance in which the CAC has decided that contrary evidence can be persuasive. In that case, union membership levels in the proposed bargaining unit stood at 46.15%. The union omitted to produce a petition demonstrating that it had additional support, while the employer conducted a snap survey that showed that 61.54% of the workforce did not support recognition. Panel members were persuaded by the latter because while the employer's covering letter issued to all workers explaining the purpose of the survey set out its opposition to recognition, it also stated that there was no obligation on employees to provide a reply and that they remained free to express their personal opinions if they did choose to respond. They were also afforded the opportunity to reply anonymously and place the replies in sealed envelopes that could then be handed to a specified employee who was a union member. The envelopes were later opened in the presence both of that individual and the company's managing director.

The CAC also considered how the provisions contained in Schedule A1 should apply in the case of employers who operated in more than one site or location. In *R (Kwik-Fit) v. CAC*³⁹⁵, the CAC accepted the union's proposal that the bargaining unit should be constituted from all of the employer's locations found within the M25 motorway. The employer argued in the High Court that the unit should be extended to include all of the company's sites beyond the M25 on the ground that this was the most appropriate bargaining unit. The High Court ruled in the employer's favour but was overruled by the Court of Appeal which reinstated the CAC's decision. Conversely, in *TGWU and Economic Skips Ltd*³⁹⁶, the CAC was persuaded

³⁹³ TUR1/634/[2008].

³⁹⁴ TUR1/639/[2008].

³⁹⁵ [2002] ICR 1212.

³⁹⁶ TUR 1/121[2001].

that a ballot should be ordered following expression by the employer of “the sincerely held view... that the majority of the workers in the bargaining unit did not want recognition”. Thus, it can be seen that the interpretative problems posed by the Schedule have deliberately been disposed of by the courts to a government body charged with specific responsibility for regulation of UK law as it applies to trade union recognition and collective bargaining matters.

Gall’s 2003 analysis of trends in recognition dates from 1995 (the point at which he suggests it became virtually certain that there would be a Labour victory at the 1997 general election and an acceptance by observers that such an administration would legislate to establish a statutory recognition procedure³⁹⁷). He reported a significant increase in the number of agreements concluded and workers covered during that eight-year period and a commensurate reduction in the number of employees who found themselves the subject of “de-recognition” by employers.³⁹⁸ He cautioned though that the phenomenon could not simply be put down to unions’ exercise of formal recourse to the Central Arbitration Committee (CAC) alone and that there were other, more reliable explanations for the growth in the number of new agreements. These included unions’ “organising activities”, the ‘shadow effect of ERA 1999, “responses by employers” and a ‘new’ climate in industrial relations. Trade union organising in particular, including exploitation of Labour’s union recognition policy at every stage (from its initial formation while in opposition through to its formal enactment once elected into government) was felt to be crucial in stimulating recognition campaigns and placing pressure on employers who might otherwise have been minded not to reach agreements. This instilled the unions with sufficient confidence to persist with their approach, enabling them to broaden their organising activities and becoming more ambitious in terms of their recognition and recruitment

³⁹⁷ Gall (n350).

³⁹⁸ *ibid* 250.

objectives.³⁹⁹

Gall also reported that “imminence” of the incoming legislation’s arrival had been overtaken by “the effect of presence and usage”. “Presence” referred to the availability of recourse to the new statutory procedure now enjoyed by unions as well as the cumulative and positive ‘bandwagon’ impact of the increased quantity of new agreements that were then being finalised, while “usage” described the threatened, partial (that is, where an application was submitted and then progressed in order that a voluntary agreement might be elicited) or full (actual) use of the statutory procedure. Gall indicated that by the end of 2002, both partial and full usage could be said to have yielded a “positive demonstration effect” with an overwhelming majority of applications to the CAC having been accepted. Only a small minority were rejected and approximately a third of those that were withdrawn by applicant unions prior to their acceptance (by the CAC) were eventually re-submitted. A clear majority of the CAC’s bargaining unit determinations favoured trade unions and this alone may have contributed significantly to the trend of increasing quantities of voluntary agreements that were concluded following applications.⁴⁰⁰

The TUC’s annual ‘Trade Union Trends: Focus on Recognition’ report published in February 2003 broadly supported Gall’s findings but offered a significantly more pessimistic assessment of recognition campaigners’ future prospects.⁴⁰¹ The rate of increase in the number of agreements secured by unions had slowed amidst concerns that most agreements that it had been expected might be struck with more receptive employers would have been concluded with more obstructive employers’ workforces having been left largely “unprotected”. Workplace

³⁹⁹ *ibid* 254.

⁴⁰⁰ *ibid*.

⁴⁰¹ EurWORK, ‘Spread of union recognition deals slows’ (Eurofound, 12 March 2003)

<<http://www.eurofound.europa.eu/eiro/2003/03/inbrief/uk0303101n.htm>> accessed 6 April 2014

campaigning had shifted increasingly towards the smaller enterprise sector simply because more agreements had been concluded in large workplaces (including those who had previously opposed recognition) but they had proved even more adept at resistance. The TUC conceded that the number of additional workers who had become covered by a recognised trade union that year totalled almost three times the figure reported in their similar survey just three years earlier, but reaffirmed its concern regarding what it saw as the scope for exploitation by employers of loopholes within ERA 1999 aimed at thwarting recognition.⁴⁰² It had, in fact, already (if not altogether successfully) submitted many of these concerns to the government-sponsored review of ERA 1999 that ministers had instigated in July 2002.⁴⁰³ Broad-based and involving consultation with both employers and unions, it reported in February 2003 and paved the way for the introduction of a second Act, ERA 2004, in September 2004.⁴⁰⁴

5.3.1 The Effect of the ‘Small Business Exclusion’

Keith Ewing and Anne Hock were asked by the TUC and a number of its affiliated unions to consider the implications of ERA 1999’s recognition provisions for smaller firms. Having recognised that neither IRA 1971 nor EPA 1975 introduced any exclusion in respect of small businesses, they examined the consequences of the exclusion of firms employing fewer than 21 workers from the statutory recognition (Schedule A1) scheme and reported their findings in 2003.⁴⁰⁵ Their eventual conclusions were founded on the premise that recognition should be

