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'THE FUTURE OF THE LAW OF WORK'

A Review Essay of
Labour Law in an Era of Globalization: Transformative Practices and Possibilities (2002)

Labour Law in an Era of Globalization represents scholarly collaboration on a global scale. That is not to say that it pretends to be (impossibly) comprehensive in its representations or its perspectives. The contributors are predominantly although happily not exclusively drawn from the most developed countries. They offer insights into the impacts of globalisation on law and work in contexts as diverse as Great Britain, Japan, Mexico, South Africa, Jordan, Israel and Silicon Valley in the USA. All are members of INTELL, an international network of labour law academics and practitioners including unionists, activists, judges, and legal practitioners, who

> generally support legal, social and political transformation to construct more just, equal, non-hierarchical, culturally and sexually pluralistic, democratic societies, and they believe that law, legal practices, legal work, and legal scholarship can and should contribute to social justice and egalitarian social change.[1]

Thus it is the subtitle, *Transformative Practices and Possibilities*, that is key in characterising this collection. Karl Klare's observation in his opening chapter, 'The Horizons of Transformative Labour Law and Employment Law', that '[l]egal discourses have no inherent political tilt; a legal discourse is a medium or location of ideological encounter and conflict'[2] is well demonstrated in the collection. The

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1 Joanne Conaghan, Richard M Fischl and Karl Klare (eds), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (2002) xxiv.

2 Ibid 3.

political dimension of every essay is explicit, but there is no homogenous approach. While work, law and globalisation may all appear to be constituted as coherent concepts, these scholars seek out and utilise the spaces and gaps within each of them. Transformative politics are, in this sense, post-modern and dangerous.[3] The very real danger for those who would expose, unsettle and subvert the existing power regimes in a quest for redistributive justice through labour law is marked poignantly yet powerfully by the inclusion in the collection of one of Massimo D'Antona's essays, 'Labour Law at the Century's End: An Identity Crisis?'.[4]

The introduction by the editors to the collection is not overly extensive: with a distinguished group of contributing scholars the approach is the more respectful one of allowing contributors to speak for themselves through their writing. The difficult editorial issue in a collection such as this is the internal grouping and arrangement of the various chapters. The editors have presented the essays grouped around seven thematic parts: Part I: Labour Law in Transition; Part II: Contested Categories: Work, Worker and Employment; Part III: Globalization and its Discontents; Part IV: Same as the Old Boss? The Firm, the Employment Contract, and the 'New' Economy; Part V: Border/States: Immigration, Citizenship, and Community; Part VI: Labour Solidarity in an Era of Globalization: Opportunities and Challenges; and Part VII: Laying Down the Law: Strategies and Frontiers. Such editorial decisions are invariably somewhat subjective, and other themes might easily have been identified. There is some signposting through footnotes to other linkages between the essays but, wisely, this is limited so as not to be intrusive, respecting the undoubted diversity in readers' interests.

Labour Law in an Era of Globalization does not resile from tackling some of the most difficult questions facing the law of work now and in the future and in so doing it is provocative, challenging and always stimulating. As it gathers together some of the very best labour lawyers in the world, the quality of the scholarship and writing is, unsurprisingly, of the highest standard across all contributions. This review essay examines the essays collected in *Labour Law in an Era of Globalization* from the perspective of an Australian feminist labour lawyer. It therefore does not purport to deal with all the contributions in the depth each may

3 Compare the insight that although Western thought constructs the world through a series of binary oppositions, the identity of one side of a dualism depends on the exclusion of other and so contains the other as a 'dangerous supplement' – see J Derrida, *Of Grammatology* (trans GC Spivak) (1974) 144ff.

4 Translated by Alan Hyde with assistance from Bruno Caruso, Karl Klare and Silvanna Sciarra. Professor D'Antona was assassinated in 1999. Both he and Professor Marco Biagi, who was gunned down outside his home in Bologna in 2002, were labour and industrial relations intellectuals committed to the attainment of justice in work relations.

deserve individually, nor to follow exactly the editors' arrangement of the chapters, but to focus on some of the arguments particularly relevant from this perspective to the future development of Australian labour law and the delivery of justice to all workers.

WORK, LAW AND LEGAL SCHOLARSHIP IN AN ERA OF GLOBALISATION

Labour Law in an Era of Globalization is a timely volume. Of all the disciplines it is the law that stands to be the most profoundly disrupted by the complex set of processes referred to under the rubric of 'globalisation'. Imbedded deep within the modern conception of law are a set of assumptions related to the existence, structure and power of the nation state. Conventionally the fundamental law of every legal system, and the source of the validity of all norms within it, constitutes the nation state as sovereign. Even law's extension beyond the nation state has remained peculiarly parasitic upon the existence of the nation state. International law, as its nomenclature signifies, is chiefly conceived of as the law between sovereign nation states. The historical subject of public international law, a bounded state with a defined population occupying a geographically defined territory, has been permeated only in relatively recent times by the development of international human rights law.[5] Private law is also affected by these assumptions. Thus, in Australia the national boundary marks the limit of the unity of the common law.[6] Private international law, through its choice of law rules, has tended to assume the unproblematic continuance of the very national legal systems that globalisation now places under challenge. Imagining law cut adrift from the nation state has thus been, in modernist thinking, barely possible.[7]

Little wonder then that legal scholars have been eager to consider the impact of globalisation upon their discipline,[8] with many suspecting that its real significance may be something far more profound than the emergence of a new and different context in which law operates, even a 'paradigmatic transition'.[9] But the relationship of law and globalisation is an intricate one, less coherent than that

5 See H Charlesworth and C Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000); and H J Steiner and P Alston, *International Human Rights in Context* (2nd ed) (2000).

6 See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563.

7 See H Arthurs, 'Labour Law Without the State' (1996) 46 *University Of Toronto Law Journal* 1.

8 Interestingly, Harry Arthurs in 'Reinventing Labour Law for the Global Economy: The Benjamin Aaron Lecture' (2001) 22 *Berkley Comparative Journal of Labour and Employment Law* 271, 273 has pointed out that frequent use of the label globalization in academic research is relatively recent – only in 1999 did the Library of Congress introduce it as a keyword classification.

9 See W Twining, *Globalisation and Legal Theory* (2000) 21.

implied from neat categorisations. Globalisation comprises a whole set of disparate processes and the law is deeply implicated in their production. And so, in contrary fashion the law has also proved itself peculiarly amenable to globalisation. The neo-liberal values structuring the emergent global marketplace have been given shape through legal doctrines, especially those of contract and property. Through these legal forms actors in the global marketplace escape the strictures of the law, and of the 'old' forms of (public) power, while simultaneously appropriating it, and the 'new' forms of (private) power, to their own ends. Nation States have been complicit in these processes, adopting 'de-regulatory' and 'privatisation' policies that they have wrapped in the rhetoric of abstentionism.

The social effects of globalisation have been profound, changing the way in which all people live. And in few areas of human relations is the impact of globalisation more marked than in the world of work. Little wonder then that everywhere the law of work has been in upheaval.

So great have been the changes in work relations wrought by globalisation that the International Labour Organisation (ILO), the body entrusted with ultimate responsibility for labour standards at the international level, was threatened with irrelevance in the early 1990s. Subsequently it embarked on major rethinking of its role and initiated some organisational change in an effort to reinvent itself. The ILO now espouses a commitment to securing four fundamental rights and principles at work for all: freedom from child labour, freedom from forced labour, equality and freedom of association.[10] Galvanised around the concept of 'decent work', the ILO has explicitly broadened its mandate to a concern with all work, paid and unpaid, and specifically focussed attention on the proliferating forms of precarious work and their lack of protection in law.

The upheaval in the law of work has been felt particularly acutely in Australia. With its peculiarly antipodean form of regulating work relations through a centralised system of conciliation and arbitration, the Australian model was historically far removed from Kahn Freund's famous characterisation of labour law as 'collective laissez faire'.[11] Although the pressure to transform the Australian law

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[10] See the ILO's *Declaration on Fundamental Principles and Rights at Work* 1998. For an analysis of the response of the ILO to globalisation, see L F Vosko ''Decent Work' The Shifting Role of the ILO and the Struggle for Global Social Justice' in (2002) 2 *Global Social Policy* 19.

