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BASIC RIGHTS OF EMPLOYEES: A COMPARISON OF THE SITUATION UNDER AUSTRALIAN AND SPANISH LAW

INTRODUCTION

The developments in the regulation of industrial relations during the 1990s prompt an examination of the extent of basic rights enjoyed by employees in Australia. All employees are parties to individual contracts of employment, which grant them certain rights. These rights may be either express — and particular to the individual employee, or they may be implied. There are certain established 'implied terms', which in the absence of express treatment of the issue, will be implied into every work relationship determined to be an employment contract. These implied terms thus effectively create a set of minimum employee rights, which employees will be entitled to enjoy unless they have expressly accepted less extensive rights. However, this set of minimum rights is a limited one because, until the mid-1990s, the majority of Australian employees looked to awards to secure their basic entitlements. Award terms were enforceable, whatever the contract expressly or impliedly stated, in the relevant industrial tribunals. An employee could take action in the 'ordinary' courts to enforce the express or implied terms of the contract, and they or the union party to the award could take action in the industrial tribunals to enforce the terms of the award. By the later decades of the twentieth century, awards included terms providing for a wide variety of employee rights and benefits — things such as shift allowances, redundancy pay, sick pay, parental leave, protection against unfair dismissal and consultation on the introduction of technological changes. The breadth of enforceable, award-based rights, and the fact that the majority of the workforce were covered by awards, meant that little attention was paid to the set of minimum rights provided by the law of the individual employment contract.

Now, with the cutting back of (federal) awards to the provision of minimum 'safety net' conditions limited to the twenty 'allowable award matters' in s 89A of the *Workplace Relations Act 1996*, with the emphasis on individual and enterprise agreements, dependent in their scope on the strength of the parties in negotiation, and with the progressive emergence of new areas of work not covered by the awards of earlier decades, it becomes of greater moment to inquire into the rights which employees enjoy by virtue of that status. I have chosen to do this by comparing the Australian situation with that in Spain, where all employees are

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covered by and derive rights from the *Ley del Estatuto de los Trabajadores*[1] — the Statute of Employees.

My purpose is not to compare working conditions, nor to compare the details of regulation. In both countries, employer and employee can contract about the specific conditions of the work, and the terms of those contracts can be enforced by action in the 'ordinary' courts. In both countries, employees (with or without union input) can negotiate collectively with their employer about specific conditions to apply to employment in that employer's enterprise. And in Australia, certain minimum conditions can be established by a safety-net award. My purpose is to look at the general and basic rights which an employee enjoys independent of the specific terms of contract, collective agreement or award. To a large extent, this involves comparing the rights attaching to employees by virtue of the *Estatuto de los Trabajadores* with rights arising under the implied terms of the common law contract of employment. In essence, those implied terms create a remedy — an action on the contract in the event of their breach. However, the following survey will examine both the implied terms and generally available 'rights' deriving from statute, to the extent that such exist.

At this point, the choice of Spain as the point of comparison should be justified. It is not the country the average labour lawyer in Australia would imagine as being in the vanguard of employee rights. The average labour lawyer would know, with a greater or lesser extent of detail, that Germany (at least in its days of being the FDR) and the Scandinavian countries had elaborate systems relating to employee rights, but would not expect Spanish law to be any 'threat' to the image of Australia as a country with a good, even impressive, record in this regard. That is the point! Whatever the validity of this categorisation of European countries based on the extent of their employee rights, Australia does not pull up very well against even the (arguably) 'second division'.

BASIC RIGHTS DERIVING FROM STATUS

In a comparison of the rights given to employees by the *Estatuto de los Trabajadores* with the 'rights' accessible to employees through remedies for breach of the common law contract, it is first necessary to identify and briefly discuss a group of Spanish statutory rights for which there is no common law contractual equivalent.

These are the fundamental rights established by Artículo 4.1 — rights of employees, by virtue of that status, outside the actual day-to-day operation of the workplace,

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1 Texto refundido. Real Decreto Legislativo 1/1995.

some of which at least read very strangely to those accustomed to the Australian system.

Employees have as basic rights...the rights of:

(a) Work, and free choice of profession or occupation
(b) Freedom to join a trade union
(c) Collective bargaining
(d) Collective industrial action
(e) Strike
(f) Meeting
(g) Worker participation.

The Right to Work

In relation to this right, there is no equivalent in Australia. Australians largely have no fundamental rights; the Constitution contains nothing equivalent to a Bill of Rights. On the other hand, it could be said that there is little value in a statement like that in Artículo 4.1(a) — if the statutory declaration of a right to work had any real force, there would be no unemployment in Spain. There is more point in a statutory declaration of a right to free choice of a profession or occupation. This means that any imposition of barriers to entry into a profession or occupation is contrary to law. Of course, rigid professional regulation in Spain[2] has the effect that there are substantial qualificatory requirements, but these must be appropriate to the educational background required for practice of the profession. In Australia, this is not so directly the case. The various anti-discrimination Acts prohibit barriers to entry to a profession based on any of the stated grounds of discrimination — sex, race, religion etc.[3] Beyond that, it is quite legal for the professions to impose their own chosen barriers. However, an individual may take action in Equity to gain entry to a profession that has imposed such barriers on the grounds that the barrier in question is unenforceable as being in restraint of trade. The comparison is essentially that between a right and individual access to a remedy.

2 *Estatuto de los Trabajadores*, Artículos 22–24, 39.

3 See *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* (Cth), *Discrimination Act 1991* (ACT), *Anti-Discrimination Act 1992* (NT), *Anti-Discrimination Act 1977* (NSW), *Anti-Discrimination Act 1991* (QLD), *Equal Opportunity Act 1984* (SA), *Equal Opportunity Act 1995* (Vic), *Equal Opportunity Act 1984* (WA).

Freedom of Association — Free Syndication

It is ironic that Australia has been investigated and criticised by the International Labour Organisation (ILO) for failure to fully observe the Conventions on freedom of association. The irony lies in the pervasive belief throughout much of the twentieth century that trade unionism in Australia was very strong. While there were certainly periods of a comparatively high level of unionisation, the developments of the past decade allow us to raise important questions as to the genuine strength of trade unionism in this country. Put briefly, the co-optation of trade unions through the system of compulsory arbitration gave an illusion of strength. The dismantling of that system has exposed substantial weaknesses. These are weaknesses not only within the unions themselves, but in the rights they enjoy within the social structure.

Part of the explanation for these weaknesses can be seen in the fact that in Australia, until recent years, 'freedom of association' was commonly regarded as being the right *not* to join a trade union. It was largely accepted, without serious question, that the right to join was entrenched and untrammelled. Opinion as to the importance of the right *not* to join was divided on predictable political lines. Encouragement of the association of employees into representative trade unions was given pride of place among the objects of the *Conciliation and Arbitration Act 1904* (Cth) and *Industrial Relations Act 1988* (Cth). The *Workplace Relations Act 1996* (Cth) shows the difference of its focus by listing 'freedom of association, including the rights ... to join ... or not to join ...' as merely the sixth of the listed objects. However, while the change in the objects clause is a significant indication of a change in philosophy, that does not mean that fetters on freedom of association came only with the 1996 Act. They were there from the beginning.

Those fetters were forged from two links: the craft-based nature of Australian unionism, and the co-optation of unions into a state-regulated system. The system of compulsory arbitration made trade unions star players, but the script of the play circumscribed their roles. *Registered* unions had considerable freedom to approach the tribunals for binding settlement of disputes over terms and conditions of employment. In other words, the price of that freedom was acceptance of the requirements for registration. One of the requirements for registration was that there was not another union in existence to which the proposed membership of the new union could conveniently belong. The proposed membership would be determined by the applicant union's 'eligibility clause', which identified persons eligible on the basis of craft or occupation. As techniques of production developed, areas of overlap could occur — these were the source of the often-anathematised 'demarcation disputes' when unions competed to enlist members in overlapping occupations and pressured employers to hire their members in preference to those of the competing union. However, once a union had achieved registration, it could seek an award binding employers in relation to the performance of a particular job

without having to establish any special rights to negotiate with those employers. Registration gave the right to negotiation, providing jobs covered by the union's eligibility rule were performed in the enterprise in question. An additional issue, which occasioned critical examination by the ILO, was the number of members required before a union could be registered.

What emerged from this was not in truth 'freedom of association'. What emerged was the creation of two theoretical types of unions — registered and unregistered. By and large, there was no regulation of unregistered unions, outside the general requirements of the law relating to organisations, and there was unfettered freedom to join such a union. On the other hand, freedom to join an unregistered union was of little value. Such unions could not take part in the established system of conciliation and arbitration, and they were in a legally vulnerable position, without the benefits of quasi-corporate status deriving from registration. But freedom to join a registered union depended on eligibility — on fitting within the eligibility clause, and registration depended on the uniqueness of that clause — on there not being another union already registered to cover such work. Employees had the freedom to join a union (or to refuse to join), but they did not have a genuine freedom to choose the union they wished to join.

