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## **THE PARALLEL INTELLECTUAL UNIVERSES OF JUSTICE HEYDON AND KEITH WINDSCHUTTLE: A MEETING OF MINDS?**

### ABSTRACT

This article examines two recent publications that have struck a deep chord in the intellectual life of Australia. Rarely could it be the case that the almost simultaneous publication of a legal and then an historical tract has led to such a strong debate about the nature of the disciplines of law and history. In his widely reproduced article on judicial activism Justice Heydon gave an intellectual fillip to legal positivism by arguing that a neutral and autonomous concept of law was a precondition for the operation of the rule of law. Keith Windschuttle's history of frontier conflict between whites and Aborigines in colonial Tasmania became an overnight publishing sensation and a reaffirmation of the positivist precept that an historian was a neutral looking glass whose craft was based on historical facts that were separate from the political and philosophical presuppositions of the observer. This article lowers the disciplinary drawbridge between law and history by challenging the methodological framework of Justice Heydon and Keith Windschuttle. It argues that Justice Heydon and Keith Windschuttle are kindred spirits joined at the intellectual hip by a method that espouses impartiality, but in practice operates to produce judicial decisions and historical judgments that are a condensation of a particular brand of politics and philosophy. In sum, these two thinkers have only ideological illusions to offer in the fields of law and history.

### INTRODUCTION

Summer in Australia is not a time of the year that one associates with an efflorescence of public intellectual life. Yet the intellectual ennui of summertime Australia was broken in late 2002 and early 2003 by the release of two extraordinary publications. Within a short space of time Keith Windschuttle released his striking and important revisionist account of white and Aboriginal relations in colonial Tasmania,<sup>1</sup> while Justice Heydon, recently appointed to the High Court, published a provocative critique of judicial activism

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<sup>1</sup> Keith Windschuttle, *The Fabrication of Aboriginal History, Volume One, Van Diemen's Land, 1803-1847* (2002).

that equated it with the demise of the rule of law.<sup>2</sup> Both of these publications had an important impact on the intellectual landscape and the themes they explored have set the agenda for historical and legal debates within Australia.

Prior to the publication of his book Windschuttle had spent the bulk of his working life as a relatively obscure academic. His book turned him into a national figure. Windschuttle shed a controversial light on the early life of colonial Australia, his exploration of the extent and degree of frontier conflict between whites and Aborigines becoming a contested historical issue. In the course of the research for his book, Windschuttle examined primary sources that other historians had previously mined. These historians had trawled through archives and concluded that settler massacres were the keynote of early colonial Australia. Instead of endorsing the conventional wisdom that settler violence had been the guiding principle of early colonial Australia, Windschuttle claimed politically motivated historians of the left had fabricated a history of frontier conflict. Windschuttle distinguished himself from the alleged fabricators by claiming that his historical work was motivated by a desire to pursue truth on the basis of an apolitical examination of facts.

Before the publication of his critique of judicial activism Justice Heydon had scrupulously avoided the legal limelight. A spell as a legal academic and barrister was followed by appointment to the NSW Supreme Court. In both his academic and legal life Justice Heydon never courted controversy and maintained a low public profile. The publication of his article changed all that and the fallout is still resonating in the Australian legal world.<sup>3</sup> In a nutshell, Justice Heydon's article blended vocal support for the dominant judicial methodology with a vitriolic attack on judges who eschewed mainstream jurisprudence. Justice Heydon proffered a ringing declaration for judicial reasoning to entail the strict application of neutral rules to facts. He vigorously advanced the view that law was an autonomous sphere of legal rules and apolitical legalism was a necessary component of the rule of law.

At first blush these two thinkers and their respective publications appear poles apart. It simply appears that it was an accident of history that they both became prominent public intellectuals at the same time. Moreover, the roles of judge and historian appear diametrically opposed. But this article will argue that these two influential thinkers inhabit parallel intellectual universes and that an examination of

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<sup>2</sup> Justice Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 47 *Quadrant* 9; (2003) 23 *Australian Bar Review* 110; (2003) 14 *Australian Intellectual Property Journal* 78; (2004) 10 *Otago Law Review* 493.