[11] See Paul Davies and Mark Freedland (eds), *Kahn-Freund's Labour and the Law* (3rd ed) (1983) 18. See also Keith Ewing's examination of the similarities of the British and Australian systems – 'Australian and British Labour Law: Differences of Form or Substance' (1998) 11 *Australian Journal of Labour Law* 44.

of work according to a neo-liberal agenda was at first resisted,[12] the first tentative steps to reform quickly gathered pace in the early 1990s. The significance of each stage of the transformation was signalled by the changing titles of the major national legislative instruments.[13] But it was their constitutional foundations that really betrayed the revolution taking place. Tellingly it was not really the reliance on the external affairs power but the turn to the corporations power that provided a basis for embracing an agenda more consistent with the neo-liberal values and 'de-regulatory' practices that globalisation represented.[14] The trade and commerce power, perhaps an even more suitable vehicle to further this agenda, remains only sparingly used to support law regulating work in Australia, perhaps awaiting a re-interpretation that would awaken it to a potentially more dominant role in the global era.[15] In Australia, the contest over the regulation of work remains fierce: resistance to a deeper engagement with the neo-liberal agenda of the Liberal Government has been evident at the federal level,[16] while in some of the states, Labor Governments have instituted inquiries to examine options for reform of the law of work with an eye to securing the protection of the most vulnerable workers while simultaneously ensuring business remains competitive within the global economy.[17]

Such explorations have been replicated in many jurisdictions around the world. Although to varying degrees, there is now widespread recognition of the need for

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12 See the Keith Hancock *Report of the Committee of Review on Australian Industrial Relations Law and Systems* vols 1–3)(AGPS, Canberra, 1985).

13 In 1988 the *Conciliation and Arbitration Act 1904* (Cth) was amended and renamed the *Industrial Relations Act 1988* (Cth). Further changes were introduced by the *Industrial Relations Reform Act 1993* (Cth), which in turn underwent even greater transformation when amended in 1996 and renamed the *Workplace Relations Act 1996* (Cth).

14 In his article 'The Internationalisation of Australian Labour Law' (1994) 16 *Sydney Law Review* 112, Ron McCallum perceptively pointed out that the use of the external affairs power to support the *Industrial Relations Reform Act 1993* (Cth) was not so much about the influence of globalisation but more a matter of political contest between the Commonwealth and states. On the prospect of greater reliance on the corporations power in the future, see A Stewart, 'Federal Labour law and New Uses for the Corporations Power' (2001) 14 *Australian Journal of Labour Law* 145.

15 The interpretation of the trade and commerce power, s 51(i) the Australian Constitution, is markedly different from that of its counterpart in the United States Constitution. There has been no major case in Australia interpreting the extent of s 51(i) since the mid 1970s.

16 See for example the failure of the *Workplace Relations Amendment (Better Jobs, More Pay) Bill 1999* (Cth).

17 See Prof R C McCallum, Chair, *Independent Report prepared for the Victorian Industrial Relations Taskforce*, (The State of Victoria, August 2000) and Greg Stevens, *Report of the Review of the South Australian Industrial Relations System*, hereinafter the '*Stevens Report*'. (Workplace Services, Adelaide, November 2002, available at www.eric.sa.gov.au).

reform of the law in response to the pressures on work from globalisation. Perhaps the most creative and compelling of all these reviews is that produced for the European Commission by the group of experts led by Alain Supiot.[18] The '*Supiot Report*' addresses five major themes — work and private power; work and membership of the labour force; work and time; work and collective organisation; and work and public authorities — and provides a theoretical framework for forging a genuinely new conceptualisation of the law of work attentive to delivering justice in work relations in the new global era. It advocates a redefinition of labour market status taking account of the participation of workers over a lifetime. Work, rather than employment, thus becomes the basis for access to social rights and protections, with the incorporation of a principle of social drawing rights that individuals can use to manage their own flexibilities.

Labour law scholars began early to think about and to analyse the impact of the de-regulatory agenda of the new economy on the law of work.[19] However despite, or indeed perhaps because of, the enormity of the changes taking place, scholarly textbooks have tended to maintain a fairly traditional framework of analysis of the subject. Changes in the structure of regulation or the composition of the main players are invariably noted.[20] In some jurisdictions the 'constitutionalisation' of rights has meant the emphasis has changed from the collective to the individual aspects of labour law.[21] But in few of the textbooks is there evidence that the discipline has been subverted in a serious way by the complexity and profundity of the changes in the law of work wrought by globalisation.

Collections of essays, in which a number of scholars are brought together and each can focus on a smaller aspect of the discipline, can provide a better opportunity for more fruitful and provocative engagements with the law of work in the emerging global or new economy. In Australia, the 'Redefining Labour Law' project was the first to confront explicitly the changing nature of the discipline at the end of the last century and raised a whole set of issues for teaching and research in labour law.[22] Most significantly it acknowledged the importance of bringing to the centre

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18 The report has now been published in book form: see A Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (2001), hereinafter the '*Supiot Report*'.

19 See for example Keith Ewing (ed), *Working Life: A New Perspective on Labour Law* (1996).

20 See B Creighton and A Stewart, *Labour Law: An Introduction* (3rd ed) (2000); M J Pittard and R B Naughton, *Australian Labour Law: Cases and Materials* (4th ed) (2003).

21 H Collins, K Ewing and A McColgan, *Labour Law: Text and Materials* (2001) is one such example.

22 See Richard Mitchell (ed), *Redefining Labour Law: New Perspectives on the Future of Teaching and Research* (1995).

critiques that had previously been confined to the margins, the necessity of interdisciplinary analysis and the possibility of using labour market regulation as a new focus in the conceptual reorganisation the discipline. *Labour Law in an Era of Globalization* takes readers to these and to many other themes, all explored in a range of different contexts.

LABOUR LAW – A DISCIPLINE IN CRISIS?

The central 'pillars', as Massimo D'Antona describes them, of labour, employment and industrial relations law in the industrial era — the nation state, large factories, full-time employment, and trade union representation — are all destabilised in this era of globalisation, prompting scholars and practitioners to ponder what remains of the disciplines of labour, employment and industrial relations law.

In his opening essay, 'The Horizons of Transformative Labour and Employment Law', Karl Klare identifies the need for the 'reinvention' of the discipline. He sees that this requires, among other things, the opening up of the subject to include new players beyond those traditionally encompassed by the employment relation. The unpacking of work is thus a central theme in the book especially as the disappearance of the 'typical' worker along with technological developments, and the opening of global markets, forces a rethink of work, workers and workplace. The relations between, and the definition of, productive and reproductive work and the boundaries of workplace have all come under the microscope with the increase in women's participation in the paid workforce. In the enterprise of reinventing the discipline it is clear that any attempt to comprehend work relations solely through the lens of labour, employment and industrial relations law in isolation from other areas of the law, such as social security law, corporate law, taxation law, competition law, is inadequate. One of the great strengths of this particular collection of essays is that it brings to the centre expertise and perspectives that often remain on the periphery of labour law scholarship. Lucy Williams, in her contribution 'Beyond Labour Law's Parochialism: A Revisioning of the Discourse of Redistribution', for instance, uses social security law to explore the way in which concepts of dependence are manipulated by law to value certain kinds of work. Linda Bosniak, 'Critical Reflections on 'Citizenship' as Progressive Aspiration', uncovers the assumptions within the concept of citizenship to interrogate its usefulness in the project of delivering justice to all workers in the global era. Just as significantly other analyses in the collection travel deep into areas, such as property and contract. As Klare points out markets and economies, work and workers, do not exist in the absence of law, but are and remain constructed by law.

Labour law has always been concerned with power. The traditional rationale of labour law was the need to protect those who were less powerful in work relations.

By contrast, the neo-liberal theory that infuses globalisation assumes the equality of all market players, including workers and business, and that co-operation rather than confrontation and conflict between them is the natural order of their relations.

One of the devices of power is to naturalise a certain state of affairs, so removing it from an inquisitive and critical gaze. When the processes of globalisation are presented as natural, and therefore inevitable, the effect is to mask power. Kerry Rittich in her contribution, 'Feminisation and Contingency: Regulating the Stakes of Work for Women', for instance, observes that work is a deeply gendered activity in which the differences between reproductive and productive work are not inherently or naturally different, and that law plays a constitutive role in moving work in and out of the market economy.

A common conviction among many of the contributors is that globalisation is not a state of nature. Thus globalisation is itself a contested terrain. Klare's analysis is the most forthright here: 'there is no such thing as 'free trade'', he maintains.[23] His strong critical statements are backed by careful argument and analysis. This is above all humane and compassionate scholarship, the commitment to social justice revealed most powerfully in the stories grounded in the reality of the lives of individual workers. The story of the organisation of Californian 'home care aides' in which industrial action was restyled as a civil rights campaign and alliances were built with others, including the parents and families of those who received care, is but one example of the transformative practices and possibilities going to the reinvention of labour law.[24] The call made by Klare is not simply for regeneration of the old but a serious engagement with the issues raised by the new world of work: this book thus seeks to identify the 'emancipatory potential' of developments in the global era.[25]

WHO IS LABOUR LAW'S SUBJECT?