⁴⁰² Workplace Law, ‘Union recognition still rising’ (Workplace Law, 20 February 2003)

<<http://www.workplacelaw.net/services/news/3178/union-recognition-still-rising>> accessed 6 April 2014

⁴⁰³ EurWORK, ‘Government rejects calls for major changes to the Employment Relations Act’ (Eurofound, 12 March 2003) <<http://www.eurofound.europa.eu/eiro/2003/03/inbrief/uk0303102n.htm>> accessed 6 April 2014

⁴⁰⁴ EurWORK, ‘Employment Relations Act 2004 begins to come into force’ (Eurofound, 7 November 2004) <<http://www.eurofound.europa.eu/observatories/eurwork/articles/employment-relations-act-2004-begins-to-come-into-force>> accessed 6 April 2014

⁴⁰⁵ Keith Ewing and Anne Hock, *The Next Step - Trade Union Recognition in Small Enterprises* (Popularis Ltd 2003).

seen as a “precondition of collective bargaining” and that any resulting right to bargain collectively is recognised as a human right in various international human rights treaties that bind the UK.⁴⁰⁶ The ILO provisions regarding collective bargaining are located in Article 4 of its Convention 98 (Right to Organise and to Bargain Collectively), which states that:

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

Ewing and Hock recognised the settled view of the ILO’s Committee of Experts that few, if any, exceptions to the rights set out in Convention 98 were permissible (those that did pertained more to particular groups of workers such as the military and police) and noted the absence in the ILO’s jurisprudence of any suggestion that a state might exclude small employers from its obligation to deliver collective bargaining under Article 4.⁴⁰⁷ Far from accepting the small business exemption from the statutory scheme, the Committee of Experts identified the upsurge in the number of small enterprises (with all the associated fragmentation in labour markets and consequences for employment patterns) as compelling evidence that states should *increase* the scope for collective bargaining within their jurisdictions. There was particular anxiety that the emergence of this “new economy” raised particular concerns for advocates of collective bargaining. It had been demonstrated that there was little or no tradition of bargaining practice in many small enterprises, while the growth of outsourcing (as practiced by increasing numbers of larger concerns) had radically altered the nature of many employment relationships.⁴⁰⁸

Ewing and Hock discovered that the most striking effect of the small business exclusion had been to deny more than a fifth of the labour force the right to trade union recognition and representation unless their employer agreed. They found that 24,695, 000 employees had been

⁴⁰⁶ *ibid* 10.

⁴⁰⁷ *ibid* 11.

⁴⁰⁸ *ibid*.

employed by 1.2 million employers and that of the former, 1.6 million had been employed in concerns containing between 10 and 19 employees, 1.5 million had been employed in concerns containing between 5 and 9 employees and 2.3 million had been employed in concerns containing between 1 and 4 employees. Overall, 21.8% of workers had been employed in businesses containing fewer than 20 employees.⁴⁰⁹ The impact of the exclusion was not the same in every sector of the economy and specific industries, including clothing and printing, were said to be characterised by an especially high number of small businesses while other industries contained a much lower than average number. They also noted some specific effects in manufacturing.⁴¹⁰ Ewing and Hock concluded that the provisions contained within the Schedule A1 Procedure effectively denied more than 5.5 million people the right to trade union representation on the same terms as workers employed in concerns containing 21 or more employees and that these same people were also being denied rights that were conditional upon their trade union being recognised.⁴¹¹ There was also a concern that consequences arising from the small business exclusion could prove to be particularly detrimental to women, due both to the correlation between an absence of collective bargaining and pay inequality and because more women than men were likely to be employed in small businesses (and were therefore exposed greater risk of being denied the right to be a member of a recognised union).⁴¹² The exclusion of small firms from the statutory recognition scheme continues to be a running sore for the TUC.⁴¹³

⁴⁰⁹ *ibid* 12.

⁴¹⁰ *ibid*.

⁴¹¹ *ibid* 15.

⁴¹² *ibid* 17-18. 44.5% of men were shown to work in workplaces containing fewer than 50 employees, compared to 52% of women.

⁴¹³ Trades Union Congress, *The Employment Relations Act 2004 - A TUC Guide* (Trades Union Congress 2005) 7.

5.4 The ILO and TUC Responses to the Introduction of Schedule A1

The Schedule A1 scheme attracted the wrath of the ILO's Committee of Experts. It considered submissions from the UK government, the International Confederation of Free Trade Unions and the TUC and found that the procedure contravened its Convention 98 (the Right to Organise and Collective Bargaining) in five respects.⁴¹⁴ Their concerns focused on the rules regarding prohibition of acts of anti-union discrimination and interference by employers and 'unfair practices' perpetuated either by a union or an employer, the stipulation that successful applicants would need to have recruited a majority of the workers in the bargaining unit into membership *or* secure a majority vote in a ballot where at least 40% of workers had voted⁴¹⁵, the exclusion of applications in respect of employers who employed fewer than 21 workers (the Committee referred specifically to the TUC's submission that the effect of this constraint would be to deny the employees of small businesses the right to participate in a union) and, the disqualification of applications in circumstances where recognition agreements were already in existence.⁴¹⁶

While Labour ministers may not actively have encouraged trade unions to expect the restoration of all of the freedoms that they had once enjoyed, pragmatists within the union movement believed that the FAW proposals represented at least some kind of opportunity to "re-legitimise" trade unionism and re-shape the environment within which employer-employee

⁴¹⁴ CEACR: Individual Observation concerning Right to Organise and Collective Bargaining Convention, 1949 (No. 98) UK, 2007.

⁴¹⁵ The ILO supported the proposition that a union recognised as the *exclusive* bargaining agent for all workers in a bargaining unit had to be chosen by a majority. This was subject to the qualification though that, where no union covered more than 50% of workers in the bargaining unit, collective bargaining rights should be granted to all unions in the unit on behalf, at least, of their own members. The Committee asked the Government to indicate the measures that it proposed to take to ensure compliance.