<sup>3</sup> For an example of the impact of Justice Heydon's article see Allan C Hutchinson, 'Heydon Seek: Looking For Law In All The Wrong Places' (2003) 29 *Monash University Law Review* 85. For a commentary on Hutchinson's article see John Gava, 'Unconvincing And Perplexing: Hutchinson And Stapleton On Judging' (2007) 26 *The University of Queensland Law Journal* 67.

their publications highlights a meeting of minds that is based on a shared theory of knowledge.

The article opens with an exploration of the shared empiricism or positivism which seals the intellectual kinship of Windschuttle and Justice Heydon. This shared theoretical relationship is the overarching theme of the article. Following an exploration of the close theoretical connection between these two thinkers, the article examines Justice Heydon's treatment of the rule of law.

Justice Heydon avers the rule of law is based on judicial fidelity to existing legal rules. For Justice Heydon a system of fixed legal rules, in effect, binds the judiciary and government to a concordat that circumscribes the capacity of the state to arbitrarily inhibit the rights and liberties of individual citizens. Justice Heydon declares that judges guided solely by legal rules are a bulwark protecting individual liberty against arbitrary power. The law achieves legal equality by treating everyone the same and applying identical rules to all citizens. In sum, Justice Heydon argues that legal positivism is the bedrock of the rule of law. According to Justice Heydon, judges become social crusaders when a rule book conception of the rule of law is jettisoned and discretionary lawmaking prevails.<sup>4</sup> The legal rules protect the individual citizen from the arbitrary exercise of state power and from wayward judges seeking to implement a social agenda.

In the next part of the article I will examine Windschuttle's account of the rule of law. For Windschuttle the rule of law was part and parcel of settler colonisation of Australia. Fidelity to this principle prevented settlers engaging in large-scale killings of Aborigines. Windschuttle claims the rule of law was part of the democratic cultural baggage unloaded in Botany Bay and that by the time of the colonisation of Australia, it was an eternal principle and a beacon guiding *Pax Britannica*. Windschuttle and Justice Heydon emphasise different aspects of the role of the rule of law, but I will argue that they converge at the point where they push outside of conscious attention the role of a historically defined social setting as the mainspring of the rule of law. This article will canvass the view that Windschuttle and Justice Heydon have a depersonalised and mechanical approach to social phenomena and that this is exhibited by them focusing on abstract entities such as legal rules or British civilisation as the motor force of the rule of law. I argue that it is their shared positivism that is responsible for the abstract formalism that infuses their conceptual analysis of the rule of law.

In the final part of the essay, Justice Heydon's legal reasoning will be examined by reference to his ruling in an important labour law case *Electrolux Home Products Pty Ltd v Australian Workers' Union*,<sup>5</sup> where he deployed a positivist approach to statutory construction. In this decision Justice Heydon's legal conceptualisation of

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<sup>4</sup> Heydon, above n 2, 10.

<sup>5</sup> (2004) 221 CLR 309.

the issues was predicated on strict adherence to statutory language. Quite simply, I argue that his legal positivism underpinned his legal reasoning in this case. I offer the view that the focus on a narrow and technical construction of words in deciding the issues in this case resulted in a form of abstract empiricism that avoided dealing with the underlying historical forces that were the genesis of the statute. In brief, I will argue that it was Justice Heydon's philosophy of law, and not the application of the literal approach to statutory interpretation, that governed his judicial decision-making in this labour law case. In examining Justice Heydon's judicial method in this case my argument will come full circle. I will argue that his legal analysis in this labour law case crystallises how every component part of his intellectual life is underpinned by a positivistic theory.

The essay will illustrate how theoretical assumptions are not excluded from the work of these two thinkers, but are merely hidden below the surface. A key aim of this paper is to highlight that law is frozen history. In that sense, linking Windschuttle and Justice Heydon together is far more than an academic exercise. Every judge, whether he or she consciously recognises it or not, operates with not only a philosophy of law but also a philosophy of history. Learning how laws are the concentrated expression of political and historical forces focuses attention on the issue of how all judges are 'activists' in the sense that their judgments embody political and sociological indicia.