With the breakdown of traditional work relations, defining its subject has become one of labour law's most urgent and difficult tasks. Paul Benjamin, in 'Who Needs Labour Law? Defining the Scope of Labour Protection', argues that 'defining an employee is perhaps the most fundamental question in labour law'.[26] Benjamin's analysis of this problem is situated in the new South Africa, which is wresting with the particular economic legacy of the former racist State. In the first five years of the new post-apartheid regime four major new employment statutes were enacted. However each continues to define its subject as the 'employee'. While the scale of

23 Joanne Conaghan et al, above n 1, 23.
24 Ibid 21–3.
25 Ibid 6.
26 Ibid 75.

employment problems in a country such as South Africa is to Australian eyes scarcely comprehensible, the nature of the legal issues is immediately recognisable and familiar. In South Africa, as in Australia and many other jurisdictions, the control test has given way to a multi-factorial approach to determining who is an employee. In South Africa this is referred to as 'the dominant impression test'.[27] Benjamin is critical of this approach arguing it downplays the significance of control and the employer's superior bargaining strength. Nor, in his view, does it always facilitate a purposive approach to statutory interpretation allowing account to be taken of the policy reasons behind the statute. Thus, despite the new statutory regime and the impetus to a broad interpretive approach, which might have been encouraged by the constitutionalisation of rights in the new South Africa, Benjamin sees little departure from the traditional approaches and hence an inability to extend the protection of the law to those who are most in need of it. A more radical and ambitious approach is still required, he argues, and he points more optimistically to proposed new South African legislation introducing a rebuttable presumption that a worker is an employee.[28] This appears to be only slightly different from an approach that has now been recommended in South Australia.[29] However, in the *Stevens Report* this is coupled with the recognition that a broader approach — for example, one that includes a consideration of the concepts such as joint responsibility for workers — is needed to address the problem of adequately protecting vulnerable employees.[30] Similar broad ranging strategies are also currently under discussion in Canada.[31]

The extension of the definition of 'employee', including through the operation of a rebuttable presumption, is an attempt to revitalise labour law in a way that will enable it to fulfil its traditional function — the protection of dependent workers in the marketplace. However, the assault by globalisation on the world of work purports to circumvent the traditional enterprise of labour law altogether. In the global market every worker is constructed as a market actor. The basis for this conceptualisation is to be found in the writing of liberal thinkers, such as John Locke who considered that the individual has a natural property in their person and

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27 Ibid 82. For the Australian law, see *Stevens and Gray v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 and *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21.

28 Ibid 90–2.

29 See A Stewart, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15 *Australian Journal of Labour Law* 235, especially the proposed definition at 270–71 which has been adopted by the *Stevens Report,* above n 17.

30 *Stevens Report,* above n 17, Ch 5. Similarly in the *Supiot Report*, above n 18, there is a broader approach to the problems – see esp Ch 1 and pp 118–221.

31 See J Fudge, E Tucker and L Vosko, *The Legal Concept of Employment: Marginalising Workers – A Report for the Law Commission of Canada*, 25 October 2002.

in their labour, which they must use to secure their membership of civil society.[32] Workers now are said to have 'human capital', available for investment in the global market. There is a set of qualities attributed to this individual who is human capital. He is valued because he is independent and a risk taker and not for the more traditional characteristics of obligation, commitment, loyalty, and trust that grew out of a lifetime of work for a single employer.[33] The archetype of this worker with human capital is the knowledge worker of Silicon Valley, who is the subject of the chapter by Alan Hyde, 'A Closer Look at the Emerging Employment Law of Silicon Valley's High Velocity Labour Market'.

The emergence of the new knowledge worker erases the need for law's traditional binary divide between independent contractors and employees: the independent knowledge worker has no need of the protection of the law. According to Hyde, the store of knowledge that workers accumulate and which they can carry with them in going to a new firm is a new form of power. This power, Hyde argues, enables workers to build their own networks and these are the most effective way to deal with any problems in relation to work. For Hyde, traditional labour law, with its assumptions that work is about a lifetime career at a single place of employment cannot work in an era of rapid turnover of staff. The realities of the new world of work in Silicon Valley mean the law's protections of workers are placed under an overwhelming pressure against which they cannot survive. Hyde's point is made particularly strongly in his analysis of the law of trade secrets. He argues that restrictive trade covenants in employment contracts are a major obstacle to economic growth in the new economy and become unworkable in a world where there is no lifetime tenure. In this world, Hyde says, workers must be free to move to, or form, new businesses in which they put their knowledge immediately to work and he points to a growing reluctance in some jurisdictions to limit the material a departing employee can take with them.[34] Public policy for a marketplace inhabited by the person with human capital must support, according to Hyde, freedom of information. If employers no longer provide or promise lifetime employment, then employees must have ownership of their work.

Hyde argues that not only does the old law no longer work conceptually in the market place of the global economy, but also that there will be no going back to it because the new work arrangements of places such as Silicon Valley are such 'a stunning success'.[35] Instead he considers that mobility and networks offer the best solutions to workers and can even promise equity. He envisages a meritocracy in

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32 J Locke, *The Second Treatise of Government* (first published 1690) s 27. See also Peter Laslett (ed), *Two Treatises of Government* (1992) 287–9.

33 See R Sennett, *The Corrosion of Character: The Personal Consequences of Work in the New Capitalism* (1998).

34 Joanne Conaghan et al, above n 1, 249.

35 Ibid 236.

which employee's networks will provide them with the support to enter particular fields or to leave an employer and set up their own business. Hyde foresees a world where janitors, for example, will aspire, and be able, to establish their own cleaning firms. The solution to all problems in the labour market, including the social construction and valuing of skill are to be solved by the application of entrepreneurial qualities. In any event, Hyde is prepared to defend the regulation of work through mobility and networks because, he says, the old protective labour law was never effective in eliminating problems such as discrimination or providing accessible and meaningful paths out of low skilled jobs.

While the truth of this previous observation may be conceded, Hyde's use of some of the highest paid workers in the wealthiest nation on the globe as an example for progressive labour law is not persuasive. The contrast with the workers in South Africa about whom Benjamin is writing could not be starker. Indeed there are several criticisms that can be made of Hyde's portrayal of the new worker as the knowledge worker and that call into question the assumption that the protective function of labour law is otiose in the global era. First, as a number of contributors to this collection, including Rittich, Deakin and Arthurs, point out, many workers in the new economy of the global era are not so-called knowledge workers. Indeed, the new worker is more likely to be a 'contingent' worker, female rather than male, who performs very localised service tasks which are constructed as low skilled and are, therefore, low paid. Certainly this is the case in Australia.[36] And it is those workers, as Simon Deakin makes clear in 'The Many Futures of the Contract of Employment', who are currently most likely to fall into the gap, the definitional grey area, between employees and independent contractors.[37] The adequacy of the level of protection that such workers could attain through the strategies of networking and mobility is very doubtful.

Secondly, just as the independent worker of liberal theory is male,[38] so too is the typical knowledge worker. In her essay Rittich interrogates the gendered assumptions that construct this mobile knowledge worker possessed of human capital, ready to embrace risk and follow opportunities, and finds that he is not encumbered by other (familial) obligations. Hyde acknowledges that among Silicon

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36 See M Cully, 'The Cleaner, the Waiter and the Computer Operator: Job Change 1986–2001' (2002) 28 *Australian Bulletin of Labour* 141.

37 Dependent contractors and casual workers present a particularly difficult problem. Recent Australian examples include *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 concerning the bicycle couriers and *Slater v Workcover/Allianz Aust (Chiquita Brands Adelaide Pty Ltd)/CGU and Country Metropolitan Agency Contracting Services Pty Ltd* [2002] SAWCT 27 (14 March 2002) concerning seasonal tomato pickers working through a labour hire arrangement.

38 See R J Owens, 'Working in the Sex Market' in Ngaire Naffine and Rosemary J Owens (eds), *Sexing the Subject of Law* (1997) 120–9.

Valley's workers it is not women who epitomise the mobile networker, although he thinks they would do well to make better use of networks to custom design solutions to work/family 'conflict'. There is no hint that such 'conflict' is experienced by male knowledge workers and it is hard to see how the law of the market as practised through worker mobility and networks does anything to change the discriminatory structures of work that make this so.