⁴¹⁶ Dukes (n8) 262.

relations might be conducted.⁴¹⁷ The introduction of the new statutory procedure did indeed lead to a marked increase in the number of voluntary agreements, certainly in the short term, as a number of employers opted to negotiate outcomes with union representatives to avoid “state-imposed recognition”. The TUC remained critical though of agreements that it said had been concluded with unions who were not “truly independent” and what it felt was the ineffective mechanism through which such “unions” could (theoretically) be de-recognised. It also continued to voice fierce opposition to the inclusion within the scheme of high-profile, “hostile” measures such as the 40% ‘Yes’ vote requirement and the Small Business Exclusion for firms employing fewer than 21 workers. The TUC’s approach therefore became one of broadly welcoming the FAW “agenda” and the introduction of ERA 1999, while campaigning for revised legislation that would fully address their most significant concerns.⁴¹⁸

⁴¹⁷ Paul Smith and Gary Morton, ‘New Labour’s Reform of Britain’s Employment Law: The Devil is not only in the Detail but in the Values and Policy Too’ (2001) 39(1) BJIR 119, 133.

⁴¹⁸ Trades Union Congress, *The Employment Relations Act 2004 - A TUC Guide* (Trades Union Congress 2005) 5.

5.5 ERA 2004 and Issues of ‘Union Busting’

The Law Lords’ decision in *Wilson and Palmer* had prompted a series of applications to the ECtHR, claiming breaches in respect of Articles 10 (freedom of expression), 11 (association) and 14 (discrimination) of the ECHR.⁴¹⁹ In its judgement announced on 2 July 2002, the ECtHR held that the effect of UK law was that employers could treat employees who chose not to surrender the right to consult a union less favorably than others who did. Any attempt to so induce employees by means of financial incentives amounted to a frustration of a trade union’s ability to strive for the protection of its members interests and amounted to a violation of Article 11. Keith Ewing suggested in 2003 that the overriding significance of *Wilson and Palmer* lies in ministers’ failure to address all of the pertinent issues that the cases raised for a full *five years* ahead of the ECtHR decision.⁴²⁰ ERA 1999 had dealt only with “one limb” of the Lords’ judgment because while it specified that protection against discrimination applied where the alleged detriment took the form of an act or an omission⁴²¹, there was still no protection where the disadvantage complained of was connected to the use of trade union services. Further, the Secretary of State’s power⁴²² to make regulations to protect (against discrimination) workers whose terms and conditions were governed by a collective agreement had rendered itself ineffective for this purpose as no regulations had ever been made and because the section did not, in any event, apply in circumstances where a claim related to the payment of higher wages based upon performance of contractual services and not because of membership of a trade union.⁴²³

⁴¹⁹ Keith Ewing, ‘The Implications of *Wilson and Palmer*’ (2003) 32(1) ILJ 1, 2.

⁴²⁰ *ibid* 3.

⁴²¹ ERA 1999 s2.

⁴²² ERA 1999 s17.

⁴²³ ERA 1999 s17(4).

Ministers next started to contemplate how they might address some of the UK's outstanding contraventions of international labour law standards including its supposed breaches of Article 11 of the ECHR. The TUC's initial declaration that ERA 1999 represented "a significant advance in trade union and workers' rights" was now overtaken by a resolve to monitor its effects "post-implementation" together with lobbying for further advances.⁴²⁴ Pessimists perhaps expected that ministers' appetite for further legislation would be likely only to extend so far as would be necessary to address the matters specified in the ECtHR's judgement in *Wilson and Palmer*, but ERA 2004 actually amended the recognition provisions contained in ERA 1999 in a number of other respects, including:

- clarification regarding the criteria to be used by the CAC to determine what might constitute an appropriate bargaining unit;
- the creation of new rights for unions to communicate with workers within a proposed bargaining unit following acceptance of a recognition application;
- the conferment of additional obligations on employers not to interfere with union meetings during the formal balloting period;
- the introduction of further measures to prohibit employers and unions from adopting unfair practices during the balloting period;
- a declaration that provision of 'pensions' should not fall under the ambit of collective bargaining processes;
- enhanced top-up arrangements where an existing (recognition) agreement does not cover pay, hours *and* holidays.⁴²⁵

The new Act, *inter alia*, amended TULRCA 1992, section 146 to ensure that all "workers" would be afforded protection (including against dismissal) by the detriment provisions both with regard to any membership of a trade union that they held *and* as participants in "union activities".⁴²⁶ Further, while ERA 1999 had provided that independent unions would be barred from submitting applications in circumstances where non-independent unions (typically staff associations) had already secured 'voluntary' recognition⁴²⁷, ERA 2004

⁴²⁴ Trades Union Congress (n418).

⁴²⁵ *ibid* 6.

⁴²⁶ See for example, Outset UK, 'Employment Act 2004: The Roles of a Workers Companion & New Union Laws including new anti-union busting laws' (Outset UK, April 2005) <<http://www.outsetuk.com/wp-content/uploads/2010/06/Employment-Relations-Act-2004.pdf>> accessed 12 April 2015

⁴²⁷ Dukes (n8) 247.

introduced amendments which specified that an independent union could apply for de-recognition of a non-independent “counterpart”⁴²⁸ suggesting that ministers’ were no longer so reluctant to interfere with the wishes of employees who had chosen to be represented by non-independent unions. Disappointingly for The TUC, its vociferous lobbying against any retention of the 40% ‘Yes’ vote requirement *and* the Small Business Exclusion proved unsuccessful and both measures continued to form a significant element of the ‘core’ of the UK’s statutory recognition scheme. This debate nevertheless represented an acceptance by the union movement that the shift had been completed from the collective laissez-faire system that Kahn-Freund had envisaged to a process of legal recognition that they could seek to utilise in order to facilitate collective bargaining. The shift in relations has not been structured in accordance with the defence of the public interest so desired by Kahn-Freund but has more been progressed through a reduction in unions’ traditional statutory immunities and a transfer of responsibility for the protection of employees’ rights from work-based collective organisation towards state-granted rights enforceable through the courts. Thus, the trade union is no longer the source of the member’s right but it offers to defend it through support for legal action.