Spanish trade unions are not craft-based. They are philosophy-based. There are communist unions, socialist unions, Catholic unions and so on. The law gives them significant rights of representation and negotiation — once they can establish themselves within an enterprise. There are obvious advantages and disadvantages within each approach, in terms of ensuring a smooth system of industrial relations, but examination of those advantages and disadvantages is not within the scope of this work. What *is* relevant is that the Spanish system produces a greater freedom of association — whatever the ultimate benefits of that freedom may be. Spanish employees are entitled to join whatever trade union they wish — or to refrain from joining. This is acknowledged in Artículo 4.1(b) of the *Estatuto de Los Trabajadores*. But it is more definitively stated in the *Constitución Española*, Artículo 28.1, and in Artículos 2 and 3 of the *Ley Orgánica* 11/1985 *de Libertad Sindical*.

The Right to Collective Bargaining

There is no general *right* in Australia to collective bargaining. There was, prior to 1996, a right for registered unions to force employers to accept compulsory conciliation and arbitration of disputes about 'industrial matters' by the industrial tribunals. At the federal level, little now remains of this right. The arbitral powers of the Australian Industrial Relations Commission have been significantly diminished. There is a 'right' of employees within an enterprise to have a collective agreement

reached with their employers, either with or without union representation, approved by the tribunals.[4] However, there is no *right* to require the employer to enter into negotiations for such collective agreement, and no requirement that — if negotiations are formally commenced — the employers bargain in good faith.[5] The protracted saga of negotiations between the CFMEU and Rio Tinto in relation to the Hunter Valley No. 1 Mine since 1996 is graphic evidence of the employers' power to withstand and refuse attempts to bargain.

In Spain, Artículo 89.1 of the *Estatuto de Los Trabajadores* gives employees, through their legal representatives,[6] the *right* to require their employers to negotiate with them for the purpose of achieving collective agreements. Both parties are to negotiate according to the principles of good faith.

The Right to Take Collective Industrial Action

There is no general right in Australia to take collective industrial action. Depending on the nature of the action taken, it may or may not result in the employer being entitled to initiate proceedings. Industrial action can give rise to employer-initiated proceedings against the employees and their unions in two broad situations: where it constitutes a breach of the employees' contracts of employment, and where it is tortious. The most obvious example of industrial action constituting a breach of employment contracts is a strike, which will be discussed later.

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4 *Workplace Relations Act 1996* (Cth) ss 170LJ–170LL, 170LT–LW.

5 Under the *Industrial Relations Act 1988* (Cth), as amended by the *Industrial Relations Reform Act 1993*, there was no general obligation to bargain in good faith. However, by s 3(c), it was a principal object of the Act 'to provide a framework for the prevention and settlement of industrial disputes' by 'providing a framework of rights and responsibilities for the parties involved in industrial relations which encourages *fair* and effective bargaining ...' [emphasis added].
The Act established a Bargaining Division of the Industrial Relations Commission which had power by s 170QH to conciliate or facilitate the making of a certified agreement or enterprise flexibility agreement. In the course of such conciliation, by s 170QK(2)(a), the Commission could make orders for the purpose of ensuring that 'the parties negotiating an agreement...do so in good faith...' Among the matters to be considered in deciding what orders (if any) to make, the Commission was required, by s 170QK(3), to consider whether the party concerned had:
(i) agreed to meet at reasonable times proposed by another party; or
(ii) attended meetings that the party had agreed to attend. Or
(iii) complied with negotiating procedures agreed to by the parties, or
(iv) capriciously added or withdrawn items for negotiation, or ....
(v) refused or failed to negotiate with one or more of the parties.....

6 See below 89–90.

Short of a strike, a go-slow campaign would constitute a breach of contract, being contrary to the employee's implied obligation to perform the work properly in accordance with the employer's lawful orders. A work-to-rule will arguably be a breach of contract also, being a breach of an implied obligation to obey orders *reasonably*, that is, not to obey in such a way as to impede the commercial object of the enterprise. I have stated this to be *arguably* a breach of contract, because I have misgivings, expressed elsewhere,[7] about the validity of the finding in *Secretary of State v A.S.L.E.F.*[8] In that case, British railway unions carried out a work-to-rule campaign which involved following all of the rules, most long since obsolete, in BritRail's 'Blue Book' of instructions. My argument is that this was not so much an unreasonable obedience of orders as an instance of obedience of unreasonable orders. More generally, in relation to work-to-rule campaigns, I would suggest that it could not logically be a breach of contract to obey an order when it would be a breach to *dis*obey it. If an order has been given, to apply to a particular situation, then to obey it cannot be a breach, even if the order is inappropriate to the situation and therefore frustrates the 'commercial objective of the enterprise'.[9] Since the employer has the right to give orders, they also have the burden of ensuring that they are appropriate. Where the arrangements at the workplace are such that general orders are given and general 'rules' made, to be applied *where appropriate*, the decision of when the situation is an appropriate one for compliance with the rule can become part of the employee's job. In this context, to apply the rule without ascertaining that the situation is appropriate becomes a failure to perform one's work properly, and thus a breach of contract. But if an employer wishes to arrange the work on the basis of such flexible *rules*, it must be made quite clear that the employees have a duty to exercise their own discretion about the appropriateness of the rule to the particular instance. The employer cannot approbate and reprobate — cannot demand unquestioning obedience to the rules *except* when it subsequently emerges they were inappropriate.

Another form of industrial action which would amount to breach of the contract of employment is a campaign of selective work bans — where employees do a full day's work performing most of the activities of their post, but refuse to perform a particular activity (obviously one which will have a significant effect on the employer, such as where public transport employees refuse to collect fares, or where university teachers mark papers but refuse to submit the marks to the administrative branch). This would be a breach of the employee's contractual obligation to perform the work *agreed*, because that obligation involves not merely performing work for the hours agreed, but performing the required tasks within those hours.

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7 A Brooks, 'Myth and Muddle — An Examination of Contracts for the Performance of Work' (1988) 11 *University of New South Wales Law Journal* 48.

8 [1972] 2 QB 455.

9 Ibid 498 (Buckley LJ).

Industrial action which can result in employer-initiated proceedings based in tort is action which constitutes one or other of the several so-called 'industrial' or 'economic' torts: intimidation, conspiracy, inducing breach of contract and interference with contractual relations. It involves such things as picketing. There are a variety of defences to these proceedings, directed to the question of whether the employees and unions involved were acting in furtherance of a genuine wish to better terms and conditions of employment. The difficulty for employees and unions is that the exact defences vary from one tort to another. Crucial to this comparative assessment is that the defence, even where it exists, *is* a defence — a manner of exculpating oneself from conduct prima facie wrongful. It is not a *right*.

However, the above discussion is subject to the provisions of the *Workplace Relations Act 1996* (Cth), particularly s 127 dealing with orders to stop industrial action, and ss 170ML, 170 MT, and 170 WB to WE dealing with limited immunity from civil proceedings.[10]

The Right to Strike

In Australia, there is no general *right to strike*. A strike involving a refusal to work constitutes a breach by each striking employee of their individual contract of employment, and entitles the employer to dismiss the employee summarily and/or to seek damages for financial loss resulting from employee's participation in the strike. However, as the case of *National Coal Board v Galley*[11] demonstrates, the compensable loss will usually be minimal unless the employee was directly engaged in production rather than merely in provision of services. Each of the strikers may also be at risk of action for conspiracy — for concerted action taken with the intention to cause the employer harm.

There is however a vestige of a 'right to strike' as a result of the provisions of the *Workplace Relations Act 1996* (Cth), conferring an immunity from civil liability in certain limited situations. The first step in activating the right is to categorise the employer-employee dispute as a 'dispute of right' or a 'dispute of interest'. There is no immunity where the dispute is one of right. Basically a dispute of right is a dispute about the application or interpretation of an award or agreement. In this case, the parties' rights are already settled, and any dispute should be by legal proceedings to enforce the settled rights. A dispute of interest arises when the stated period of an agreement[12] has expired. At that stage, the parties are, subject to limitation, free to pursue their 'interest' in a new award or agreement by industrial action. The legislation thus divides the program for action into the period when

10 Discussed below.

11 [1958] 1 All ER 91.

12 Not an *award* — a new dispute of interest can be commenced even during the stated lifetime of an award.

rights are 'settled' and the period when they are 'up for grabs'.[13] The legislation does not actually say that industrial action within the lifetime of an agreement is prohibited. It does not need to. Prima facie, all industrial action is prohibited in not being specifically permitted. But during the negotiation periods, defences and immunities to action exist. Disputation in the lead-up period to an agreement is allowed — and even encouraged.[14] However, once an agreement has been reached, disputation is not accepted.