Law's traditional concern has been exclusively with work in the market place. Feminists have long recognised that this devalued much of the work that women do and denied the intersections between the public and private sphere and the structuring of power along gender lines. Now the relationship of paid and unpaid work is gradually gaining wider recognition. However, law has not found grappling with this an easy matter. Thus even where technological developments would appear to assist in resolving work/family 'conflict', anti-discrimination legislation has been a reluctant facilitator.[39] In Australia work and family matters have now moved to the forefront of the political agenda with the debate over paid maternity leave.[40]

In 'Women, Work and Family: A British Revolution?', Joanne Conaghan analyses the British position where legal developments concerning work and family were given a fillip by membership of the European Union. Conaghan applauds New Labour in so far as its work/family policy challenges the traditional separation between the two domains and demonstrates the power of the nation state in an era of globalisation to address social issues constructively. Conaghan notes that the British reforms operate in two different but complementary ways. First, they seek to facilitate the movement of women into the workplace of the market. To this end the government conducted research on ways to try to encourage a change in workplace culture through the adoption of 'family-friendly' practices, and backed this with legislation providing for paid maternity leave and tightening up against discriminatory dismissals. Indeed a whole raft of provisions, including those setting minimum pay, new working time regulations and the regulation of part-time workers have been characterised as family-friendly initiatives. Secondly, the policies also encourage women's participation in paid work through the

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39 See, for example, the long (and still) running Shou litigation (*State of Victoria v Schou* (2001) 3 VR 655) which raised the question of indirect discrimination against a worker on the basis of her family responsibilities when her employer refused to provide her with a modem so that she could work from home.

40 See Human Rights and Equal Opportunity Commission, *Valuing Parenthood: Options for Paid Maternity Leave*, Interim Paper, Sex Discrimination Unit, Human Rights and Equal Opportunity Commission, Sydney 2002 and Human Rights and Equal Opportunity Commission, *A Time to Value: Proposal for a National Paid Maternity Leave Scheme*, Sex Discrimination Unit, Human Rights and Equal Opportunity Commission, Sydney 2002.

restructuring of taxation and social security policies. This dual policy approach is one with which Australians are also becoming familiar.[41]

As Conaghan notes, while these policies make explicit labour law's 'schematic and conceptual dependence on women's unpaid work',[42] they involve a radical restructuring of work and family and she cautions that this is not necessarily positive for gender reasons. Because work/family policies in Britain have been presented as a way of ensuring social inclusion and at the same time encouraging independence from the State, implicit in Conaghan's essay is the need to understand the way in which those outside the paid workforce are portrayed.

These themes are picked up in Lucy A Williams' chapter, 'Beyond Labour Law's Parochialism: A Revisioning of the Discourse of Redistribution'. Williams tackles the issues from outside the discourse of labour law. Williams convinces that there is a need for an intense engagement with welfare law if there is to be any development of a progressive labour law in the future. Social welfare law, she points out often reinforces certain stereotypes, for example that of the male breadwinner, and the view that production of value outside the paid workforce does not count.[43] Other assumptions, for example that there is a partner to share the care of children, can be damaging if there is a privileging of paid work as the means to social inclusion or citizenship. As Williams shows, when the focus is on paid work rather than on challenging the structure of labour markets, existing inequalities are likely to be reinforced.

The contributions of Conaghan and Williams, together with those of Kerry Rittich and Claire Kilpatrick,[44] provide a strong feminist analysis of the impacts upon women of labour law in the global era. Kerry Rittich focuses on the feminisation of contingent (or precarious, atypical or non-standard) labour and uses it to provide a devastating analysis of the market's dependence on the unpaid work of women. She then turns the logic of the market against itself to argue for the valuing of women's

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41 See the Commonwealth Department of Family and Community Services Consultation Paper, 'Building a Simpler System to Help Jobless Families and Individuals', 12 December 2002, issued as part of the process of welfare reform and available at www.facs.gov.au/welfare_reform. This is the second stage of the Howard Government's *Australians Working Together* package and asserts that dignity is to be achieved through paid work by members of society who are 'active and contributing'. It thus implies that those who are dependent upon government support are neither 'active' nor 'contributing'. In this policy paid work becomes the means to self-reliance and through it social inclusion.

42 Joanne Conaghan et al, above n 1, 69.

43 Note the reference to Australian policy, above n 41.

44 Her chapter is entitled 'Emancipation through Law or the Emasculation of Law? The Nation State, the EU, and Gender Equality at Work'.

unpaid work. She shows that when enterprises are not required by law to internalise all the costs of work in the public sphere (which include the cost of work in the private sphere) they will be tempted to externalise them, meaning that work in the private sphere is unpaid as a result and that the claimed efficiencies of the market are in fact false. Rittich thus demonstrates that the heavy subsidisation of paid work in the market place by unpaid work in the home is a 'hard' economic issue, integral to labour law as a whole, and should not be sidelined as relevant only to women.

Rittich's essay adds to a growing body of work establishing the economic value of unpaid work. The exposure of the structure of the market as dependent upon, and indeed exploitative of, the unpaid work of women is an important step in arguing for a fairer redistribution of goods within the community, whether that community be between individuals, or larger groups at local, regional, national or global levels. Her arguments also have the potential to contribute to debates around such issues as whether paid maternity leave would be an impediment to the efficient operation of the market and whether the market or the State should pay it for. The settlement of these questions reflect and constitute power, Rittich recognises, just as existing entitlements, such as sick pay or pension entitlements, are the outcome of previous political and social contests.

CHANGING RELATIONS WITH THE BOSS?

One of the reasons that work relations have been so readily adaptive to the demands of the market is that law conceptualises work relations as contractual. However, this is a relatively recent construct, as Simon Deakin argues in 'The Many Futures of the Contract of Employment'. He shows that the contractualisation of work relations paralleled the development of social legislation. Indeed, according to Deakin, the now familiar binary divide between employer and independent contractor emerged in Britain in 1942 following the Beveridge Report.[45]

Deakin's most important point is that the contract of employment is really a complex bundle of conventions, norms, and tacit understandings as well as juridical concepts. Thus the modern contract of employment carries traces of master and servant law, and incorporates assumptions regarding the division of labour in the household. He argues that the concept of managerial prerogative imports into the contract of employment an inherent flexibility, which amounts to a saving on transaction costs. The *quid pro quo* for this was the implicit security of the worker. The modern contract of employment thus became in Deakin's eyes a 'governance

45 Joanne Conaghan et al, above n 1, 178ff. For a similar insight into the development of the concepts in Australia, see J Howe and R Mitchell, 'The Evolution of the Contract of Employment in Australia: A Discussion' (1999) 12 *Australian Journal of Labour Law* 113.

mechanism' linking work organisation and labour supply in a way that makes possible the management of long term economic risks.[46] Following from its past Deakin can imagine many futures for the contract of employment, both optimistic and pessimistic, in its response to new work arrangements.

Reading Deakin's contribution alongside that of Richard Michael Fischl, entitled ''A domain into which the King's writ does not seek to run': Workplace Justice in the Shadow of Employment at Will', is most instructive. Fischl points out that security under the old employment contract is not the reality under the American employment-at-will doctrine where in effect the law's default position is that an employee has no right to be in the workplace. Fischl discusses the very real pressures this places on workers and their legal representatives in the United States who must work against the assumptions of the law to establish a successful case of wrongful dismissal by coming within a statutory exception, such as provided under anti-discrimination legislation. From his experience Fischl argues that it will be impossible to increase equity protection for workers at the same time as removing their security. Fischl's treatment of his subject is a beautifully written account of his own very personal story of growth as a labour lawyer through dealing with a tenacious and courageous employee and her fight for justice to retain her job.

Labour law scholarship has traditionally focused its gaze more intently upon labour, the worker, and trade unions than on capital or business. To some extent that has changed with the challenges of globalisation. There is now much greater interest from labour lawyers on matters of corporate law.[47] In 'From Amelioration to Transformation: Capitalism, the Market and Corporate Reform', Paddy Ireland outlines the so-called reconfiguration of the story of the firm in labour relations 'from profit and conflict to efficiency and partnership'.[48] Ireland is not convinced that the stakeholder theory of the company can overtake the shareholder theory. Indeed he sees the laws of capital and the market as impersonal laws, exercising an ever-tightening grip over workers in recent years. Ireland's analysis of the power of the corporation is razor sharp and goes straight to the fundamentals: the concept of property encapsulated in the share, as constructed by company law, requires that labour be commodified. He is thus sceptical about calls for democratisation of the corporation, because it is largely irrelevant to the power that is capitalism. Giving workers more scope for dialogue in co-operation with business doesn't point to an immanent change in power relations, but rather to their integration into the ways of the market. Ireland sees globalisation as an extension or the next phase of

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46 Ibid 179.