⁴²⁸ Schedule A1 paras 134-135.

5.6 Comparing the UK and Australian Systems

While the mechanics of the Australian system of recognition may appear to have been more straightforward than those of its UK counterpart, there now appear to be more similarities between them in terms of their characteristics, practical operation and effects. The limited entrenched protection that exists in Australia in respect of workers' human rights – including access to trade union representation and collective bargaining – is rooted in the country's reliance on Commonwealth power to legislate with regard to corporations. Federal and state legislatures promoted a model of conciliation and arbitration that gave greater prominence to individual tribunal awards and questioned the relevance of collective bargaining as the primary means through which to solve disputes. The historical Australian approach that unions should simply be registered “centrally” in order that they can then participate in bargaining has not been replicated in the UK, which has traditionally favoured “voluntarism” in one form or another. Both industrial relations systems have, however, relied more and more on “minimum floors of rights” that arguably favour individuals more than they encourage any kind of collective approach.

Contemporary interest in any comparison of the two systems tends to focus more on the application of ‘Third Way’ philosophy and its emphasis on more local consent and participation in bargaining processes than the “centralised” processes favoured in the past. The ideas that were first put into practice by the ALP governments in Australia from 1983 effectively became a blueprint for the FAW programme of legislation introduced in the UK by successive Labour administrations from 1999. Fluctuations in union membership in both countries, due in part due to changes in economic trends and changes in the relative strengths of each of their manufacturing bases, have not always been reflected in the simultaneous electoral fortunes of

their political parties either of the Left or the Right. As the second Blair administration implemented its ERA 2004 founded in Third way thinking and to largely “complete” its programme of what it hoped would result in more “consensual” industrial relations reform, the Howard administration in Australia was introducing proposals that would lead to the introduction ‘*WorkChoices*’, which placed virtually complete emphasis on individual bargaining without collective representation and sought to severely curtail trade union activity. Chapter Five will review the nature of the UK’s model as it exists today and will include an expanded discussion of where it sits in relation to the post-WorkChoices Australian model.

Summary

“Voluntarism” and “partnership” were at the heart of proposals that were discussed in ‘Fairness at Work’, introduced in ERA 1999 in the form of the Schedule A1 statutory recognition procedure and then consolidated in ERA 2004. Schedule A1 itself represented an attempt by an incoming Labour government to establish a recognition scheme specifically designed to grant recognition for unions in any enterprise where a majority of employees favoured it, but which would in no way undermine the considerable effort that senior Party figures had expended “wooing” the business/employer lobby. The response of ministers to this particular conundrum was to conclude that unions should adopt a particular industrial relations “function” within their business relationships.

There were undoubtedly significant incentives within Schedule A1 for the parties to at least attempt to reach voluntary agreements, not least given the potential that existed for protracted disputes over (and eventual imposition of) recognition to sour any bargaining

relationship that might ultimately be established. Even “hostile” employers could reflect on the benefits of maximising control in the process (including the shaping of future bargaining processes) when the likely alternative would be to concede the eventual initiative to either the applicant trade union or to the CAC. Dukes argues that Schedule A1 has placed too much emphasis on prioritisation of voluntary agreements as “a good in itself”, that this has represented a distraction from the more important prize of effective delivery of collective bargaining and that the promotion of such accords may also reflect a disregard for potential imbalances of power between the applicant union and the employer. She questions whether a government pursuing this approach should ever be regarded as an impartial arbitrator capable of effecting a fair and proper ‘balance’ in the relationships that exist between employers and trade unions purporting to represent the interests of their workers.⁴²⁹ Similarly, Smith and Morton ponder that while the enactment of ERA 1999 could have heralded a “re-legitimisation of trade unionism”, including even “militant trade unionism”,⁴³⁰ it actually served as confirmation that the Labour Party had been “remade by means of accommodation with neo-liberalism and modified acceptance of the Thatcherite landscape”.⁴³¹ The retention of measures in respect of the outlawing of closed shops and secondary action, regarding picketing, ballots and notices, unofficial action, election of certain officials, the right of members in specified circumstances not to be disciplined by their union and the maintenance of the financial reporting rules and sanctions that the Conservatives had imposed on unions’ central bureaucracies saw the union movement in a relatively poor state of health as it entered the Schedule A1 “era”. The institution of the ‘40% Yes’ threshold and SBE rendered unlikely real scope for unions to reap spectacular benefits from the introduction of statutory recognition and any increase in membership that did materialise was unlikely to be matched by workers’

⁴²⁹ Dukes (n8) 257.

⁴³⁰ Smith and Morton (n417).

⁴³¹ *ibid.* See also Paul Smith and Gary Morton, ‘Nine Years of New Labour: Neoliberalism and Workers’ Rights’ (2006) 44(3) BJIR 401, 402.

capacity to exert greater collective power on employers. The purpose first of ERA 1999 and then of ERA 2004 could therefore be said simply to be one of “remoulding” the unions as “weaker partners” (sub-ordinates, in fact) in their relationships with employers⁴³², resulting in the conclusion that the price paid for legitimisation (in the form of quite stringent regulation) was a heavy one that imposed greater restrictions on union activity than had been seen under the auspices of ‘collective laissez-faire’. Statutory regulation has, then, become the main source of the UK’s union recognition law just as it has in respect of employment law more generally. The status that the two ERAs have conferred on the CAC has diminished the influence of the courts and judiciary who have, for the most part, opted to refrain from intervening in recognition disputes and allow space for the CAC to reach decisions.