Having said this, it should be noted that the protection given to industrial action during the period of negotiation is limited in several ways. Firstly, by the definition of industrial action, and secondly by the formalities for initiating protected industrial action. Sections 170 MT and 170WC confer immunity from civil proceedings for 'industrial action' in the course of negotiating a certified agreement or Australian Workplace Agreement (AWA). 'Industrial action' is defined in s 4(1) of the Act:

> (a) the performance of work in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work, the result of which is a restriction or limitation on, or a delay in, the performance of the work, where:
> (i) the terms and conditions of the work are prescribed...by an award or order of the Commission, by a certified agreement or AWA, by an award, determination or order made by another tribunal under a law of the Commonwealth...or
> (ii) the work is performed, or the practice is adopted, in connection with an industrial dispute[15]
> (b) a ban, limitation or restriction on the performance of work, or on acceptance of or offering for work, in accordance with the terms and conditions prescribed by an award or an order of the Commission, by a certified agreement or AWA by an award, determination or order made by an another tribunal under a law of the Commonwealth...
> (c) a ban, limitation or restriction on the performance of work, or on acceptance of or offering for work, that is adopted in connection with an industrial dispute
> (d) a failure or refusal of persons to attend for work or a failure or refusal to perform any work at all by persons who attend for work if:
> (i) the persons are members of an organisation and the failure or refusal is in accordance with a decision made, or directions given, by an organisation...

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13 As did the *Industrial Relations Act 1988* (Cth) before it, by virtue of the 1993 amendments.

14 Witness the Government's support of the stand-off at Rio Tinto's Hunter Valley No. 1 mine during several years of negotiation.

15 As defined and interpreted.

(ii) the failure or refusal is in connection with an industrial dispute, or
(iii) the persons are employed by the Commonwealth or a constitutional corporation,[16] or
(iii) the persons are employed in a Territory.[17]

This definition leaves a number of matters outside its scope, and therefore outside the limited protection offered. Paragraphs (a) to (c) relate to go-slows, work to rules and selective work bans, but arguably not to strikes. Though in one sense a strike could be said to be 'a ban...on the performance of work', the presence of paragraph (d) referring to a failure or refusal to attend for or perform work means that, by the canons of statutory construction, paras (a) to (c) with their references to *bans* have to be speaking of something different.

The result is that paras (a) to (c) define as industrial action (and therefore appropriate for limited immunity) go-slows, work-to-rules and selective work bans *if* there is already existing an award, certified agreement or AWA, or *if* the dispute qualifies as an interstate industrial dispute. Thus, a dispute of this type in the course of negotiation in a single workplace, or in a number of workplaces within one state, where there is no pre-existing coverage by the industrial legislation, will not be eligible for the limited protection. In relation to strikes, they will be eligible for protection only if the strikers are unionists and acting on union direction, or if the dispute is an interstate industrial dispute (or if the strikers are employed by a corporation or in a Territory). Non-unionised employees of unincorporated employers outside the territories have not even a limited 'right to strike' unless the dispute at the base of the strike qualifies as an *interstate industrial dispute*. The logic behind this differential coverage is hard to discover. One is tempted to suspect bad drafting, rather than obscure logic. One thing is clear however: picketing will never be able to claim even limited protection.[18]

Only industrial action as defined is entitled to the limited immunity from proceedings, and even then, only if certain formalities are complied with. These requirements are set out in ss 170MO to MP and s 170WD. They require prior negotiation, submission to a secret ballot ordered by the Commission, authorisation

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16 Foreign corporations, and trading or financial corporations formed within the Commonwealth — *Australian Constitution* s 51 (xx).

17 Ibid s 122.

18 In many cases, strikes and picketing go hand in hand. The workers on strike take up positions outside the employer's premises as a picket line. However, the limited protection conferred by the Act only refers to the refusal to attend for and/or perform the work — not the activities undertaken following such refusal. This is even more obvious when the picketers are not the strikers themselves but 'supporters'.

by the Committee of Management of a Union and three days notice of intention to take action.

Division 8 of Part VID gives limited immunity for industrial action in negotiation of the individual employer–employee AWAs. However, 'AWA industrial action', in s 170WB (1) is defined as 'any *industrial action* taken by an employee....', and thus the noted restrictions of the s 4(1) definition are enshrined in it. Section 170WD also requires three days notice of action, unless the other party is already taking action. Moreover, in reality, industrial action by an employee negotiating individually with an employer is unimaginable. Action by a group of employees where the employer is negotiating contemporaneously with each of them is vaguely conceivable, though unlikely, unless they were actually unionised, and in that case, one might expect that the union would be trying to negotiate a certified agreement with the employer on their behalf.

Industrial action not protected in this very limited manner is subject to the whole range of common law actions and, in addition to being subject to a s 127 order, industrial action in relation to an industrial dispute (as defined), negotiation for a certified agreement, or work covered by an existing award or certified agreement may be prohibited and enjoined — with all the results that flow from an injunction. However, s 170 MT(1) bars a s 127 order in the event that the industrial action enjoys the limited immunity of 'protected industrial action'. All this amounts to very much less than a 'right to strike'.

The Right of Meeting

In Australia, there is no *right of meeting*. Of course, there is nothing to stop employees meeting as and when they wish out of working hours, but they do not have any right to use employers' premises for such meetings. Artículo 77 establishes the right of employees to conduct assemblies at the workplace, at least every two months. By Artículo 78, the employer is to facilitate the holding of such assemblies, which are to take place out of working hours unless the employer agrees to their being held during working hours. The employer is also to allow access to the workplace to representatives of the relevant trade unions for the purpose of attending such meetings.

Worker Participation

In Australia, there is no general right of *worker participation*. Such a right exists only in relation to occupational health and safety, in that the occupational health and safety Acts of all of the various States (but not the Northern Territory) give employees the right to elect a health and safety representative from amongst their number, and all of the Acts give workers the right to elect delegates to a joint management-labour health and safety committee.

It is perhaps in this area that the Australian and Spanish systems diverge most dramatically. Under the Spanish system, employees have a statutory *right* to choose representatives, and those representatives have a variety of *rights* to participate in decision-making within the enterprise. This is made clear in the lay-out of the *Estatuto de Los Trabajadores*. Título I is concerned with the individual employer-employee relationship, Título II with rights 'de representación colectiva y de reunión de los trabajadores en la empresa' (rights of collective representation and of meeting of the employees in the enterprise), and Título III with 'negociación y... los convenios collectivos' (negotiation and collective agreements). Artículo 61 establishes that, in conformity with Artículo 4, 'employees have the right to participate in the business through the representative organs regulated in this Title'.

This is not merely the result of the Estatuto — it is the effectuation of Artículo 129.2 of the *Constitución Española*, that 'the public authorities shall efficaciously promote participation in business and, through adequate legislation, co-operative societies ...'.

This participation takes two forms, depending on the size of the workplace. By Artículo 62.1, employees in workplaces of 30 or less may elect one workforce delegate, while in workplaces of 31 to 49, three delegates may be elected. In larger workplaces, the organ of representation is the workplace committee. By Artículo 66, the size of committees is to conform to the following scale: 50 to 100 employees: five members; 101 to 250 employees: nine members; 251 to 500 employees: 13 members; 501 to 750 employees: 17 members; 751 to 1000 employees: 21 members; above 1000 employees — two extra members for each additional thousand employees with a maximum of 75 members. The committees and the workforce delegates have powers, under Artículo 64: to receive information on the operations of the business and on the situation of the relevant economic sector, on all sanctions imposed, on statistics of absenteeism, workplace injuries and illnesses; to report on decisions adopted by the employer as to restructuring of the workforce, reductions in the working day, transfers of the installations, plans for professional training, revision of the systems of organisation of work; to monitor compliance with the relevant laws, regulations and agreements, and to take legal action in instances of non-compliance by the employer.

Clearly then, in relation to the rights that are not linked to the day-to-day performance of work, and the conditions of that work, the rights of workers covered by the *Estatuto de los Trabajadores* are significantly more extensive than those of Australian employees.

RIGHTS IN RELATION TO WORK

Articulo 4.2 of the Estatuto de los Trabajadores establishes a number of rights of employees within their individual work relationships, effectively within their 'contracts of employment'. These rights will be much more appropriate for comparison to those provided by the common law of employment through the mechanism of the implied terms. The rights established by Artículo 4.2 are as follows:

(a) To regular occupation
(b) To promotion and on-the-job vocational training
(c) Not to be discriminated against, in obtaining work or once employed, for reasons of sex, marital status, age (within the limits set by the Statute), race, social class, religious or political opinion, membership or not of a trade union, or for reason of language inside the Spanish state.[19] Neither may they be discriminated against for reason of physical, psychological or sensory handicaps, providing they have the capacity to perform the job in question
(d) To the integrity of their person and to an adequate health and safety policy
(e) To respect for their privacy and to the consideration owing to their dignity, including protection against verbal or physical insults of a sexual nature
(f) To punctual receipt of the remuneration agreed or legally established
(g) To individual exercise of the rights of action derived from their contracts of employment
(h) To such other rights as are specifically provided by the individual contract of employment.