## I THE POSITIVIST TIES THAT BIND

Empiricism or positivism is the intellectual stock-in-trade of Windschuttle. He is a contemporary version of Leopold von Ranke, the nineteenth century German historian.<sup>6</sup> For both Ranke and Windschuttle the accumulation of facts is the cornerstone of the historian's craft. Any deviation from empirical evidence is a recipe for the abandonment of objectivity and a guarantee of a break with ideological neutrality. Facts gleaned from primary sources are sacrosanct and considered completely independent of the observer.<sup>7</sup> In *The Fabrication of Aboriginal History* Windschuttle states that it is the 'traditional role of the historian to stand outside contemporary society in order to seek the truth about the past ...'<sup>8</sup> This sentiment encapsulates the essence of positivist philosophy for it posits facts existing objectively and independently of the interpretation of the historian. It implies that an innocent reading of historical facts is possible and removes from consideration the reality that every interpretation of empirical evidence embodies theoretical and political presuppositions.

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<sup>6</sup> See eg, Leopold von Ranke, *The Theory and Practice of History* (1973). For an understanding of Windschuttle's debt to Ranke see Keith Windschuttle, *The Killing of History* (1994).

<sup>7</sup> Edward Hallett Carr, *What is History* (1974) 9.

<sup>8</sup> Windschuttle, above n 1, 402.

Windschuttle perpetuates the positivist view that there is a gulf between facts and interpretation. His historiography excludes consideration of the conceptual structure that he brings to bear when investigating a field of history. He is oblivious of the assumptions he holds about the nature of Australian society being a component part of his treatment of facts, and about the facts themselves being a product of a social order. An historian can never be a neutral looking glass and thus the pursuit of impartiality or ideological neutrality is a mirage. In either a conscious or unconscious manner the historian adopts concepts and theories that are a product of his or her location in the social structure. The social structure largely conditions the historian's culture, consciousness and brand of philosophy of history.

In Windschuttle's case his theoretical and political presuppositions are a product of a long line of thinkers who challenged medieval ideas and established empiricist philosophy as an integral part of capitalist society.<sup>9</sup> His theoretical assumptions have a causal relationship with the triumph of the bourgeois epoch and the major philosophers who pioneered empiricism.

The critique of Windschuttle's positivist methodology applies with equal force to its parallel legal model. Justice Heydon provides an object lesson of what constitutes a positivist judge by building his critique of judicial activism on the premise that law is an autonomous sphere of rules that develops according to its own internal logic.

Legal positivism exhibits an unshakeable attachment to the view that facts exist objectively and independently of the interpretation of a judge. The judicial method of a positivist judge is premised on an innocent reading of facts that excludes any link with theories or politics. The legal rules and facts are considered as atomistic entities completely independent of the judge. Operating within a misguided conceptual and theoretical framework the positivist judge is blind to the social substance that underpins legal rules.

The decontextualisation of legal rules is amplified by a myopic determination to treat the issues and facts of any dispute in a one-dimensional manner. Issues and facts are carefully filleted in order to be treated independently of any connection to the social structure. For example, in a labour contract the parties are treated as equals and the positivist judge applies this tenet free of qualms, but in reality the contract is underpinned by the sovereign property rights of the owner of capital. The existence of the managerial prerogatives doctrine in labour law supplements the property rights of employers and undermines any benefit conferred by juridic equality. By failing to incorporate within their judicial process the necessity to delve below the surface of society, the positivist judge fosters an artificial separation between legal rules and the social forces that shape the course of

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<sup>9</sup> Leszek Kolakowski, *Positivist Philosophy* (1972) ch 4. Bacon, Comte, Locke and Mill spearheaded the rise of positivism.

doctrinal categories. By circumscribing the content of their judicial reasoning positivist judges ensure that the legal rules applied to conflicting claims have an abstract aspect that is a corollary of the failure to engage with the full range of contradictions that enmesh contending parties.