47 See, for example, J Hill, 'At the Frontiers of Labour Law and Corporate Law: Enterprise Bargaining, Corporations and Employees' (1995) 23 *Federal Law Review* 204 and J Riley, 'Bargaining for Security: Lessons for Employees from the World of Corporate Finance' (2002) 44 *Journal of Industrial Relations* 491.

48 Joanne Conaghan et al, above n 1, 199.

capitalism and the market as more 'imperative' than 'opportunity', further dis-empowering rather than empowering workers.

TRADE UNIONS IN THE FUTURE LAW OF WORK

The success of capital in this era of globalisation has not been replicated by labour unions. The Australian statistics tell a particularly remarkable story. Australia once had the highest level of trade union participation in the world, peaking in 1953 when 63 per cent of its workers belonged to trade unions.[49] By 2000 this had dropped to 25 per cent. This trend is one that has been repeated right around the world, though not always to such dramatic degree. Identifying the reasons for the decline of union power is not easy. All too often they are presented as an inevitable aspect of the emergence of the modern global market, in which trade unions are third party intervenors in an arena constituted by direct contractual relations between business and workers. Trade unions, so the argument goes, need to be eliminated because they are anti-competitive, introducing additional costs and inefficiencies and thus hostile to the values of the market.

In her essay, 'The Decline of Union Power — Structural Inevitability or Policy Choice?', Frances Raday challenges this view. Her thesis is that trade unions are no more cartels than other composite actors, such as corporations, and so can easily be conceived of as market actors. Raday argues that the decline of trade union power is not a phenomenon occurring in isolation but one that is also the product of regulation, that is of 'politico-legal choices', not just 'socio-economic structural exigencies'.[50] State regulation legitimatising non-union bargaining, facilitating employer exit from collective bargaining, and undermining of trade union power to strike and bargain, demonstrates her point precisely. The subsequent decentralisation of industrial relations, along with limits on secondary boycotts and the consequent division of worker power, means that trade unions have to find new ways to press their claims for justice for workers. When legislators do not deliver minimum standards, trade union achievements are in turn undermined and a self-perpetuating cycle of powerlessness is established.

There are strong resonances here with the situation in Australia[51], where the destruction of the once legally sanctioned system of security for trade unions has

49 For a summary of data from the Australian Bureau of Statistics for the years 1911–1996, see D Peetz, *Unions in a Contrary World: The Future of the Australian Trade Union Movement* (1998) 26.

50 Joanne Conaghan et al, above n1, 356.

51 See R Naughton, 'Sailing into Unchartered Seas: The Role of Unions under the *Workplace Relations Act 1996* (Cth)' (1997) 10 *Australian Journal of Labour Law* 112.

been systematic over the past decade.[52] However, the elimination of preference clauses and the *de facto* closed shop has been the least significant aspect of the demise of the power of Australian trade unions. Rather the transformation of the relation between trade unions, as organisations registered under workplace relations statutes, and their members has done most to change their role and to destroy their power. Throughout the 20th century Australian law acknowledged the central role of the registered trade union, which as a body corporate could act as a party principle in industrial disputation.[53] Now that awards have been simplified, that individual workers are required to vote to approve collective agreements, even where negotiated by a trade union, and that trade union can only act as an agent for individual members in the striking of Australian Workplace Agreements, the relations between the registered trade union, as a collective body of its members, and individual workers has been radically transformed.

Further, the values of collectivism underpinning the formation and function of trade unions in the industrial era have been profoundly subverted in the marketplace. In contrast to a conception embodying collective values,[54] freedom of association has been refigured as an individual right entailing equally the right not to join and to join a trade union, but not the right to bargain collectively and the right to strike. The ascendency of this neo-liberal conceptualisation of freedom of association has occurred variously as a result of ordinary judicial interpretation[55] and the constitutionalisation of rights.[56] In Australia, this transformation has been brought

52 See P Weeks, *Trade Union Security Law: A Study of Preference and Compulsory Unionism* (1995) for an account of the historic Australian position.

53 See *Burwood Cinema Ltd v The Australian Theatrical and Amusement Employees' Association* (1925) 35 CLR 528 and *Metal Trades Employers' Association v The Amalgamated Engineering Union* (1935) 54 CLR 387.

54 As understood in traditional ILO jurisprudence – see B Creighton, 'The Internationalisation of Labour Law' in Richard Mitchell (ed), above n 22.

55 Raday (p 359) points to the decision of the European Court of Human Rights in *Young, James and Webster*. See also the United Kingdom decision of *Associated Newspapers Ltd v Wilson; Associated British Ports v Palmer* [1995] IRLR 258 in which the House of Lords adopted an individualised conception of freedom of association and affirmed the right of the business to prefer to enter contracts with those workers who do not use a trade union. However, the recent decision of the European Court of Human Rights concerning this case has drawn back somewhat from this position – see *Wilson and the National Union of Journalists; Palmer, Wyeth and National Union of Rail, Maritime and transport Workers; Doolan and others v United Kingdom* [2002] IRLR 128.

56 See, for example, the cases decided under the Canadian Charter generally referred to 'the labour trilogy': *Reference Re Public Service Employee Relations Act (Alta)* [1987] 1 SCR 313; *PSAC v Canada* [1987] 1 SCR 424; and *RWDSU v Saskatchewan* [1987] 1 SCR 460.

about by a deliberate incorporation of neo-liberal values in legislative policy and confirmed through judicial interpretation.[57]

Raday's assessment for trade unions that must operate within the constraints imposed by the dominant neo-liberal theory is ultimately fairly pessimistic. This is despite the fact that she recognises that mechanisms, such as those to be found in countries like Finland, Sweden and Belgium where trade unions perform a range of social functions including the administration of unemployment insurance, do exist that could currently support union power. The abundance of very powerful instances in history where trade unions have taken a leading role in campaigns to eliminate local systems that entrenched political, social and economic injustice should also suggest a positive role could be played by them in global action. However, although the support of the international trade union movement has often significantly assisted local players and emphasised the inevitable global connections in localised disputes, it has not often played a critical role.[58]

In his essay, 'The Voyage of the Neptune Jade: Transnational Labour Solidarity and Obstacles at Domestic Law', James Atleson ascribes responsibility for the decline of union power more specifically to national repression and suppression of the trade union movement's traditional means of expressing class solidarity, the sympathy strike. Certainly sympathy strikes can provide a powerful weapon of transnational direct action, their effectiveness demonstrated aptly by the troubled voyage of the Neptune Jade charted by Atleson.[59] However, as Atleson notes the possibility for transnational action depends on its legality under local law. Although Atleson's writing here does not focus on strike action generally, it can be noted that the law of strikes has now been modelled to conform to and to express the logic of the market: disagreement and industrial action is permissible outside agreements in the process of their negotiation, but once a deal is struck co-operation must prevail and contract rules. The market then refigures the relations of capital and labour as co-operative

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[57] See Part XA: Freedom of Association of the *Workplace Relations Act 1996* (Cth) and cases such as *BHP Iron Ore Pty Ltd v AWU* (2000) 96 IR 422; *BHP Iron Ore Pty Ltd v AWU* (2000) 171 ALR 680; and *AWU v BHP Iron Ore Pty Ltd* (2001) 106 FCR 482.

[58] That has certainly been the case in the two biggest industrial battles in Australia in recent years, the pilots' dispute and the waterfront dispute. As to which see respectively K P McEvoy and R J Owens, 'The Pilots Dispute in the International Context' (1993) 6 *Australian Journal of Labour Law* 1, and G Orr, 'Conspiracy on the Waterfront' (1998) 11 *Australian Journal of Labour Law* 159.

[59] The context for the voyage of the Neptune Jade was a dispute on the waterfront in England. International trade union solidarity with the English waterside workers meant that after the ship was loaded with cargo in England in 1997 it sailed to the east coast of the United States where picketers prevented its unloading, forcing it to sail on to Canada and Japan where it was greeted likewise. Eventually it was reported that the ship was unloaded in Taiwan. See Joanne Conaghan et al, above n 1, 382–3.

rather than competitive, abolishing any sense of class hostility. Through an examination of the laws of the UK, Canada, Japan and the USA, Atleson unpacks the rationality of neo-liberal opposition to the sympathy strike. At one level he does this by pointing to the false dichotomy between primary and secondary strike action, and between economic (or industrial) and political strikes.[60] As Atleson says, all strikes are political in so far as they seek a redistribution of wealth and power. Thus laws contrary to secondary boycotts serve to prevent workers identifying with one another as workers, and law's assertion of its own neutrality in this process is thus revealed as deeply political.