The Right to Regular Occupation

Just as the right to strike in Artículo 4.1(e) is exciting to eyes used to the common law, so is the right in Artículo 4.2(a) — a 'right' also not given by the common law, a right to be provided with work, in addition to the wage. In general terms, the common law does not impose on an employer an obligation to provide the

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19 Spain has four languages, with official recognition — Castillano (which is what most people know as 'Spanish'), Catalan, Vasco and Gallego. Inhabitants of Catalunya, País Vasco and Galicia are entitled to interpreters in court proceedings, the regional Parliaments operate in the regional language, and the schools teach in the regional language — with the requirement that Castillano is also a compulsory subject in the schools.

employee with work to do: 'provided I pay my cook her wages regularly, she cannot complain if I choose to take any or all of my meals out'.[20]

Traditionally, there have been only three categories of employment where an employer has had an obligation to provide actual tasks to do. The first is where the employee is remunerated on a piece-rate or commission basis: the employer must provide sufficient work to enable the employee to earn a reasonable amount.[21] The second category relates to cases where the job for which the employer has engaged the employee involves the employee holding an office, from which flow privileges and powers, as in *Shindler v Northern Raincoat Co.*[22] which concerned a company director, displaced from the directorship but not from employment as a result of a merger. The third category covers the broad area of employment in the entertainment field, applying to actors, singers, producers, scriptwriters, and professional sportspersons. The reason for this exception to the general rule is that this is an area where engagements are usually for a short term only, and the performer's opportunity to gain further engagements is closely linked to their reputation, which derives from the publicity from past performances.

The Right to Promotion and Training

This right, referred to in Artículo 4.2(b), is spelt out in Artículos 22 to 25.

Artículo 22: Sistema de clasificación profesional

1. The system of professional classification of the employees by means of professional categories or groups will be established through collective negotiation or, in its absence, through agreement between the business and the employees' representatives.[23]
2. 'Professional group' means that which brings together the professional abilities, degrees and general content of the job, and can include both distinct professional categories and different professional functions or specialities.
3. A professional category will be equivalent to another when the professional ability necessary for the performance of the particular functions of the first allow the development of the basic services of the second, following the undertaking, where necessary, of simple courses of training or retraining.
4. The definitional criteria for the categories and groups should apply common rules for employees of either sex.

In relation to part 1 of this Artículo, it is necessary to consider also Artículo 16:

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20 *Collier v Sunday Referee Publishing Co Ltd* [1940] 2 KB 647, 650 (Asquith LJ).

21 *Devonald v Rosser & Sons* [1906] 2 KB 728.

22 [1960] 2 All ER 239.

23 As provided for in Artículo 61, above 89–90.

> The content of the work the subject of the contract of employment, and in particular the allocation to a category, professional group or level of remuneration set out in the Collective Agreement or, in its absence, the practice of the business will be established by agreement between the employer and the employee.
> When the performance of the work involves the functions appropriate to two or more categories, professional groups or levels, the allocation will be made by reference to the dominant functions.

Artículo 23: Promoción y Formación Profesional en el Trabajo:

> 1. The employee has the right:
>   (a) To receive leave necessary to take part in examinations, or where appropriate to the system established in the business to elect particular shifts, when undertaking regular studies for the acquisition of an academic or professional qualification
>   (b) To the variation of the ordinary working day for the purpose of attending courses of professional training or to the grant of leave to undertake professional training or improvement with reservation of his/her position.
> 2. The provisions for exercise of these rights will be agreed on in collective agreements.

Artículo 24: Ascensos.

> 1. There should be promotion within the system of professional classification in conformity with that established by formal collective agreement, or, in its absence, in agreement between the business and the representatives of the employees.
>   In any case, promotions should take into account the training, merits and seniority of the employee as well as the organised facilities of the business.
> 2. The criteria for promotion should apply common rules for employees of either sex.

Artículo 25: Promoción Económica.

> 1. An employee in an expanded work function will be able to claim a salary increase in the terms fixed by collective agreement or individual contract.
> 2. The provision in the preceding part applies without prejudice to the rights acquired or in the course of acquisition in a concurrent temporary period.

By comparison, there is no implied duty at common law that the employer will provide the employee with an opportunity for promotion and training. Individual contracts may provide expressly for this, but if they do not, the employer is free to

leave the employee in the same position as was contracted for at the entry into the employment. This is subject to the existence of awards or certified or enterprise agreements dealing with promotion and training.[24] There are also statutory avenues to challenge a failure to promote or train as being the result of prohibited discrimination.[25]

In fact, the previously established absence of an obligation on the employer to provide work (in the sense of tasks to perform) runs clearly counter to any implication of an obligation to provide opportunities for training, and in practice would seriously undercut any possibility of arguing for an obligation to provide 'promotion' — or, as human resources jargon would have it, a 'career path'.

Two points need to be noted in relation to the comparison between the Spanish and Australian positions on promotion and training. First, Spain — like most of the countries of western continental Europe — has a much more formal system of professional qualification. In Australia, it is effectively only the established *professions*, like law, medicine, dentistry, nursing and so on, that actually require a prior professional qualification. However, in Europe, most jobs (other than the most menial) require a course of professional study or training before they can be entered into. The trend to professionalisation has begun in Australia, as witnessed by the development of courses in, for example, hotel management, but so far such studies provide an edge in obtaining employment rather than being an essential prerequisite. Second, in practice, even in Spain, the right established by Artículo 4(2)(b) would be dependent on the nature of the job. There would be a number of jobs and forms of work which would not provide the opportunity for promotion or training.

The Right Not to Be Discriminated Against

This right in Artículo 4.2(c) is elaborated in Artículo 17.1 and 17.2: 'No discriminación en las relaciones laborales' — No discrimination in work relations.

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24 This depends on interpretation of s 89A(2)(a) of the *Workplace Relations Act 1996* (Cth) whereby 'classifications of employees and skill based career paths' is one of the 20 allowable award matters. It would seem logical that this would involve provision for promotion when skills or qualifications appropriate to a higher classification have been achieved. Or such provision might be justified by means of s 89A(6) whereby the Australian Industrial Relations Commission may include in an award matters incidental to the allowable award matters and necessary for the effective operation of the award. However, a narrow interpretation could limit para (a) to the classifications themselves, excluding movement between them on subsequent acquisition of further skills or qualifications.

25 See list of relevant Acts, above n 3.

1. Regulatory precepts, clauses of collective agreements, individual contracts and unilateral decisions of the employer which contain favourable or unfavourable discriminations on the grounds of age, or favourable or unfavourable discriminations in employment, in particular in relation to remuneration, hours and other conditions of employment on the grounds of sex, origin, marital status, race, class, religious or political opinions, membership or not of a trade union, family ties with other employees, and language inside the Spanish state,[26] will be void and of no effect.
2. There may be established by statute exclusions, reservations and preferences which may be freely provided for by contract.

An example of 'positive discrimination' as foreshadowed in part 2 is the requirement, in *Ley* 13 of 1992, which deals with integration of the disabled, that businesses of more than 50 employees must ensure that two per cent of the workforce are disabled persons. Artículo 17.2 is subject to the provision in Artículo 17.3 for the government to establish employment creation programs. The first paragraph of Artículo 17.3 states:

> Notwithstanding the provisions in the preceding part, the Government may introduce measures dealing with reservation, duration or preference in employment which have as their object the facilitation of finding positions for workers seeking employment.

At common law, there has never been held to be an implied obligation on an employer not to discriminate against an employee, on the grounds mentioned or indeed on any others. In fact, the rules of the common law as to termination of the contract — by which the termination will be lawful, whatever its motivation, provided it is preceded by proper notice — actually enshrined a *right* of employers to discriminate. The rule regarding notice is that, in the absence of an express statement of a period of notice, an employer may terminate the employment by the giving of 'reasonable notice', and it has been constantly made clear that this means 'the giving of notice of reasonable length' and not 'the reasonable giving of notice'. Thus, to give a person notice on the grounds that they had red hair, had married, had become pregnant, had developed a physical or mental infirmity, had passed a certain age, had joined a trade union, or had come to hold particular religious or political beliefs was considered legitimate provided only that the period of notice was reasonable in the circumstances.