The upshot is that the legal rule applied to settle conflicting claims often proves unsatisfying as it produces distorted judgments or at best partial solutions. By evading the substratum of social, economic and political forces that trigger conflicting claims requiring adjudication, positivist judges may at first blush appear to fashion a coherent discourse. However, it is one punctuated with juridical illusions. It is a judicial process that hides key sources of conflict and contradictions. And by suppressing the deep-seated forces that produce conflict and social contradictions, positivist judges become open to the charge that they are conceptual ideologists who act as the guardians of a social system. In concealing from view the full extent of issues, contradictions and social facts that naturally arise in disputes, positivist judges hide the true nature of conflicting claims and in effect affirm and legitimise the social order.

Legal positivism further obscures social reality by concealing from view the theoretical assumptions that guide the judge when interpreting the legal rule and facts of a case. Every judge operates with a philosophy of law that influences both the selection of facts and the values inserted in the course of his or her interpretive technique. The positivist judge operates as if it were possible to exclude his or her theoretical and political presuppositions. In fact, these theoretical and political assumptions are merely buried below the surface. From this subterranean point an unexpressed political ideology flourishes, allowing law to play a major role in allocating political power. A judge may wear with pride the badge of robust individualism and insulation from social influences. The conceptual framework of apolitical legalism is, after all, underpinned by the credo of methodological individualism, a term that conceives a judge as existing outside of any particular set of social relations. But the fallacy of methodological individualism is apparent from even a superficial analysis of the countless ways that the individual consciousness of a judge is wired by the web of social and economic relations he or she inhabits.

The positivist judge is not a transhistorical and politically neutral agent separated by a Chinese wall from the impact of social and economic relationships. Clausewitz wisely observed that war was nothing more than the continuation of politics by other means.<sup>10</sup> Just as below the surface war has a political dimension law at root is a concentrated expression of politics.

In the medieval world natural law was the dominant jurisprudence. Natural law projected an image of divine inspiration whilst in practice it was complicit in the consolidation of the feudal power structure. Legal positivism, in supplanting natural

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<sup>10</sup> Carl von Clausewitz, *On War* (1982) 119 [trans of: *Vom Kriege* 1832].

law, eschewed religious dogma as the source of law and instead provided a secular legal template that served the property and class interests of an insurgent merchant bourgeoisie.<sup>11</sup>

The hub of my argument in this section of the paper is that neither Windschuttle nor Justice Heydon is capable of an innocent reading of texts. Every text they encounter in their respective fields of study is filtered through their particular theoretical presuppositions. In a nutshell, Windschuttle and Justice Heydon bring to bear the conceptual structure of positivism to any examination of empirical data and this strongly conditions their interpretation of legal and historical facts. Bearing this in mind, it is illogical to claim that legal positivism upholds the rule of law and advances democracy solely by virtue of its objective vetting of facts and consequent inherent ideological neutrality. There is nothing democratic about legal positivism. As the following sections of this article highlight, democratic positivism was not involved in the genesis of the rule of law and has not underpinned its evolution.

## II THE POLITICS OF JUSTICE HEYDON'S CONCEPT OF THE RULE OF LAW

The premise of Justice Heydon's article is that the rule of law is a component part of an objective and apolitical legal system. For Justice Heydon, law has a fixed and unchanging form. What appears in the books has what Justice Heydon terms an 'objective existence'.<sup>12</sup> Law is an objective and autonomous thing that is encompassed in rules that are physically recorded in books.

Dworkin in his stinging and incisive critique of legal positivism scrutinises the type of judge who approaches the judicial task with an invincible belief that adjudication involves solely what is found in law reports and statutes.<sup>13</sup> Dworkin's account of the bearers of what he terms a 'plain fact' view of the judicial function fits Justice Heydon like a glove.<sup>14</sup> Dworkin, by excoriating the positivist article of faith that law is merely rules, directs attention to the extra-legal factors that are incorporated into the judicial task. Dworkin's liberal legalism with its focus on promoting unfettered individualism as the keystone of law is misguided, but his expansive analysis of law exposes the glaring limits of Justice Heydon's jurisprudential model.<sup>15</sup>

An holistic view of what constitutes law is the polar opposite of Justice Heydon's positivist jurisprudence. Justice Heydon avers that law is separate or autonomous from the consciousness and beliefs of the judge.<sup>16</sup> In the austere positivist

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<sup>11</sup> Michael Freeman, *Lloyd's Introduction to Jurisprudence* (7<sup>th</sup> ed, 2001) 89; Raymond Wacks, *Understanding Jurisprudence* (2005) 55.