Atleson's analysis of the hostility of the law — common law, civil law and statute law — to sympathy strikes is particularly pertinent to Australian labour law. In the early years of the Great Depression the refusal of the law to recognise sympathy strike action not only significantly impacted on the ability of the workers to protect themselves against the operation of capital in the market-place, but often prevented them operating effectively at federal level.[61] Australian law also has been particularly hostile to boycotts and has been used with powerful effect against the trade union movement.[62] The political contest over whether the regulation of these matters should be seen as pertaining primarily to industrial or market relations has been intense, and imported further sets of assumptions regarding the separation and indeed incompatibility of these two arenas.[63] For the present Australia has again opted to include the law on boycotts within the framework of competition law, the *Trade Practices Act 1974* (Cth).

The unsettling account given by Carlos de Buen Unna in 'Mexican Trade Unionism in a Time of Transition' may be reason to pause over the reconfiguration of the relation between trade unions, their members and capital as co-operative in the global arena. This chapter provides a powerful example of the corruption that inevitably infects any institution, including the trade union movement, which loses sight of its reason for existence. In the political crisis in Mexico in the latter third of the 20th century the alliance between trade unions, government and corporations eventually unravelled. The crisis grew out of an environment in which trade unions had elevated the interests of political connections ahead of their own members. The

60 Ibid 395–6, and 396–8. Cf R Doyle, 'The Industrial/Political Dichotomy: The Impact of the Freedom of Communication Cases on Industrial Law' (1995) 8 *Australian Journal of Labour Law* 91.

61 See especially the notorious case of *Caledonian Collieries Ltd & Ors v Australasian Coal and Shale Employees Federation & Ors* [No 1] (1930) 42 CLR 527.

62 See, for example, *AMIEU v Mudginberri Station Pty Ltd* (1987) 74 ALR 7 in which $1.458m damages were awarded against the trade union.

63 For the history of the provisions against boycotts see B Creighton and A Stewart, '*Labour Law: An Introduction*', above n 20, 416–8.

resultant institutionalised cronyism ultimately impacted on the very survival of Mexican industry.

The Mexican crisis highlights the primary role and function of the trade union movement as representative of the interests of workers. One of the major failures of trade unions, no less than other institutional actors, has been the inability to conceive of the worker in other than fairly one-dimensional terms as a person with a uniform set of interests. An unquestioning acceptance of the separation of work and home by trade unions has further exacerbated the problem for workers and their participation as representing the shop floor.[64] The decline in trade union membership has been further exacerbated by the creation of a workforce of contingent workers, who at the very least are not as easily amenable to traditional forms of union organisation.

Maria L Ontiveros, in her essay 'A New Course for Labour Unions: Identity-Based Organizing as a Response to Globalisation', makes the case for identity-based unions as a solution to these problems. Identity-based organising is characterised by attending to the whole identity of the person, including race, gender, sexual orientation, nationality, social class, or religious affiliation, not just the characteristic of the person at the workplace, that is as a worker. As evidence of the power of such an organisational approach, Ontiveros tells the story of the success of the Service Employees International Union (the SEIU) in the fight for dignity and justice, not just higher wages, for janitors in California. The SEIU recognised that these workers could not attend meetings because of their responsibilities for children and work in the home and approached the campaign in a way that was more akin to the organisation of religious festivals familiar to the group. In a constructive use of consumer alliances the SEIU gained recognition of the affronts to dignity that were imposed on particular immigrant class to which these workers belonged. In Australia, too, there is a growing recognition by the trade union movement in a number of industries that the adoption of such multifaceted strategies — in which alliances are formed between community (including ethnic and religious) groups, consumers, and trade unions — is necessary in the fight to attain social and economic justice. The *Fairwear Campaign* is a good example of this.[65] As Ontiveros points out, the use of such strategies also appears to be a promising one as the changing nature of cross border migration can be culturally challenging and so it shows more accurately the patterns of abuse of workers.

The juxtaposition of Ontiveros' essay with 'Difference and Solidarity: Unions in a Post-Modern Age', by Michael Selmi and Molly S McUsic, is particularly thought

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64 See S Franzway, *Sexual Politics and Greedy Institutions: Union Women, Commitments, and Conflicts in Public and in Private* (2001) and Barbara Pocock (ed) *Strife: Sex and Politics in Labour Unions* (1997).

65 See the *Fairwear Campaign* website at http://.fairwear.org.au.

provoking. Selmi and McUsic question the benefits of what they see as the extremes of identity unionism where women and other minorities are encouraged to form their own workplace organisations.[66] In their view, such a path risks a destructive fragmentation of workers and their efforts. Where there is no common group, they believe, workers will become more concerned with asserting their identity than winning workplace change. Theirs is an argument arising in part from a fear that so long as the law requires a majority vote to achieve workplace change through collective agreement, identity unions will not have any real power to change the relations that structure economic life. This is an argument that appears to assume that the most important, or perhaps the only relevant, economic relations are those in the marketplace and to ignore the economics of unpaid labour and its relation to the marketplace. For the reasons made explicit in Rittich's chapter this analysis this is not entirely persuasive.

More convincingly, Selmi and McUsic question the post-modern credentials of some identity politics, which, in questioning the commonalities between workers, can suggest that the person has a fixed identity prior to arriving in the workplace rather than recognising that identity is an ongoing creation. In 'cosmopolitanism' with its emphasis on the commonalities while maintaining differences, they discern the possibility of identifying a common good in which the interests of all are addressed, thus preserving the interests of the individual and at the same time maintaining a sense of community. When compared with identity politics the 'community of difference' that is 'cosmopolitanism' places more emphasis on that which is common and an empathetic understanding/outlook to fellow human beings.

LABOUR LAW AND THE CONSTITUTION OF COMMUNITIES

The global era has been characterised by the crossing of national borders by immigrant workers, as well as a growth in the trade of goods, and in the process communities are re-constituted. While this is not a new phenomenon — the link between immigration and work has been a subtext in the constitution of the Australian nation and citizenship from the outset[67] — its scale has produced a new series of challenges to the law of work. In 'Immigration Policies in Southern Europe: More State, Less Market?' Bruno Caruso discusses the links between labour law and the increase of irregular and clandestine immigration. So important are these issues globally that the ILO now pays considerable attention to the

[66] See, for example, M Crain, 'Images of Power in Labour Law: A Feminist Deconstruction' (1992) 33 *Boston College Law Review* 481.

[67] See Mary and Kerry Lyon (eds), *Nation Skilling: Migration, Labour and the Law* (2003), and A O'Donnell and R Mitchell, 'Immigrant Labour in Australia: The Regulatory Framework' (2001) 14 *Australian Journal of Labour Law* 269.

informal sector.[68] Caruso attributes the trend to a demand for low cost jobs, such as cleaning, elder care, childcare, catering, (and all are jobs where women tend to predominate), as well as the widespread evasion of tax and minimum welfare standards. In Italy it is also fostered by a large number of family companies and a weak system of monitoring, certifying and rendering transparent their operation. Caruso's efforts offer insight into the social effects of labour movements in southern Europe and the tensions between the desire to control immigration and at the same time to integrate migrants. To resolve this tension Caruso looks to a revival of 'the emancipatory and egalitarian significance of the right to work'.[69]

Within Europe, workers are guaranteed freedom of movement and so a form of economic citizenship. Margriet Kraamwinkel, in 'The Imagined European Community: Are Housewives European Citizens?', shows how this European citizenship is constructed through law's conception of work. Sport can be work: thus a restrictive system of soccer transfers within Europe has been held to be contrary to the guarantee of freedom of movement. More controversially prostitutes are entitled to move freely and cannot be excluded on moral or public policy grounds from entering another nation within the European Union.[70] By contrast the housewife performing unpaid work has no such rights, as freedom of movement attaches only to paid work. Kraamwinkel's discussion of sex work, to which there has been little attention paid by traditional labour lawyers,[71] neatly depicts its constitutional movement out of the informal economy and the inversion this entails in women's citizenship.[72] However, Kraamwinkel's essay is not as strongly theorised as the contributions of, say, Rittich or Conaghan and her conclusion[73] that there may be transformative potential in law's devaluation of women's unpaid work because it will encourage women to move into paid employment is rather weak.