That is, however, the traditional position, and to say that an implied duty not to discriminate has not been 'held to exist' does not mean that one does not 'exist'. It must be acknowledged that questioning whether or not an as-yet-undeclared implied

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26 Above n 19. This reference indicates that there is to be no discrimination on the grounds of speaking — or not speaking — one of the four Spanish languages.

duty 'exists' plays along with the whole fiction of the common law as regards implied duties. This fiction says that judges do not create the common law; they merely declare what it has always been. It also says that a duty will be implied because it is so obvious a concomitant of the contractual relationship that the parties must have intended it, that their failure to refer to it expressly was simply because it was so obvious that it was tacit — that it 'went without saying'. My suggestion that an implied duty not to discriminate 'exists' rests on decades of statutory commitment to equality of treatment in relation to race, sex, marital status and similar social differences. If a barrister representing an employee were to argue in a court that there is an implied duty against discrimination in that employee's contract, it is quite possible that the judge would agree that protection from discrimination is so obvious a concomitant of the relationship that the contracting parties left the matter tacit, since 'it went without saying'.

Moreover, even if there is not an implied duty directed specifically to freedom from discrimination, there is now a judicial recognition of the duty of an employer to be 'good and considerate' to an employee,[27] and discrimination on grounds of race, sex and so on, would clearly amount to a failure to be good and considerate. However, the scope of this duty is somewhat limited. In relation to statutory unfair dismissal schemes, it is available to turn a subsequent departure by an affronted employee into a 'constructive dismissal', thus giving access to the remedies of the statutory scheme. At common law, it turns the subsequent departure into a wrongful dismissal justifying rescission by the employee, and thus prevents an action for breach by the employer. It does not give grounds for a claim for *additional* damages for the wrongful dismissal per se[28] — and the resulting destruction of necessary trust and confidence would be a close to insuperable barrier to a claim for an order for specific performance or an injunction prohibiting the dismissal.

This is all somewhat precious, however, for the existence of statutory prohibitions on discrimination makes the establishment of an implied contractual obligation of

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27 *Courtaulds Northern Textiles v Andrew* [1979] IRLR 84; *Woods v WM Car Services (Peterborough) Ltd* [1982] ICR 693; *Bliss v South East Thames Regional Health Authority* [1987] ICR 700; *Byrne v Australian Airlines Ltd* (1994) 120 ALR 274; *Burazin v Blacktown City Guardian Pty Ltd* (1996–97) 142 ALR 144; *Police Service of New South Wales v Batton* [2000] 98 IR 154.

28 This is not to ignore the House of Lords decision in *Malik v BCCI* [1997] 3 All ER 1. However, the damages there were for the breach of the duty of trust and confidence itself. The contract in question was not in fact terminated in circumstances of constructive dismissal, but by a 'properly' negotiated redundancy arrangement. Where the employee *does* rescind, the wrongful dismissal will sound in damages according to established measures — with the possibility, in appropriate circumstances, of damages for loss caused by the wrongful dismissal making it difficult for the employee to gain new employment. Realistically, a wrongful dismissal per se is unlikely to have such effects.

little moment. Its only relevance would be to give access to remedies more substantial than those the statutes might provide. In that respect, there *is* some point: where appropriate, the statutes allow orders for reinstatement (or for provision of the benefits refused). Such orders would be more freely given than a specific remedy at common law, even allowing for the recent trend by judges to stress the existence of a jurisdiction to give such remedies where appropriate. However, it will often be the case that reinstatement — or a common law order having that effect — will not be appropriate because the discriminatory treatment will have had the result that a harmonious working relationship cannot be recreated. In that case, the remedy will be monetary compensation. Even with the restrictions on common law damages resulting from the various component elements of the measure of contractual damages, it is quite possible that an award would be greater than the maximum sums provided for by the statutes — for example, AS40,000 in New South Wales.[29]

The Right to Health and Safety

The part of Artículo 4.2(d) relating to this is elaborated in Artículo 19: Seguridad e higiene — Safety and Hygiene.

> 1. The employee, in the provision of his/her services, has the right to an effective protection in relation to safety and hygiene.
> 2. In the performance of his/her work, the employee is obliged to observe the legal and regulatory measures of safety and hygiene.
> 3. In the inspection and control of the employer's observance of these measures, the employee has the right to participate, by means of his/her legal representatives in the workplace, if there are no means or special centres competent in the matter in accordance with the legislation in force.[30]
> 4. The employer is obliged, personally or by the intervention of the relevant authorities, to provide to the employees practical and adequate training in the matter of safety and hygiene at the time of contracting or when there is a change of post or when a new technology is introduced which may cause serious risk to the employee, his/her companions or third parties. The employee is obliged to follow these instructions and to carry out the training practices when they occur during working hours or at other times, but with a rebate for the time spent on them.

The right provided by Artículo 4.2(d) is to be compared with the implied obligation in the common law contract that the employer will ensure that reasonable care is taken to avoid exposing the employee to unnecessary risk of injury. The shorthand

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29 *Anti-Discrimination Act 1977*, s 113(1)(b)(i).

30 *Ley de Prevención de Riesgos Laborales*, 31/1995, 8 November (Law of Prevention of Occupational Risks), Articles 30–40.

common law phrase for this area of obligation is 'health and safety'. 'Seguridad e higiene' translates as 'safety (or more literally *security*) and hygiene'. Arguably, *hygiene* is narrower than *health*, and in day-to-day parlance, *safety* is usually thought of in terms of absence of risk of physical accident. However, common law cases examining the duty have found it to be broken by exposure to the risk of mental injury also. And *security* is quite wide enough to encompass protection against such risk. Additionally, the 1995 *Ley de Prevención de Riesgos Laborales*,[31] which establishes a far-reaching system of occupational health and safety monitoring in workplaces, makes it clear that psychological as well as physical well-being must be protected. It could be said that Artículo 19.1 parallels the common law duty, but that Artículo 19.4 specifically prescribes matters which, depending on the circumstances of a particular case, might or might not be necessary for fulfilment of the common law duty. For the most part, however, the obligation to provide training in Australia comes not from the contract but from the occupational health and safety statutes of the various states and territories. Similarly, there is no common law contractual right to employee participation equivalent to Artículo 19.3. This again comes out of the statutes. While the occupational health and safety statutes in Australia require employees to co-operate in health and safety measures which the employer is statutorily obliged to put in place, there is no specific contractual obligation to that effect equivalent to Artículo 19.2. Wilful obstruction of such measures would almost certainly amount to misconduct, constituting a breach of contract. Negligent failure to observe the measures might amount to breach of the employee's duty to work with care. Beyond that, the failure would merely raise an issue of contributory negligence in a damages claim in the event of the employee's injury.[32] One of the difficulties of the 'duty of reasonable care' is that it inevitably involves a degree of *ex post facto* judgment as to what steps were necessary. The specific statement — in advance — of the right to participation and of the obligation to provide training and retraining in Artículo 19 is an advance on the common law position.

The Right to Privacy, to Consideration of One's Dignity, to Freedom from Sexual Harassment

This is made up of the opening words of Artículo 4.2(d) — 'A su integridad física' and Artículo 4.2(e), and is elaborated in Artículo 18: Inviolabilidad de la person del trabajador — Inviolability of the employee's person.

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31 Ibid.

32 In earlier decades, failure to observe the safety precautions might have gone to causation, operating as a *novus actus interviens*. However, the stress in the last two decades on the employer's obligation to monitor and enforce compliance with safety procedures would leave little scope for a *novus actus* argument. See, for example, *McLean v Tedman and Brambles Holdings Limited* (1984) 56 ALR 359, 364 (Mason CJ, Wilson, Brennan and Dawson JJ).

> Search of the employee's person, his/her locker and personal effects are permitted only when necessary for the protection of the property of the business and of the other employees, inside the workplace and during working hours. In so far as possible, searches should be carried out with maximum respect for the employee's dignity and privacy and in the presence of an employees' legal representative or, in his/her absence from the workplace, another employee.

No such rights have been implied into the common law contract of employment. However, in relation to privacy and sexual harassment, some protection exists by statute. Additionally, a right to consideration of one's dignity is obviously akin to the 'right' derived from the implied duty of the employer to be good and considerate to the employee. Lack of consideration for the employee's dignity was, in fact, the very matter which Arnold J found to be a breach of the implied duty in *Courtaulds v Andrews*,[33] one of the early instances in which the duty was formulated. The early British cases establishing this duty were concerned with the right to compensation under unfair dismissal legislation. However, the later case of *Bliss v S.E. London Health Authority* [34] upheld the existence of the duty in a purely common law claim.

The Right to Punctual Payment of the Agreed Wage

The right in Articulo 4.2(f) is elaborated in Artículos 26 to 33.

Artículo 26: Salario — Salary.