⁴³² *ibid.*

CHAPTER SIX

THE UK AND AUSTRALIAN MODELS: A COMPARATIVE ANALYSIS

Introduction

Chapter Six will evaluate the cumulative effect of the UK's trade union legislation (including the Blair governments' two Employment Relations Acts) on unions' ability to organise, recruit members and participate in collective bargaining. It also assesses the extent to which legislation and case law has impacted upon employers' attitudes and seeks to identify any "shortcomings" that may persist even following the procession of reform overseen by governments led by parties of Left and Right. The "findings" that emerge from this analysis may assist in our understanding as to how, if at all, the introduction of a statutory recognition scheme in the form of the Schedule A1 scheme – and in particular the 'Third Way' approach to political discourse favoured by 'New Labour' politicians - can be said to have altered the "character" of the UK's traditionally 'collective laissez-faire' (non-interventionist) model of trade union recognition. A further point of interest within this discussion is whether the maintenance of the Small Business Exclusion within Schedule A1 gives rise to effects that reach beyond those enterprises and employees who are "caught" directly by it.

The analysis contained in Chapter Six also includes further exploration and comparative analysis of the legal provision for recognition that exists in the UK and Australia. The discussion will reach its conclusion in the identification of areas of apparent convergence and continuing divergence between the two regimes.

6.1 The Respective Characters of the UK and Australian Recognition Models Today

The analysis of the Australian model and the most recent legislative changes made in the UK that took place in Chapter Three and Chapter Four revealed the most noteworthy and significant features of the respective recognition mechanisms to be:

Model/Jurisdiction	Key Characteristics
Australia	<ul style="list-style-type: none"> • Recognition rights have been enshrined in law since the enactment of the Conciliation and Arbitration Act ('Conciliation Act') 1904 (Cth), which required unions to register as an organisation for the purposes of <u>federal</u> industrial relations legislation. • Traditionally impartial but firmly weighted towards employer interests following the introduction of WRA 1996 and then WorkChoices from 2006. • Avoids 'majoritarian' support for collective bargaining as a pre-condition for recognition but, following introduction of FW Act 2009, notably endorses a "individualist" model of collective bargaining (talking about employers and employees and NOT unions), although some safeguards now exist to guarantee unions' involvement in the bargaining process.
UK	<ul style="list-style-type: none"> • Historic "collective laissez-faire" (non-interventionist) approach favoured by successive governments until 1980. • The emphasis has traditionally been on leaving employers and employees to reach voluntary agreements with recourse (now) to a statutory recognition procedure only where it proves impossible to reach a voluntary agreement. • Attempts have been made to introduce statutory recognition, culminating in the 'social partnership model' from 1999 onwards. The statutory mechanisms that do exist with regard to unions are comparatively complex.

There appears to be almost complete unanimity amongst academics that the UK Labour government's purported "lack of bias" in the aftermath of its 1997 election victory more

reflected a shift in prevailing attitudes towards fairness in employment relations than it did ministers' intent to ensure that their new legislation would prove to be "even-handed".⁴³³ The mechanisms for recognition that were contained in IRA 1971 and EPA 1975 were arguably founded upon a more traditional "pluralist conception" of collective representation and negotiation and an acceptance that the consequence of an expansion in collective bargaining might prove to be a more robust form of industrial relations regulation.

The Schedule A1 procedure that ERA 1999 first inserted into TULRCA 1992 is symptomatic of a particular kind of Third Way approach. It follows the simple hypothesis that "fairness" shall be determined by the free choice of the majority with provision for recognition being made *only* where a majority of the workforce wishes it all while striving to inform (arguably conflate) the institution of a new statutory provision with the long-established 'custom and practice' that the parties should be free to "escape" down any voluntary route at any stage. If Schedule A1's motivation was to encourage settlement of recognition disputes by voluntary means alone, then the yardstick by which to judge the procedure must inevitably be the extent to which such conflicts have proved capable of being resolved without the need for a union to invoke the procedure, at least in any formal sense. There certainly appears to be strong evidence that the enactment of ERA 1999 signified a change in mood and transformation of the atmosphere within which negotiations regarding recognition took place and there is little doubt that the "threat" (whether implicit or explicit) that a union might invoke the statutory procedure prompted many employers to opt for some form of accord with their employees and their unions over the prospect that they might have recognition "imposed" on them by the state.⁴³⁴ The new statutory procedure did, the effects of the 40% 'Yes' vote requirement and

⁴³³ Alan Bogg, 'The Political Theory of Trade Union Recognition Campaigns: Legislating for Democratic Competitiveness' (2001) 64(6) MLR 875; Dukes (n8) 248; Gregor Gall, 'Trade Union Recognition in Britain: An Emerging Crisis for Trade Unions?' (2007) 28(1) EID 78, 79.

⁴³⁴ n396.

the Small Business Exclusion notwithstanding, afford trade unions a legal mechanism through which they could “forcibly” achieve their aim. The most accurate measure of its effectiveness may, however, simply be the extent to which it yielded increased numbers of recognition agreements.

Further legislative reform in the UK and Australia since the turn of the millennium has resulted in the two jurisdictions’ recognition models appearing to move closer together. The UK model has, with its increased emphasis on ‘social partnership’ and the availability of a “statutory procedure of last resort”, evolved from a purer form of ‘collective laissez-faire’ to become a “collective laissez-faire hybrid”. ‘Voluntarism’ and ‘partnership’, such as they exist, are driven by the statutory element that now forms the basis of the UK model, albeit there remains something of a “nullifying” effect with the SBE’s continued presence within the Schedule A1 scheme. The intention of the FAW reforms may simply have been to instil “order” into the UK’s, at times, “chaotic” model with the aim of incentivising the parties but avoiding measures that might alter the fundamental balance of power within it? The Australian industrial relations system, which was almost unique throughout most of the 20th century due to its ‘arbitral’ character (most developed nations had pursued models that could be said to have their foundations in ‘bargaining’) remains highly regulated. FWA 2009 abolished the AWAs and restored at least some of the union rights that were so severely curtailed under WorkChoices. Unlike its UK counterpart, the Australian model remains steadfastly “non-majoritarian” in character. The effect of the WRA 1996 and later ‘Workchoices’, both of which have been only partially tempered by the introduction of FWA 2009, has been to shift the emphasis of the Australian model to one that places far greater significance on individual choice. Employers have been able to exert much more influence over regulation of their industrial relations (with their employees) and while FWA 2009 called time on the highly

contentious AWAs that ‘WorkChoices’ established, a significant sustained and cumulative effect of the past two decades of legislation has been the replacement of former ‘compulsion’ with ‘voluntarism’ into the model at the enterprise bargaining level.