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68 The growth of the informal sector is not only linked to migrant labour. For instance, in many developing nations workers spend their entire lives working in the informal sector, with governments often encouraging it in the belief that it will promote the development of small and medium enterprises. In developed nations it is often women who similarly spend a lifetime working in this way. The informal sector has thus become a particular focus of concern in its 'decent work' agenda – see International Labour Office, 'Decent Work in the Informal Economy', Report VI International Labour Conference, 90th session, Geneva, 2002.

69 Joanne Conaghan et al, above n 1, 318.

70 See *Adoui and Cornaille v Belgium* [1982] ECR 1665.

71 While labour lawyers have not been unconcerned with sex work (for example, see R J Owens, above n 38), rarely is the issue addressed in conventional labour law texts, monographs and journals.

72 Women's 'citizenship' has traditionally attached to their role as wives and mothers – see M Thornton, 'Embodying the Citizen' in Margaret Thornton (ed) *Public and Private: Feminist Legal Debates* (1995).

73 Joanne Conaghan et al, above n 1, 335–8.

The implications of using citizenship for transformative ends are critically addressed by Linda Bosniak in her essay on 'Critical Reflections on 'Citizenship' as Progressive Aspiration'. The concept of citizenship has been used by progressive labour lawyers elsewhere[74] as well as in Australia[75]. The motivation for this arises, Bosniak considers, from the fact that equality is implicit in citizenship: citizenship has positive connotations in its attention to participation and belonging in community as well as an abhorrence of stratifications, as indicated in the idea of 'second class' citizenship. However, as Bosniak points out citizenship discourse rarely questions its link to the nation and in an era where cross-border migrations have increased dramatically the effect of this can be to exclude rather than include. In suggesting the adoption of a concept of 'alien citizenship', Bosniak is attempting to expose the limits of concepts of universality and thereby to preserve the positive aspects of citizenship, such as equality and inclusion.

THE FUTURE OF THE LAW OF WORK

One of the primary functions of traditional labour law was the provision of a protective regime of minimum pay and conditions for dependent workers who were unable to protect themselves. More than ever before this appears to be under threat. Not all contributors to this collection have given up on this traditional role. Dennis M Davies, in 'Death of a Labour Lawyer?', reasons that if the nation state is the site for investment, as was recognised in the *World Development Report* of 1997, then there is a space for interpretation to retrieve some of the traditional policy agendas of labour law, including the maintenance of a non-discriminatory policy environment and investment in basic social services and infrastructure protecting the most vulnerable. Furthermore as Davies points out the question remains open, in the light of OECD data, as to whether adhesion to protective minimum standards jeopardises competitive performance in the global arena, although he concedes that these matters are not ones easily susceptible of proof.

However, minimum standards today are everywhere increasingly giving way to flexible arrangements. Conaghan notes that in Britain minimum standards are weakened by agreements to opt out.[76] In some parts of Canada there is now legislative provision for increased flexibilities in relation to working time and other traditional rights.[77] In Australia this same regulatory trend has been facilitated by the operation of the 'no disadvantage test', and the embrace of neo-liberal

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74 In addition to those cited by Linda Bosniak, see K D Ewing, 'Social Rights and Constitutional Law' [1999] *Public Law* 104.

75 The work of Ron McCallum is most notable here: see 'Collective Labour Law, Citizenship and The Future' (1998) 22 *Melbourne University Law Review* 43.

76 Joanne Conaghan et al, above n 1, 66.

77 *Employment Standards Act 2000* (Ont).

flexibilities by a whole range of players from trade unions to judicial officers.[78] Conaghan has noted that the trend to flexible regulation can contradict other policies, pointing out the way in which flexible regulations extending working time may undermine the incorporation of women into work in the marketplace or may entrench the construction of women's work as part-time work.

The most striking impact of flexible regulation has been on the increase in working hours, which is now a most serious problem in most industrialised countries.[79] However, the dangerous effects of excessive working time are most stark in Japan, where socio-medical terms — *karoshi* and *karojisatsu* — have been coined to describe the phenomena of death and suicide from overwork. Japanese law imposes few limitations on overtime, where hours can be lengthened by agreement. Makoto Ishida, writing of 'Death and Suicide from Overwork: The Japanese Workplace and Labour Law', is in no doubt that long hours are the immediate cause of the deaths, but he is as concerned with the underlying causes to be found in cost cutting and a corporate culture that has tended not to reflect upon its own nature and responsibility in these cases.[80]

Of all the essayists in this collection, Hugh Collins in 'Is There a Third Way in Labour Law?' is among the most articulate in giving expression to the values which underpin the new or 'third way'.[81] He appears also the most enthusiastic in rethinking labour law as regulation for competitiveness. Collins adeptly debunks the view that the global era is characterised by de-regulation. Rather he argues that the purpose of labour regulation has changed: its aim is no longer the protection of dependent employees but the improvement of performance in the marketplace.

To illustrate the nature of this change, Collins suggests that the old value of equality has been replaced by social inclusiveness. While at first blush this appears to suggest an emphasis on social responsibility, belonging and community values, on closer examination of Collin's writing its fundamental concern appears to be with a liberal individual who inhabits a hollowed out procedural state. The primary function or responsibility of the state is now to provide the means, including through education and training, for individuals to remain independent and responsible for themselves and to enhance that individual's 'employability' so that they can survive in the job market. A secondary function is to remove any other societal barriers to participation in the job market: for example, ensuring there is no discrimination in the workplace, providing the infrastructure such as childcare to

78 See R J Owens, 'Decent Work for the Contingent Workforce in the New Economy' (2002) 15 *Australian Journal of Labour Law* 209, 229ff.

79 See A Supiot, *Beyond Employment,* above n 18, Ch 3 – 'Work and Time'.

80 Joanne Conaghan et al, above n 1, 224ff.

81 Collins has published widely on these matters – see 'Regulating the Employment Relation for Competitiveness' in (2001) 30 *Industrial Law Journal* 17.

make participation possible and eradicating financial disincentives. Collins' essay thus provides an alternative story to that of Conaghan and Williams.

Collins' reasoning is that real or substantive equality is no longer the concern of the state: it is assumed that participation in the market is enough to produce a fair distribution of social goods. With the exception of some kind of basic minimum wage to ensure that individuals are better off working than remaining at home on welfare, he concludes that it is hard to see that there is any place for even the most basic substantive rights under the logic of the third way. Indeed the third way assumes that fixed minimum rights impede co-operation and harm competitiveness and efficiency. In the third way, recognising the equality of workers or treating them fairly has the sole purpose of ensuring that everyone will act in ways that enhance the competitiveness of the business. Thus while Collins does not dismiss consideration of minimum standards outright, he does consider them to be alienable and able to be ceded through the processes of collective agreement. The ability to bargain away fundamentals ensures the flexibility necessary to stay competitive.[82] Ireland put the matter more strongly, arguing that demands for flexibility signal that labour rights are incompatible with capitalism.[83]

Supporters of the 'third way', including Collins, often say it is about developing a practical program for implementation rather than a fixed set of beliefs. But no practice is a-theoretical or a-political.[84] The theoretical supplanting of conflict by co-operation and collaboration, and the prioritising of the competitiveness and efficiency of capital over and above the protective functions of labour law and the redistributive project of the welfare state are, as the contributions of Conaghan, Williams and others in this collection make clear, political choices. The politics of the third way embraces the neo-liberal agenda with its attendant assumptions. For example, to assert that all the state need do is make childcare available, and that it need not otherwise provide welfare payments, before requiring single parents to enter the workforce ignores the complex and often conflicting set of societal pressures about what it is to be a 'good' parent and the nature of the different choices available to those of different economic means.

In the global era competitive work relations are supposed to have been replaced by co-operative ones, in which workers and bosses are united in the common enterprise of making business competitive. In effect this means a change in the focus of labour's conversations with business, from the old concerns about the price of labour to new ones about production, and efficiency etc. In an interesting turn Collins points out that not all businesses relations in the marketplace are

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82 Collins cites the *Working Time Regulations* 1998 SI 1998/1833 reg 5.