<sup>12</sup> Heydon, above n 2, 10.

<sup>13</sup> Ronald Dworkin, *Law's Empire* (1991) 7.

<sup>14</sup> *Ibid.*

<sup>15</sup> Wacks, above n 11, 130. Wacks provides examples of Dworkin's liberal legalism.

<sup>16</sup> Heydon, above n 2, 10.

intellectual landscape inhabited by Justice Heydon there is no scope for justifying doctrinal propositions according to any posited social propositions that encompass policy, politics, philosophy or even life experience. For Justice Heydon it is quite simply the case that for judges to uphold the rule of law they must exhibit strict fidelity to existing legal rules. Any departure from this schema will ensure the triumph of judicial activism.

Judicial activism will replace a law of neutral rules with what Justice Heydon terms a ‘political, moral or social programme’.<sup>17</sup> According to Justice Heydon, this programme will result in ‘the destruction of the rule of law’.<sup>18</sup> Judicial whims and political preferences will govern the adjudication process. Justice Heydon declaims the virtue of equality before the law. And this is a key feature of his vision of the rule of law.

Justice Heydon’s focal point in the *Quadrant* speech is the causal link between legal principles and the rule of law.<sup>19</sup> In pursuing this connection Justice Heydon ignores the political, social and historical context of the rule of law. This omission reinforces the technical approach to the rule of law that Justice Heydon so assiduously advocates. The essence of Justice Heydon’s thesis is that the rule of law is inextricably entwined with a strict adherence to a rule book conception of law.

At the outset of his article it is not obvious that Justice Heydon’s vision of the rule of law is shaped by conservative philosophy. For example, he eschews any mention of Hayek’s view of the rule of law. This is despite the fact that Hayek’s vision of the rule of law mirrors Justice Heydon’s.

In *The Road to Serfdom* Hayek, one of the most distinguished modern conservative thinkers, argues that the essence of the rule of law is a system of fixed legal rules that binds state officials and curbs their scope for arbitrary governance.<sup>20</sup> Hayek notes that the clearer the legal rules are, the narrower the scope for discretionary decisions which enhance the power of the state and undermine individual freedom.<sup>21</sup> For Hayek, legal doctrine is the cornerstone of the rule of law. Without legal rules individual freedom would wither and free market capitalism would be inconceivable.<sup>22</sup> Quite simply, Hayek perceives the legal rules as a vehicle facilitating the market individualism that is the hallmark of a society based on the sovereignty of private property. It is interesting that Hayek, one of the founding figures of neo-liberalism, forges a causal link between the rule of law and a free market economy; Hayek links a free market and economic individualism with the rule of law. Justice Heydon steers clear of formulating any such linkage. Unlike

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<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Friedrich von Hayek, *The Road to Serfdom* (1997) 54.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid 61.



Hayek, Justice Heydon avoids drawing any parallels between the juridical logic he espouses and support for a market society. But Justice Heydon's failure to identify consciously the theoretical framework that underpins his treatment of the rule of law is not of cardinal importance.

Justice Heydon may exclude the theoretical assumptions and practices implicit in his judicial methodology. He may remove from conscious attention his theoretical premises. The crucial factor is that his conceptual analysis of the rule of law, based upon the principles of legal positivism, has social and political ramifications.

The significance of Hayek's conception of the rule of law is that he boldly declares that a legal category has an economic basis. He eschews a transhistorical and purely textualist explanation for the rule of law. Within the highest ranks of modern conservatism a brilliant thinker has enunciated the causal link between legal doctrine and the rule of law, but progresses a step further than Justice Heydon by candidly delineating the economic basis of a key legal category. In the process, Hayek demolishes any claim of ideological neutrality for the juridical logic that governs Justice Heydon's vision of the rule of law.