> 1. Salary means the total of the economic entitlements of employees, in money or in kind, for the professional[35] provision of services on account of another, as compensation for regular work, whatever the form of remuneration, or the periods of rest allowed during employment. In no case may salary in kind exceed 30 per cent of the total salary entitlements of the employee.
> 2. Salary does not include the amounts received by the employee as indemnity or replacement for expenses incurred in the performance of his/her work, Social Security benefits and indemnities,[36] and indemnities relating to transfers, suspensions and dismissals.

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33 [1979] IRLR 84.

34 [1987] ICR 700.

35 'Profesional' or professional does not refer to the 'professions' in Australian parlance. Effectively, it refers to a job or an employment: here, the provision of services within the context of employment.

36 It sounds a little unnecessary to Australian ears to say that Social Security benefits are not *salary*, since we think of Social Security as 'the dole', which is paid when one is unemployed, and therefore by definition without a salary. However, the Spanish Social Security system is more complex, and to my mind, much more

3. The salary structure is to be determined through collective negotiation or, in its absence, the individual contract, and should include the base salary, whether time rate or piece rate, and where relevant, salary allowances fixed in relation to the personal circumstances of the employee, the work done or the situation and output of the business calculated according to the criteria agreed for that purpose. The fixed or non-fixed character of these allowances should also be agreed; those based on the job or the situation and output of the business will not be fixed unless agreed to the contrary.
4. All tax and social security obligations the responsibility of the employee will be satisfied by the employee, any agreement to the contrary being void.
5. Compensation and absorption will operate when the salaries actually paid in their entirety, on an annual basis, are more favourable to the employees than those fixed in the relevant normative or conventional order.

Artículo 27: Salario mínimo interprofesional: Minimum interprofessional salary.

1. The Government will fix, after consultation with the most representative trade unions and employer associations, the minimum interprofessional salary, taking into account:
   (a) the consumer price index
   (b) the national productivity average achieved
   (c) the increase in the participation of employment in the national income
   (d) the general economic situation.

   In addition there will be a six-monthly review in case of discrepancy in the forecasts of the price index referred to.

   This review will not affect the structure or amount of professional salaries when these, in their entirety and on an annual basis, are greater.
2. The amount of the minimum interprofessional salary is non-deductible.

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generous. It is beyond the reach of this work to go into detail on Spanish social security law, but briefly: employees fully covered by Social Security receive, on loss of their job, their pre-loss salary for two years. If at the end of that period they have not found other employment, they start to receive a standard payment equivalent to the dole in Australia. Where the benefit is the same as the previous salary, it makes more sense to stress that it is *not* salary. This two-tier system is available only to employees in jobs that are fully covered — where the employer is making regular payments into the system. Employees in the 'black economy' receive only the lesser dole-type payment from the moment of loss of the job.

Artículo 28: Igualdad de remuneración por razón de sexo: Equal pay regardless of sex.

> The employer is obliged to pay the same salary, both base salary and salary allowances, for the performance of work of equal value, without any discrimination on the grounds of sex.

Artículo 29: Liquidación y pago: Settlement and payment.

1. The settlement and payment of salary is to be made punctually and with documentation on the date and in the place agreed or in conformity with custom and usage. The period of time to which the payment of periodical remuneration refers must not exceed one month.
   The employee and, with his/her authorisation, his/her legal representatives, have the right to receive, in advance of the day set for payment, advance payment on account of work already performed.
   Documentation of salary is to be made by the delivery to the employee of an individual receipt indicating its payment. The salary receipt is to conform to the model approved by the Ministry of Employment and Social Security, unless another model has been established by collective agreement or in its absence by agreement between the business and the employees' representatives, having the proper clarity and indicating the different allowances of the employee and also the deductions legally made.
2. The right to salary by commission arises at the moment of performance and payment of the transaction, investment or sale in which the employee has been involved, and is to the settled and payed at the end of the year, in the absence of agreement to the contrary.
   The employee and his legal representatives may demand copies of the part of the books referring to such entitlements at any time.
3. In the event of a delay in payment of salary, the amount owing will attract interest at the rate of 10 per cent.
4. The employer may effect payment of the salary and of the Social Security benefits delegated to him/her in legal tender or by cheque or similar method of payment through credit organisations, notified or admitted to the committee of the business or the delegates of the workforce.

Artículo 30: Imposibilidad de la prestación: Impossibility of service.

> If the employee is unable to render services at any time the contract is in force because the employer fails to give him/her work as a result of difficulties of the employer and not of the employee, the employee will

> retain the right to his/her salary without deduction for amounts referrable to other work performed during that period.

Artículo 31 gives employees a right to two special bonuses each year — one at Christmas, and the other in a month set by collective agreement or agreement between the employer and the employee representatives — of an amount set by collective agreement. The collective agreement may establish that these bonuses may be on a pro rata basis in relation to the twelve-month period.

Artículo 32 establishes priority for salaries in the event of bankruptcy or winding up of the business. Salaries for the last 30 days work, up to an amount twice the minimum interprofessional salary, take absolute priority over all other credits.

Artículo 33 establishes a Salary Guarantee Fund from which the employee is entitled to be indemnified for salary unpaid following a bankruptcy or liquidation.

There is no doubt that an obligation on the employer to pay the wage agreed will be a term of any employment contract in which such obligation is not expressed. Remuneration is an inherent feature of the arrangement's being contractual, since without consideration moving from both parties there is no contract. The absence of any agreement for remuneration would be powerful evidence that there was not a contract — that there was no intention to create legal relations. However, if such intention can be deduced from other aspects of the negotiations, a promise to pay remuneration will be implied. And if there is a promise to pay, there must of necessity be an obligation to comply with the promise. It is not, however, clear whether that obligation extends to prompt payment; or, put another way, whether delayed payment will constitute a breach of the obligation. Nor is it clear whether failure to pay for a particular period, or to pay in full, constitutes a repudiatory breach, as witnessed by the House of Lords decision in *Rigby v Ferrodo*.[37] While common sense suggests that prompt payment is fundamental to a contract of this nature, the absence of any clear statement to that effect must throw some doubt on the common sense interpretation.

It is clear that a failure by the employer to pay promptly and in full constitutes breach of an award covering the employment. As a result, it was believed until February of 1994 that such an obligation would be imported into any contracts covered by award. However the Full Federal Court decision in *Byrne and Frew v*

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37 [1988] ICR 29, 33 Lord Oliver: 'It is common ground that the unilateral imposition by an employer of a reduction in the agreed remuneration of an employee constitutes a fundamental and repudiatory breach of the contract of employment.' However, such unilateral variation amounts to a persistent breach of the term as to wages, and the case is therefore not necessarily authority for the proposition that a single failure to pay, or a single underpayment is repudiatory.

Australian Airlines,[38] subsequently upheld by the High Court,[39] rejected the previous position as being a misinterpretation of earlier High Court decisions such as *Amalgamated Collieries of W.A. Ltd v True*[40] and *Mallinson v Scottish Australian Investment Co Ltd*.[41]

In relation to the specific requirements of Artículos 26 to 33, the following points of comparison and contrast can be made: first, the provision of Artículo 26.1 allowing payment in kind of up to a third of salary, while more restrictive than the common law position which would allow the entire remuneration to be provided in specie, is in apparent direct contrast with the statutory provisions in most Australian states[42] that the whole salary must be paid in money (in currency, or by cheque or electronic transfer). The contrast is apparent only because — at least at the upper levels of employment in Australia — it is common for employees to be remunerated by salary 'packages', including benefits such as use of a car, and the payment on the employees' account of personal expenses.

The provision in Artículo 26.3, for determination of the salary by collective agreement or contract, and that in Artículo 27 for the establishment by the Government of a Minimum Interprofessional Salary, taken together, have no purely contractual equivalent in Australia, but have similarities to the situation produced by the interaction of contracts, awards and over-award payments. The equivalent of the Salario Mínimo Interprofesional was the 'National Wage'. This was not, however, decreed by the Government.[43] It was in fact the salary set each year by the Australian Industrial Relations Commission in an arbitration to vary the wages in the leading award — the Metal Trades Award. This arbitration took place after intensive argument before the tribunal by the peak trade union body, the Australian Council of Trade Unions, and the peak employer bodies. In arriving at its decision in the arbitration, the tribunal had regard to the various matters set out in paras (a) to (d) of Artículo 27.1. Following the decision for variation of the Metal Trades Awards, the tribunal proceeded to vary, of its own motion, all other federal awards by increasing the wages contained in them by the same amount as the increase in the Metal Trades Award. Customarily, the industrial tribunals of the states then

38 (1993) 47 FCR 300.

39 (1995) 185 CLR 410.

40 (1938) 59 CLR 417.

41 (1920) 28 CLR 66.