83 Joanne Conaghan et al, above n 1, 211ff.

84 See M Davies, 'Taking the Inside Out' in Ngaire Naffine and Rosemary J Owens (eds) Sexing the Subject of Law, above n 38.

competitive. On the contrary the requirements for complete quality assurance of products, 'Total Quality Management', and the demands of 'just-in-time' ordering systems often impel long standing, and therefore co-operative, arrangements or partnerships with other industries in which the chains of production are linked through a sharing of design and expertise. By analogy these co-operative arrangements, Collins argues, must extend to workers who as human capital really act in partnership with business. Employee share plans and performance related pay systems are all ways of emphasising that business and workers are now on the same side, united in the aim of ensuring business is competitive in the marketplace. Like Hyde, Collins identifies a need for the law to develop in new ways to promote this relation and he already discerns the first tentative signs of this in cases such as *Malik v Bank of Credit and Commerce International SA*,[85] where the implied duty of trust and confidence was applied in a way that required a business not to be run in a way that damages an individual's employability, rather than simply as a restraint on an employer's inappropriate treatment of a dismissed worker (as has more generally been the situation in other cases in which the duty has been discussed).[86]

The real interest for the third way advocates is how to achieve this. For a long time now 'regulation' has been the 'in' concept with lawyers.[87] It is now *de rigueur* to claim that the 'command and control' form of legislation is ineffective and what is needed is some more responsive form of regulation, something subtler than the imposition of rules. A range of regulatory options is available.[88] One is the imposition of higher penalties to stop employers breaching any requirements, and yet another is the provision of compliance guidelines so that business can set their own specific agendas within a broad framework. A further option is to make provision for the certification of internal company rules to enhance their credibility, effectively turning codes of practice into certification standards. Collins sees this as the next and almost inevitable development. A similar idea has been presented in the 'ratcheting labour standards' theory, which also advocates making use of so-called independent and external, though not state, accreditation regimes.[89] What is

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85 [1997] 3 WLR 95 [HL].

86 A further example of Collins' point could be the duty to exercise care in providing references for employees. See *Spring v Guardian Assurance Plc* [1995] AC 296. In Australia see *Wade v The State of Victoria* [1991] 1 VR 121 but cf *Rowen v Cornwall (No 5)* (2002) 82 SASR 152, 372–9.

87 See A Supiot, 'Towards an International Social Order? Preliminary Observations on the 'New Regulations' in Work, Employment and Social Protection', a paper delivered at a conference on The Future of Work, Employment and Social Protection, Annecy France, 18-19 January 2001 and available on the ILO website: http://www.ilo.org/public/english/bureau/inst/papers/confrnce/annecy2001/supiot/ (24/3/03).

88 See J Braithwaite and P Drahos, *Global Business Regulation* Cambridge (2000).

89 C Sabel, D O'Rourke and A Fung, 'Realising Labour Standards: How Transparency, Competition and Sanctions Could Improve Working Conditions Worldwide' (2001)

particularly interesting is that in these visions for regulation in the future much of the existing role of the national, public systems of regulation is being incorporated into these supposedly new systems and being transferred to private actors.

In 'Private Ordering and Workers' Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation', Harry Arthurs examines the new fervour for voluntary codes of conduct. Arthurs observes that codes are often closer to the model of state legislation than they care to admit because state systems too have changed and now often encourage self-regulation. He thus points to a merger, not a dichotomy, in public and private, international and national, regulatory styles, and notes the irony in the fact that the codes of conduct of transnational corporations appear to indicate a commitment to the kind of ordering that they reject at the national level. Arthurs does not find the argument that voluntary codes are needed to attract and keep human capital persuasive. As he points out many rank and file workers are still by and large treated as disposable by business and do not fit the profile of the knowledge worker. Arthurs' favoured explanation for the enthusiasm of business for voluntary codes is that given the nature of production in the global economy, that is chains of production across several countries or locations, it is 'vulnerable to disruption' and so workers need to be pacified and are so by a display of commitment to voluntary codes.[90] For Arthurs, the biggest problem with corporate codes of conduct is their legitimacy: they are written by those who would be bound by them while the supposed beneficiaries have no role in their formulation. According to Arthurs voluntary codes are attractive both to corporations because they remain in control and to nation states because foreign investors are not deterred by them. It is not surprising that, as Arthurs observes '[v]oluntary codes are emerging as the most significant feature of a fragile, inchoate regime of transnational labour market regulation'.[91]

The vision of the future of labour law characterised by the absence of protective labour standards or their alienability through worker agreements or self regulation of work relations by business though corporate codes would appear to be contrary to the emergence of a human rights agenda applicable to work.[92] In the final chapter of the book, 'Social Rights, Social Citizenship, and Transformative

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26 *Boston Law Review* 1. For a critique, see J Murray, 'The Sound of One Hand Clapping? The 'Ratcheting Labour Standards' Proposal and International Labour Law' (2001) 14 *Australian Journal of Labour Law* 306.

90 Joanne Conaghan et al, above n 1, 479.

91 Ibid 487.

92 See the ILO's *Declaration of Fundamental Principles and Rights at Work* 1998 as evidence of this coming together of 'labour rights' and 'human rights'. This is not to deny the possibility of constructive development of human rights; see for example the essays collected in Stephen Bottomley and David Kinley (eds) *Commercial Law and Human Rights* (2002).

Constitutionalism: A Comparative Assessment', Dennis M Davis, Patrick Macklem and Guy Mundlak offer a comparative study of South Africa, Canada and Israel examining the desirability of constitutionalising rights to protect social citizenship and offset the negative effects of neo-liberalism. However, the specific focus of their analysis becomes the right to health[93] demanding too much to be done by way of analogical development for the labour law reader to gain the maximum from their discussion. They do examine some of the well-known issues, pointing out, for instance, the spuriousness of the distinction between positive and negative rights because all rights require some kind of structural support and action from the state. While alluding to judicial reluctance to give definition to social rights, the authors do suggest that the courts can offer great remedial flexibility. In so doing they aver to a distinction between the social and the individual dimension of rights, and separate constitutional functions, the legislative and judicial respectively, in relation to them, without ever really offering anything new to resolve the tensions between them. There has been much excellent writing on the constitutionalisation of labour rights in recent years[94] and it is a pity that this collection did not use the opportunity to interrogate the difficult terrain concerning the advantages or otherwise of the law of work conceptualised through the constitutionalism and the nation state in contradistinction to the human rights discourse of international law or indeed to explore the relationships between constitutionalism and international human rights law.

For Australians, the lack of a constitutional Bill of Rights and the difficulty of constitutional amendment rights talk is always controversial. That is one of the reasons why, to Australian eyes, developments at the ILO are among the most significant for labour law in this era of globalisation. Yet curiously few of the contributions to this collection concern themselves with it.

One exception is Brian A Langille's essay, 'Seeking Post-Seattle Clarity – and Inspiration'. Langille deconstructs ILO statements and critiques the assumption within them that the economic is prior to and separate from the social. His technique is to start from an unreal world of island jurisdictions and introduce a consideration of issues such as trade and foreign investment to elucidate the issues. Drawing on the insights of Amartya Sen,[95] Langille argues that values, such as equality and freedom of association, should not be seen only as the means to an end of national economic growth and successful participation in the global market, but are important *in themselves*. Langille's argument is grounded in the western liberal philosophical traditions. He sees exciting possibilities in which 'the economic and

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93 Joanne Conaghan et al, above n 1, 522ff.

94 See, for example, K D Ewing, above n 74.

95 A Sen, *Development as Freedom* (1999).

the social are increasingly seen as integrated and mutually reinforcing, and not as mutually exclusive alternatives to be traded off in a zero-sum game'.[96]

Guy Mundlak, in 'The Limits of Labour Law in a Fungible Community', provides a very different perspective on the role of the ILO. Mundlak sees little prospect for a universal labour law in the global era. His point here is that labour law must be closely linked to social and juridical institutions, connected to a community, and he considers the global is a weak community and therefore is a weak source of labour law. In his view the ILO's four basic principles in the *Declaration of Fundamental Principles and Rights at Work* don't count for much, being essentially procedural and having no substantive bite. Mundlak sees that there may exist commonalities that can be developed to advance the prospects of all workers and urges that local co-operations, between trade unions and others, may be more productive. He shows how these have already worked in two towns 20 kilometres apart in Israel and Jordan. Here is powerful local specificity which, by analogy, could be applied at the intersection of other jurisdictions where there is a flow of capital and work from a developed economy with stronger labour protections to a weaker developing economy.

CONCLUSION

Labour Law in an Era of Globalization presents an incredibly diverse range of arguments regarding the future of the law of work. All these are grounded in the practices of many jurisdictions around the world and the contributors individually imagine a wide range of possibilities for the future development of the law. It is a collection which should be read by everyone who has an interest in the promotion of justice in work relations and the strength of its content has the capacity not only to contribute to but to be highly influential in those political contests through which the law and the world of work is created.

[96] Joanne Conaghan et al, above n 1, 138.