Instead of being guided by an impartial and value-free logic, Justice Heydon's concept of the rule of law is in fact mediated by an ideological assumption. The rule of law is given a false autonomy from the economic and political base of society, and legal fetishism prevails. Justice Heydon posits a stale form of conservatism compared to the vibrant analytical framework within which Hayek's conservative approach to the rule of law is expounded.

Hayek's formulation of the synergies between legal positivism and market relations opens a nest of termites for a judge bent on promoting law as an autonomous sphere of concepts. Justice Heydon is able to sidestep any possible confrontation with Hayek's scholarship due to his summoning of George Orwell as an advocate for a rule book conception of the rule of law. Having gone down this path Justice Heydon creates an intellectual bond with Orwell, but it is a connection fraught with contradictions.

Ostensibly it is a cunning move, for by calling upon Orwell's authority the idea is sown that all political persuasions rally under the neutral banner of the rule of law principle. Justice Heydon refers to Orwell's socialism during the course of outlining their shared viewpoint on the rule of law. The implication is that Orwell's socialism was no barrier to adherence to the conventional understanding of the rule of law.<sup>23</sup> Justice Heydon focuses on a few sentences in *The Lion and the Unicorn*, where Orwell gives credence to the view that law in the books offers refuge from

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<sup>23</sup> Heydon, above n 2, 9.

capricious judges and state machinations.<sup>24</sup> Justice Heydon quotes Orwell positing ‘the law as something above the State and above the individual ...’<sup>25</sup>

Justice Heydon is not the first conservative to annex parts of Orwell to bolster the case being pursued. And it is not a difficult task to excise parts of Orwell to serve conservative ends. Orwell was a walking paradox. He was a medley of contending ideologies and his chameleon nature was his intellectual Achilles heel. Recognition of the flaws in Orwell’s conceptual analysis highlights the disingenuous nature of Justice Heydon’s annexation of Orwell as a socialist to bolster the claim that different social theories unite under the neutral banner of the rule of law principle. Far from recruiting a socialist to reinforce his vision of the rule of law, Justice Heydon kicks a spectacular own goal; for Orwell was, in the final analysis, a fellow positivist.

Raymond Williams has, in a penetrating analysis, captured the debilitating nature of Orwell’s failure to penetrate below the surface of social phenomena. Williams noted that Orwell’s observation of English life failed to ‘develop any kind of thinking which can sustain and extend a critical analysis of structures’.<sup>26</sup> The practical effect of this omission was, as Williams notes, that Orwell adopted a ‘successful impersonation of the plain man who bumps into experience in an unmediated way and is simply telling the truth about it’.<sup>27</sup> Williams does not elaborate on this striking insight but the inference is clear. Williams viewed Orwell as a thinker entrapped by the notion that discrete facts were the sum of all there was to know, putting Orwell in the category of empiricist thinkers. For Orwell, only what he could see or taste existed. But a structure of power is not perceivable by sense organs.

A theory that penetrates below the surface level of social phenomena is required if structures are to be anatomised. Orwell’s tragic failure as a social thinker was his incapacity to excavate below the level of appearances. His impressionistic analysis was the hallmark of a thinker mirroring visible social relations or the epiphenomena of surface appearance. Orwell exhibited an empiricist distaste for theories, while ironically being entrapped within an unconscious theoretical framework that limited his intellectual horizons. His empiricism precluded him from distinguishing appearance from social reality.

Orwell’s narrow empiricism ensured he was incapable of undertaking an analytical study that peered below the surface of social relations. This shortcoming barred him from taking into account the hidden structures that would render intelligible the facts he encountered as part of sensory observation. In effect, Orwell’s theoretical

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<sup>24</sup> Ibid. See George Orwell, *The Lion And The Unicorn: Socialism and the English Genius* (1941) 22-5.

<sup>25</sup> Ibid.

<sup>26</sup> Raymond Williams, *Orwell* (1979) 23.

<sup>27</sup> Raymond Williams, *Politics and Letters* (1979) 385.

framework prevented him from raising himself above a narrowly limited outlook on issues such as the rule of law. His methodology ensured that he was incapable of laying bare the real social relations underlying the operation of the rule of law and thus grasping the processes responsible for bringing this legal category and the interwoven network of unequal economic and power relations that it upheld into existence.