42 *Industrial Relations Act 1996* (NSW) s 117; *Industrial Relations Act 1999* (Qld) s 393; *Industrial and Employee Relations Act 1994* (SA) s 68(2); *Industrial Relations Act 1984* (Tas) s 51(3) and (4); *Minimum Conditions of Employment Act 1993* (WA) ss 17B and 17C. The limitation on payment in kind in South Australia and Tasmania applies only to wages fixed by awards or enterprise agreements.

43 The specific limitations on Commonwealth legislative power, particularly in ss 51(ii), (xx) and (xxxv) of the Constitution, made across-the-board legislation of a minimum wage impossible at a national level.

varied their own awards by the same amount. Theoretically, this increase in the 'national' wage benefited only those employees covered by awards, but employers traditionally passed on the annual salary increment to all their employees, whether covered by awards or not.

The system introduced by the *Workplace Relations Act 1996* (Cth) aims to reduce the function of awards to that of a minimum 'safety net', underlying individual 'workplace agreements' and certified agreements — where these have been negotiated. The Australian Council of Trade Unions now argues for an annual increase in the minimum 'safety net' wage. However, while an increase in the minimum wage in one safety-net award would flow through to the others, it would not affect employees covered by certified agreements or the individual AWAs.

It is possible for employers and employees in Australia to contract for whatever wage they wish, whether above or below that set in a safety-net award or certified agreement.[44] Where there is a state award or a federal safety-net award undisplaced by a certified agreement or an AWA covering the employment, the wage in that award is the minimum legally payable. If the contract wage is less than the award wage, the employee may still take action in the industrial tribunals to recover the award wage. If the contract wage is higher than the award wage, the employee may take action on the contract in the civil courts to enforce payment of the contract wage.

Whilst there has not been to this stage any 'official' system of collective agreements in Australia, similar to that provided by the *Estatuto de los Trabajadores*, it has been common practice over the years for trade unions to negotiate outside the award system with particular employers. Thus, in an area of employment covered by an award, a trade union could reach an agreement with one or more of the employers party to the award for the provision to the employees of said employer(s) of benefits and conditions in excess of those in the award. In the matter of wages, these were referred to as 'over-award payments'. The extent to which such over-award benefits were contractually enforceable by the employees depended on whether the union negotiated as agents for the employees — thus producing a variation of the contract of employment of the employees who were its members. Traditionally, however, agreements for over-award conditions have been 'enforced' against employers who 'went back' on their bargain by traditional trade union methods — by industrial action. The provision for union–employer certified agreements in individual workplaces, over-riding the award, provides a more solid and secure foundation for such negotiation of above-award terms.

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[44] Where there is an AWA, employees contract on the basis of the terms of that agreement.

There is no common law principle equivalent to the provision of Artículo 27.2 that the proportion of contract salary conforming to the Salario Mínimo Interprofesional is protected against deductions. The contract of employment *may* authorise the employer to make deductions for any one of an infinite variety of purposes. Additionally, an award or certified agreement could authorise deductions — providing they related to the 20 allowable award matters.[45] Where there is no award or certified agreement covering the employment, deductions (other than those for PAYE income tax and for superannuation contributions) are prohibited by sections in the industrial relations legislation of the various states and territories.[46] For completeness, it should be noted here that it is possible to have a court order directing a 'deduction' in the sense of an allocation at source. This is known as a 'garnishee order'. The most common situation in which garnishee orders are made is where a man has failed to comply with maintenance orders in respect of a dependent wife and/or dependent children. Courts are empowered to make a garnishee order which requires the employer to deduct an amount equal to the periodic maintenance payments from the man's salary and pay the sum directly to the dependants. Similar deductions are authorised in Spain by Art. 1.451 of the *Ley de Enjuiciamiento Civil* (Law of Civil Proceedings).

Artículo 28 gives a statutory right to equal pay for work of equal value regardless of sex. There is no such right to be derived from the implied obligations of the common law contract, nor is there a direct and universal statutory right. The *Workplace Relations Act 1996* (Cth) provides a mechanism whereby the Australian Industrial Relations Commission *may*, if it considers it *appropriate*, on application, make an order for equal pay in relation to the particular claimants (s 170BC). Standing to apply for an equal pay order is limited to a trade union whose rules entitle it to represent the industrial interests of the employees to be covered by the order, and the Sex Discrimination Commissioner (s 170BD). However, by s 170BE the Commission may not consider an application for an equal pay order if it is satisfied that there is available to the applicant or to the employees represented an adequate alternative remedy via a law of the Commonwealth or of a State or Territory. Employees covered by State awards would have the possibility of seeking the inclusion of equal pay provisions in such awards. Additionally, the anti-discrimination legislation of both the Commonwealth and the States could entitle individual employees (or a group) to allege discrimination on the grounds of sex where they did not receive equal pay, and the tribunals could order an increase.[47] Despite these various statutes, the fact remains that in Australia, as in Spain, the

45 *Workplace Relations Act 1996* (Cth) s 89A (2). It is difficult to see how any of these matters would in practice involve deductions.

46 *Industrial Relations Act 1996* (NSW) s 118; *Industrial Relations Act 1999* (Qld) 391; *Industrial and Employee Relations Act 1994* (SA) s 68(3); *Minimum Conditions of Employment Act 1993* (WA) s 17D.

47 See above n 3.

requirements of equal pay — to the extent they exist — are honoured in the breach rather than in the observance.

State industrial relations legislation requires punctual payment of agreed wages, with documentation, as do federal awards and certified agreements. The maximum period to which payment can relate under state legislation is, however, two weeks and not a month, as in Artículo 29.1. There is no Australian equivalent of the right in Artículo 29.1 to an advance of salary in relation to work performed. Nor is there any general provision in relation to payment of commission. Such would be governed, if at all, by express terms of the individual contracts. There is no general provision for payment of interest on delayed salary. Where it is necessary to take action on the contract to achieve payment of salary, the court order may include a direction for interest, the rate set by the Rules of the court in question. In Australia, as in Spain under Artículo 29.4, salary may be paid in currency, cheque or credit to a financial institution to which such transfer is to be made.[48] However, this provision comes from statute and not from any implied obligation in the contract of employment.

In Australia, the law as to the provision of wages in the absence of work is largely as provided by Artículo 30: where the employer fails to provide the employee with work, they must still provide the wage. The contractual obligation is 'to employ' until the contract is lawfully terminated. As seen previously, there is no obligation to provide work (except in the three categories of exception) but the wage must be provided. The employee is required to work 'when work is provided'. In this respect, however, it is necessary to refer to the position in *Automatic Fire Sprinklers Pty Ltd v Watson*.[49] In that case, the employer purported to dismiss the employee. The dismissal was wrongful, in that the notice was short of that contractually required. The contract required three months' notice of termination, and the notice given was one day short. However, improper notice is 'no notice', and the dismissal was therefore effectively summary, and since there was no conduct of the employee justifying summary dismissal, the employer was in repudiatory breach of contract. It is basic contractual doctrine that a repudiatory breach gives the innocent party an election to rescind the contract, or to waive the repudiation and keep the contract on foot. The employee chose not to rescind, but instead continued to attend at the employer's premises. After some years, the employee brought an action claiming the wage for those years. The High Court held that this was not possible — that while the employee's election had kept the contract on foot, the relationship had been ended by the breach and the employee's only remedy was in damages for the failure to give proper notice. The amount of such damages was merely the equivalent of wages for the notice period of three months. Thus, the court held that, while the employee was entitled to wages even if work was not provided while the

48 See above n 42.

49 (1946) 72 CLR 435.

employer *affirmed* the contract, the right to wages was lost once the employer *rejected* the contract.

This ruling cannot be fully sustained today however. It was based on the prevailing belief that specific remedies in equity — an order for specific performance of the contract or an injunction restraining a proposed breach — were not available in the case of contracts of employment. That position has been strongly rejected in recent years, the courts confirming that they have jurisdiction to grant specific remedies in such cases even though, in the exercise of their discretion (since equitable remedies are always discretionary) they may decide to refuse them. Perhaps the strongest example of that affirmation is to be found in the judgment of Gray J in *Bostik Australia Pty Ltd v Gorgevsk (No.1)*.[50] Also, there have been cases in Britain (for example, *Powell v Brent London Borough Council*[51]) and Australia (*Reilly v State of Victoria*[52]) where specific remedies have been granted. Of course, it will rarely be possible for an employee to seek a specific remedy, for that avenue will be cut off once the employee has accepted the breach, and the commencement or even search for alternative employment will be treated as acceptance. But where, as in *Automatic Fire Sprinklers*, the employee clearly has not accepted the breach, there is no barrier to seeking a specific remedy. It was the supposed unavailability of specific remedies that had led the High Court to say that the relationship was ended by the wrongful dismissal. The modern position on specific remedies means that the High Court's argument against a continuing right to wages is no longer completely sound. Contractually, that right will be ended only by the employee's acceptance of the breach or by the employer subsequently giving proper notice. However, although the reasoning is no longer sound, the decision would be the same today. Where an employee does not accept the repudiation in a situation of unfair dismissal, they must move very quickly to claim the specific remedy. Delay in seeking it — laches — will be likely to cause the court to decide, in its discretion, to refuse it. A delay of years, as in *Automatic Fire Sprinklers*, would certainly do so. The employee in such a position should move immediately to seek an interlocutory injunction. If a speedy application for a specific remedy is successful, then the employee would be entitled to the wages that would have been paid between the exclusion from the job and the eventual court order. As noted above, this issue relates to the situation where the employer purports to reject the contract. Where the failure or inability to provide work is not in the context of such rejection, Australian law is, except in one respect, equivalent to that in Artículo 30.