6.1.1 Continuing Non-Compliance with ILO Conventions

Chapter Four reflected on the antipathy shown by the ILO towards the raft of collective labour law introduced in the UK by Conservative administrations during the 1980s and 1990s as well as the FAW legislation introduced by Labour ministers elected from 1997 and whose efforts to ensure that UK law would conform to ILO standards appear to have been somewhat half-hearted, especially during their first term of office. The first Blair government *did* restore the right to GCHQ employees to join their preferred union and new protections from dismissal for workers taking part in industrial action were also introduced but there was no excursion into other areas of contention such as the prohibition on secondary industrial action. The effect of those decisions, especially when coupled with the institution of the Schedule A1 procedure, was that the Labour administration actually *added* to the already lengthy list of transgressions of ILO Conventions that had been promulgated by the post-1979 Conservative governments!⁴³⁵

Smith and Morton admitted to some possibility that the introduction of ERA 1999 might help to “re-legitimise trade unionism” and possibly even “militant trade unionism” (as opposed to the re-casting of unions as “social partners” within enterprises), but believed that the sharp decrease in collective bargaining from 1980 actually rendered more certain scenarios within which employers would seek to contest applications for statutory recognition.⁴³⁶ A significant “hurdle” in

⁴³⁵ Dukes (n8) 261.

⁴³⁶ Smith and Morton (n417).

any discussion remains, of course, that the ILO is a *voluntary* organisation with only limited power to enforce its normative instruments in member states. If its major levers are “moral persuasion” and “technical assistance” for the implementation of its labour standards, then it is perhaps no surprise that compliance will not be uniform, especially in a recession-hit but still globalised economy? It is probably unwise though to underestimate the continuing influence of the ILO. Smith and Morton certainly believed that the Blair-led Labour governments’ retention of so many of the measures introduced prior to 1997 was so grave that they no longer believed it appropriate to attach the ‘Conservative’ label to that raft of legislation simply because far too many inconsistencies remained with “the spirit and letter of the relevant conventions of the International Labour Organisation and other bodies.”⁴³⁷

Similarly, while Australia’s enactment of FWA 2009 restored many rights that had been removed by ‘WorkChoices’, the International Trade Union Confederation reported that certain aspects of the right to join and form unions, to bargain collectively and to strike still failed to comply with the requirements laid down in ILO Conventions 87 and 98. It identified particular problems in the building and construction industry in the form of particular exemptions that continued to operate in breach of international standards on freedom of association and pointed too to the maintenance of a stipulation that workers could not take industrial action when bargaining with multiple employers unless they formed themselves into a single interest group.⁴³⁸

6.1.2 ‘Excluding Small Businesses’

⁴³⁷ *ibid* 121.

⁴³⁸ International Trade Union Confederation, ‘Australia: Time to Improve Workers’ Rights and to Empower Women and Indigenous Peoples’ (ITUC, 4 April 2011) <<http://www.ituc-csi.org/australia-time-to-improve-workers>> accessed 6 July 2015

The TUC in the UK offered a cautious and qualified welcome to the introduction of ERA 2004 in the same way that it had in the case of ERA 1999.⁴³⁹ It had been prepared, in the short-term, to endure some of ERA 1999's more "hostile" provisions such as the 40% 'Yes' vote requirement and the government's insistence on the insertion of the SBE for firms employing fewer than 21 workers on the basis that the new Act represented welcome, if "incremental", progress but their retention in ERA 2004 came as a severe disappointment.⁴⁴⁰ Presented as a measure to exempt small businesses generally from "unnecessary 'red tape'/regulation, the SBE represented arguably the starkest example of Labour ministers' attempts to secure more widespread acceptance of their 'Fairness at Work'-inspired raft of legislation. The Australian federal governments led by John Howard and Rudd refrained from introducing similar measures into the Australian industrial relations system, at least in any kind of "overt" sense, but it remains an obvious measure that could be adopted by a future administration.

Alan Bogg predicted back in 2005 that the UK government's decision to retain its SBE is likely to prove far more significant in the longer term than the introduction of other amendments that were received more warmly by the trade union lobby.⁴⁴¹ The then General Secretary of the TUC, Brendan Barber, acknowledged in 2003 (while final drafts of ERA 2004 were being prepared) that his organisation had previously offered a "warm welcome" to the generality of the proposals first tabled under 'FAW' umbrella. This had, however, been "tempered by one stark omission" in the form of the SBE. Dissenting from the government's declaration that its statutory scheme was a product of some kind of "accord" between the employer and employee lobbies, Barber maintained that retention of the SBE merely served to

⁴³⁹ Trades Union Congress (n418).