The circumstance of difference is that, where the employment is covered by an award, in circumstances where the employer is unable to provide work to an employee because of industrial action by other employees, the employer may apply

50 (1992) 36 FCR 20.
51 [1988] ICR 176.
52 (1991) 34 AILR 133.

to the industrial tribunals for a 'stand down' order, which will entitle the employer to stand the employee down without pay until it is again possible to provide the work. Such 'stand down orders' are included in the twenty allowable award matters under s 89A(2)(o) of the *Workplace Relations Act 1996* (Cth).

There has existed in Australia a curious partial equivalent to Artículo 31. For a considerable period of time, it had been the custom to insert in awards the requirement of a holiday 'loading' of 17.5 per cent on the salary paid for the period of annual leave (state legislation[53] requiring that employees receive four weeks' paid leave per year). While this loading was enforceable only in the case of employees covered by those awards, it became the practice for employers to pay the 17.5 per cent loading to all employees. The loading was traditionally included in the last payment of wages prior to Christmas, even though the annual holidays may be taken at any time throughout the year. As certified agreements and individual Workplace Agreements become more common, it is not unlikely that the practice of 'voluntarily' paying the loading to all employees will disappear.

The requirements of Australian law in relation to the matter covered in Artículo 32 — employee rights in the event of winding up or bankruptcy — are to be found in companies legislation[54] and in Commonwealth bankruptcy legislation.[55] Effectively, employees' rights to salary and salary-related payments come after the costs of the winding up or administration (which includes amounts owing in tax) and the secured creditors. After salaries come employee rights to Workers' Compensation payments and damages for work-related injuries. In the last decade, there have been a number of well-publicised instances of company failures where the costs of the winding-up and the amount owing to secured creditors left nothing available to meet outstanding employee entitlements. There is, at the date of writing, no effective Australian equivalent to the Fondo de Garantía Salarial. The Commonwealth has introduced the Employee Entitlements Support Scheme[56] aimed at the creation of a 'fund' jointly financed by itself and the states (and thus ultimately by the taxpayer). This fund would safeguard entitlements up to a (fairly unsatisfactory) maximum amount of $20,000 per employee. However, the Labor states have refused to join in the scheme, arguing that the cost of such a fund should come not from the taxpayer but from employers. Apart from genuine instances of company failure, there have been a number of cases where retrenchments or 'downsizing' have been accompanied by the use of interlocking company structures

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53 *Annual Leave Act 1973* (ACT) ss 5–6; *Annual Leave Act 1981* (NT) s 6; *Annual Holidays Act 1944* (NSW) s 3; *Industrial Relations Act 1999* (QLD) ss 11–14; *Industrial and Employee Relations Act 1994* (SA) s 71 and Sched 4; *Minimum Conditions of Employment Act 1993* (WA) Part 4.

54 *Corporations Act 2001* (Cth) s 556.

55 *Bankruptcy Act 1966* (Cth) s 109.

56 On 1 January 2000.

to move assets from the 'employing' company to related corporate entities in order to avoid the obligation to pay employee entitlements.

The Right to Individual Action on the Contract

Obviously such a right exists at common law — individual actions for breach of contract being the essential process that turns obligations of one party into quasi-rights of the other. This is summed up in the old maxim 'No right without a remedy'. The common law is inherently remedial — even, it might be said, procedural. It is reactive rather than proactive.

The *Estatuto de Los Trabajadores* gives, or acknowledges, remedies as well as rights. The right mentioned in Artículo 4.1(g) is taken up in Artículo 2 of the Real Decreto 521/1990 approving the *Ley de Procedimiento Laboral*:

> The social tribunals have authority over matters in dispute:
> (a) between employers and employees as a result of employment contracts...[57]

Rights Specifically Provided by the Contract

There is little point in comment on the residual right to whatever else is specifically provided by the employment contract. We may note however that there are two obligations implicitly owed to an employee under the common law contract, and thus two quasi-rights of the employee, that have no equivalent in Artículo 4.2. The first is the employer's obligation to terminate the contract lawfully, which involves the rule as to notice. Lawful termination in contracts of fixed duration has three possible forms: first, termination summarily in the event of a repudiatory breach by the employee; second, termination by the expiration of the fixed period; third, automatic termination by operation of law where a frustrating event occurs. Lawful termination in contracts of indefinite duration also has three possible forms: first, summary termination for repudiatory breach; second, termination by the expiry of a 'proper' period of notice, which will be the period expressly stated or, where nothing is expressly stated, a period determined as 'reasonable' in the circumstances of the particular case; third, automatic termination by the occurrence of a frustrating event. The *Estatuto de los Trabajadores* deals with these matters elsewhere — in Artículos 49 to 55.

The second implied obligation without equivalent in Artículo 4.2 is the obligation of the employer to indemnify the employee for expenses incurred on the employer's behalf and for losses suffered as a result of performance of the job.[58]

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[57] In our terminology, 'social tribunals' would translate as 'civil courts' — not a phrase that can be usefully employed in a 'civil law' country.

CONCLUSION

The foregoing survey demonstrates that the rights ensured to employees, *qua* employees, in Australia are substantially less extensive than those ensured to Spanish employees. There are a number of factors that are possibly responsible for Australia's poor showing. One, I believe, is a basic, structural factor. Common law countries have an inherently 'ad hoc' approach to the creation of legal rights. In relation to matters associated with contract, as is employment, those rights are more procedural than substantive. They amount to the availability of a *remedy* against a failure by the other contracting party to comply with their obligations. Out of this 'ad hoc-ery' comes a certain suspicion of codes — both of rights and of obligations. To the extent that statutes are used to flesh out the obligations of contracts of whatever type, the statutes also tend to be limited and 'ad hoc' in scope. The civil law countries proceed by the creation of substantial organic codes — of rights and obligations. These can of course be regressive as well as progressive. Thus, dramatic political changes[59] in civil law countries can result in a far more dramatic upheaval in the *topography* of rights. The common law on the other hand proceeds by stealth and slowly. Advances are initially unremarkable. Retreats can go largely unremarked also. It is very difficult to imagine a common law country passing legislation such as the *Estatuto de los Trabajadores*. It is too bold, too definitive — too brave.

The 'rights' guaranteed in the past by awards (and now to varying extent by certified agreements) are *procedural* rather than basic, in that they derive from the processes of the arbitration system and negotiation. They are dependent on being awarded, or agreed to, in the particular circumstances of the dispute or negotiation. They are not universal — guaranteed to all employees throughout the country; they are particular to the groups in dispute or negotiation. And they are transitory rather than permanent. They endure for the stated life of the award or agreement and thereafter until a new dispute or negotiation, amongst the parties to the award,

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58 *Burrows v Rhodes* [1899] 1 QB 816; *Puppazoni Fremantle Fishermen's Co-op Society Ltd* (1981) 23 No. 5 AILR 168; *Kelly v Alford* [1988] 1 Qd R 404.

59 By 'dramatic political change', I do not mean merely the election of a conservative government in place of a labor or socialist government, or vice versa. I mean far more serious changes — like that from an elected government to government by military junta or vice versa. It is worthy of note that the change from the socialist PSOE government to the conservative PP government in Spain in 1996 resulted in no substantial changes to the system of rights set up by the *Estatuto de los Trabajadores*. In fact, subsequent legislation continued to expand, progressively, the application of those rights. See for example *Ley 29/1999*, 16 de julio (re employees of labour hire agencies). Comparison of that outcome to the situation in Australia, with the *Industrial Relations Act 1988* replaced by the *Workplace Relations 1996*, points up the distinction.

results in a new procedural, particular, transitory solution. The Spanish system provides for collective agreements in settlement of disputes or as a result of negotiation, but the provisions of those agreements must be *in addition to*, and not in diminution of, the basic, fundamental, guaranteed and continuing rights laid down in the *Estatuto de los Trabajadores*.