⁴⁴⁰ *ibid.*

⁴⁴¹ Alan Bogg, 'Employment Relations Act 2004: another false dawn for collectivism?' (2005) 34(1) *ILJ* 72, 72.

deny approximately six million people rights that were being enjoyed by their compatriots working in larger concerns. It was, both in principle and in practice, “arbitrary and unfair” and undermined the spirit of ministers’ stated commitment that they would ensure “fairness at work”. The TUC vowed that it would “defeat the arguments of the small firms lobby” and persuade the government both that the SBE’s continued existence represented an infringement of the democratic rights of any employees who were unfortunate enough to work in qualifying (small) enterprises and that its abolition would not, in any case, harm any small business.⁴⁴²

There is no doubt that the SBE was intended to a compromise (some might suggest it represented little more than a “fudge”) solution that was borne out of ministers’ desire for political “consensus” that they hoped would deliver enduring harmony in UK industrial relations and perhaps even lay memories of the fabled ‘Winter of Discontent’ during the tenure of the previous Labour government to rest. Economic considerations did not appear to play any part in the formulation of the Schedule A1 procedure save, perhaps, for the government’s apparent acceptance of the argument that absence of a SBE would result in a heavy cost burden to smaller enterprises. For some, the ‘Third Way’ and “compromise” are inextricably linked even if the FAW programme of legislation was arguably only a product of the first Blair government’s “take” on previous Third Way thinking. The SBE effectively validates the suggestion that trade union activity can be said to be undesirable (either in principle or effect), at least in certain circumstances. It is no wonder then that the TUC has opposed the SBE vigorously ever since its inception. Welcome as the other provisions contained in the Schedule A1 scheme may be, the enduring effect of the SBE may simply be to undermine any effort by the union movement to more broadly put its case and expand its operations. Bogg has, more recently, argued recently that the Schedule A1 scheme represents just the most recent

⁴⁴² Ewing and Hock (n405) 7.

manifestation of a drawn-out and highly unproductive “Wagner-inspired debate”⁴⁴³ that has seen successive UK governments obsess over “worker choice” and the “hows, whys and wherefores of (their) consent”. Bound up in procedure and shaped entirely by considerations of ‘voluntarism’, he concluded in an article published in 2012 that UK statutory recognition was “dying”, a mere 15 years after the introduction of the Schedule A1 scheme.⁴⁴⁴

6.1.3 UK ‘Coalition’ and Conservative Governments from 2010

Hepple argues that the Conservative-Liberal Democrat coalition government (formed following the 2010 General Election) settled on an approach to employment law that effectively saw its members adhere to a policy borne out of competing tensions of “social liberalism and market fundamentalism but wrapped in the language of ‘fairness’”, resulting in “continuity with... (a) ‘Third Way’ of ‘regulating for competitiveness’ and social inclusion” on the one hand, but pursuance of its “Red Tape Challenge... leading to the abolition or scaling down of employment and equality rights” on the other.⁴⁴⁵ Gall suggests that this apparent endorsement of the Blair (and Brown) Labour governments’ policy of industrial partnership and lack of any substantive “proposals to modify the highly complex ‘red tape’ of (Labour’s) weak trade union recognition procedures”⁴⁴⁶ is most likely founded on an absence of any discernable pressure for change from employers pacified by what he sees as the declining effectiveness of the procedures introduced in ERA 1999 and ERA 2004.⁴⁴⁷ Opponents of unions have claimed

⁴⁴³ The US National Labor Relations (or ‘Wagner’) Act 1935 purported to encourage voluntary recognition of trade unions by employers, but was met with sustained employer hostility (and ensuing consequences for the recognition process and what had been a hoped-for expansion in voluntarism).

⁴⁴⁴ Alan Bogg, ‘The Death of Statutory Recognition in the United Kingdom’ (2012) 54(3) JIR 409.

⁴⁴⁵ Bob Hepple, ‘Back to the future: employment law under the Coalition Government’ (2013) 42(3) ILJ 203, 203.

⁴⁴⁶ *ibid* 210.

⁴⁴⁷ See Gregor Gall, ‘Union Recognition in Britain: The End of Legally Induced Voluntarism?’ (2012) 41(4) ILJ 407.

repeatedly for several years now that they wield disproportionate influence in the public sector and that they lack relevance in the private sector.⁴⁴⁸ The majority Conservative government elected in May 2015 has, at least for now, also resisted any temptation to seek to curtail union influence through reform of the Schedule A1 scheme. It has instead pledged that it will introduce legislation designed to severely restrict union members' ability to take lawful strike action.⁴⁴⁹ This presents yet another challenge to trade unionists as they strive to demonstrate their worth not only to their members (and potential recruits) but to their employers too.

Summary

The UK TUC reported in April 2006 that the significant and continuing expansion in recognition campaigning had, nevertheless, been met by a marked *decrease* in the number of agreements that unions had found themselves able to conclude with employers.⁴⁵⁰ There might be a number explanations for this phenomenon including the possibility of a sense on the part of at least some employers that, once implemented, ERA 1999 and ERA 2004 more or less (i.e. questions of recognition apart) preserved the kind of "restrictive" regime of trade union law that they had become so accustomed to over the previous two decades? The suggestion that the introduction of statutory recognition in the form of the Schedule A1 procedure could result in a wider overhaul (expansion) in collective bargaining⁴⁵¹ has been rejected by the likes of Smith and Morton, who argue that the union movement's condition was already such that it

⁴⁴⁸ BBC News, 'CBI boss blasts 'outdated' unions' (BBC News, 3 September 2004) <<http://news.bbc.co.uk/1/hi/business/3622276.stm>> accessed 7 July 2011

⁴⁴⁹ See BBC News, 'Sajid Javid: Significant changes to strike law' (BBC News, 12 May 2015) <<http://www.bbc.co.uk/news/business-32702585>> accessed 31 May 2015

⁴⁵⁰ Trades Union Congress, 'Union recognition campaigns treble as deals get tougher to secure' (Trades Union Congress, 2006) <<https://www.tuc.org.uk/union-issues/union-recognition-campaigns-treble-deals-get-tougher-secure>> accessed 31 May 2015

⁴⁵¹ Oxenbridge and others (n393).

was unlikely to reap significant benefits from the introduction of statutory recognition and argue instead that the purpose of ERA 1999 and ERA 2004 was simply to “remould” unions as “weaker partners” in relationships with employers.⁴⁵²

Bogg has tempered his declaration that the advent of ERA 2004 did “not disclose a collectivist turn in (the) second phase of New Labour's collective labour law reforms” with an acknowledgement that it did at least contain “significant new measures in relation to freedom of association and collective bargaining rights.”⁴⁵³ His most significant contention remains, however, that it is the retention of the Small Business Exclusion within the Schedule A1 scheme that is likely to be most long-lasting (and far-reaching) in its effect. The passage of time between ERA 1999 and ERA 2004 was, of course, relatively short. Ministers’ original decision to confine requests for statutory recognition to enterprises comprising fewer than 21 employees followed concerted lobbying by Conservative Party politicians and employers’ groups for a much higher figure. It may appear somewhat ironic though that the UK political party that was founded by trade unions should, arguably, shoulder much of the responsibility for putting in place - largely through the introduction of the small business exclusion contained within the Schedule A1 procedure - significant barriers to the expansion of membership in private sector industries. The scope and effect of the SBE within the UK statutory recognition scheme and/or the “business-friendly methodology conceived in FAW to help devise the limits of proposed bargaining units could conceivably constitute sufficient subject matter sufficient to justify an entirely separate study as could the extent to which unions both in Australia (by virtue of their registration as ‘corporate entities’) and the UK (through the raft of 1980s Conservative legislation that was left largely intact by the FAW reforms) have seen state-

⁴⁵² Smith and Morton (n417).

⁴⁵³ Alan Bogg, ‘Employment Relations Act 2004: Another False Dawn for Collectivism?’ (2005) 34(1) ILJ 72, 72.

sponsored scrutiny and regulation of their internal affairs become intertwined with their ability to obtain recognition and participate in collective bargaining.

Australian federal and state industrial legislation bestows rights on trade unions on the one hand but these are then “tempered” by strict scrutiny of organisations’ internal rules and processes *and* their finances. The Australian model has evolved however from one in which State arbitration authorities proved pivotal in the resolution of disputes between parties and the setting of standards in working conditions (through the system of awards that could be applied either to specific enterprises or across entire industries) to a system that remains founded in registration but which has been decentralised so that it concentrates much more on individual “employers and employees”. Australian trade unions are treated as “parties principal” with a legal identity separate and distinct from their members. They are able to effectively “police” industries and occupations and can take action in support of their objectives that may not necessarily be consistent with the views of their members.

Australian trade unions continue, because of the status afforded to them upon registration, to remain integral to the industrial relations system. The Australian model of recognition by virtue of registration thereby provides a unique point of contrast to the more limited model of recognition introduced in the UK in ERA 1999. By ensuring that recognition flows automatically from participation in the conciliation and arbitration system the Australian model avoids the complications and limitations that arise under the British system, which requires minimum membership levels, secret recognition ballots and the involvement of both the employer and the Central Arbitration Committee in the recognition process.

The influence and power – and memberships - of UK trade unions have all been steadily

in decline since the early 1980s. The legislation that the Thatcher (Conservative) governments in particular introduced to remove many trade union rights and immunities has, over time, been supplemented by increased emphasis on the quantity and scope of individual employment rights, which raises inevitable questions regarding the perceived relevance of trade union membership for many members of the workforce. The introduction of a scheme (Schedule A1) for statutory recognition by the first Blair (Labour) government was arguably designed to help extend the reach (if not the power) of trade union influence, but UK trade union membership has continued to decline in both the public and (especially) the private sector. The general trend in both Australian and the UK has been to place far more prominence on the grant of individual (rather than collective) workplace rights and this continues to present stiff challenges to their respective trade union lobbies (the ACTU and TUC) as they seek to convince employees of their relevance into the 21st century and their respective governments that access to trade unions should be available on the basis of “rights” and not facilitated through the kind of business efficiency that employers in either model may demand.

UK trade unions’ concerns regarding the Blair governments’ inability to effect a restoration of pre-1979 trade union powers and the immunities for secondary industrial action apart⁴⁵⁴, those administrations’ commitment to ‘Third Way’ thinking plainly did impact upon the UK’s model of recognition, altering it to an updated – but now significantly distorted – form of the ‘collective laissez-faire’ pioneered by Kahn-Freund six decades earlier. The Conservatives’ victory in the 2015 UK general election may threaten the “stability” that has been inherent in the UK model since full implementation of ERA 2004 in April 2005. Similarly (if not necessarily identically), a further Liberal/National general election victory in Australia during 2016 could herald some kind of re-consideration of the themes explored previously in

⁴⁵⁴ Hepple (n445) 209-210.

WorkChoices. These remain, however, points of conjecture. For now, the UK model has evolved to a position where “legal” union recognition has become increasingly important coincidental with its diminished role in Australia. The respective histories and characters of the respective systems as they entered the 2000s were however such that it cannot be said that the direction of travel in either model could simply be said to have been opposite to that in the other.

There is no doubt that post-1999 reforms introduced in the UK have enshrined a presence for trade unions within the industrial relations model. What would not appear to have been settled is the precise role (or function) that they may be expected to fulfil in different sets of circumstances? Both major political parties’ increased emphasis on the maintenance of individual employment entitlements protected by law appears to undermine the very essence of collectivism and employee organisation in workplaces. Third Way/’New Labour’ proponents of ‘social partnership’, who appear (certainly at the outset) to have envisaged a specific (some might say “diluted”) function for trade unions - and a particular kind of relationship that they hoped might evolve between them and their members might, of course, argue that the two are not mutually exclusive? An obvious argument that may be advanced is that the now evident concentration on advances in individual employment protections has served to render trade union membership and organisation obsolescent. An effective counter-argument to this might be that putting the continued slow decline in trade union membership bases on one side, many employers continue to prefer to engage with their representatives for bargaining purposes. Particular, now long-established provisions such as the statutory right of the individual to be accompanied to a grievance or disciplinary meeting by “a trade union official”⁴⁵⁵ rely on and are founded in an acceptance of the trade union presence and it may

⁴⁵⁵ ERA 1999 s10.

also be argued that while support for (and participation in) trade unions may continue to fluctuate over time. Demands for (and pressures on) workers to embrace “flexibility” in employment notwithstanding the now more regimented post-Kahn-Freund model that exists does at least afford those who seek to promote worker freedom of association a practical means of survival and potentially even a platform from which they might hope to re-grow their scope one day.

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