Both Orwell and Justice Heydon mystify the nature of social relations when they treat the rule of law as a haven that offers relief to those unfortunate enough to be experiencing the wrath of the powerful. Justice Heydon states that '[t]he rule of law preserves for citizens an area of liberty in which they can live their lives free from the raw and direct application of power'.<sup>28</sup> This sentiment exhibits a vitiated concept of liberty for it conveys the view that the will of the powerful is circumscribed by an autonomous body of legal rules. It is an example of the triumph of juridical illusions over the way social relations and power relations affect and organise human society. The formal equality accorded by the rule of law offers a degree of protection to those outgunned by the powerful, but the substantive inequalities that lurk behind the facade of a professed independent body of legal rules ensure that any fetters on the powerful are limited in nature.

Formal equality must be defended but at its core it is an expression of the operation of a specific network of social relations based on a profit system. The logic of hidden structures limits the scope of any restraint on power. The limited containment of power implicit in the legal positivist approach to the rule of law espoused by Orwell and Justice Heydon can be graphically demonstrated by focusing on an area that is central to people's lives.

Work impacts decisively on a range of crucial matters and values that combine to shape the human spirit. Within the workplace, legal equality is regarded as a linchpin of the wage contract. Thus the relationship that is at the heart of the institutional framework of our society has the imprimatur of legal equality. In the eyes of the law, this contract with its mutual obligations and rights is one of equality and free choice. But in reality this legal equality masks substantive inequality concealing the structures that disadvantage workers.<sup>29</sup>

Equality of legal rights represents only one side of the wage-labour bargain and it is a surface phenomenon that masks the unequal social relationship underlying the exchange of wages for labour power. The 'fair exchange' that occurs at the level of market relations, and it is this phenomenon that the concept of legal equality reflects, is overshadowed by the buyer of labour power engaging in the production of goods that creates value greater than the wages paid to the seller of labour

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<sup>28</sup> Heydon, above n 2, 10.

<sup>29</sup> See, eg, Karl Marx, *Capital: Volume One* (Ben Fowkes trans, 1979 ed) 680 [trans of: *Das Kapital*].

power.<sup>30</sup> In effect, below the surface of formal equality and ‘fair exchange’ that express an open marketplace of voluntary contractual exchanges between those who buy and sell labour power, the law acts to shore up a profit system based on extracting unpaid labour from the direct producers.

In a relationship central to people’s lives the law only catches the surface appearance of things and fails to penetrate beneath the phenomena that can be detected by the sense organs. Below the level of visible social relations, it is not free will and legal equality that govern the wage contract. By focusing on the level of visible social relations, the underlying structure that governs the wage contract is obscured.<sup>31</sup>

The primary reality of the wage contract is the economic mechanism by which unpaid labour is pumped out of the workers.<sup>32</sup> The rule of law mantra that rules must apply equally to all is in effect a legal category that serves to disguise the workings of the hidden structure that governs the wage-labour and capital relationship.

In sum, workplace legal rules give effect to the economic power of capital over labour, and far from creating a world of equality and fairness, legalism is deeply implicated in forging relations of subordination and domination. Law itself, as Pashukanis noted, has a parallel history.<sup>33</sup> On the one hand, it mediates social relations through juridical concepts based on equal rights, whilst on the other hand, the credo of independent wills or legal equality is an ideological construct that obscures the real nature of a society based on economic exploitation.

The sterile nature of the legal conservatism espoused by Orwell and Justice Heydon is further illuminated by drawing out the dialectical link between the wage contract and the modern corporation. The wage contract is the bedrock of the modern corporation and just as the law offers only a partial insight of the employment relationship the disinfectant of law fails to penetrate to the heart of a modern corporation. The modern corporation is the form through which the owners of capital pool their investments in order to maximise the profits gained from the portion of labour power that is unpaid. Corporate law is focused on facilitating the respective interests of shareholders, directors and, to some degree, creditors. Apart from reinforcing the proposition that directors are excluded by their fiduciary duties

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<sup>30</sup> Karl Marx, *Grundrisse* (1974) 271, 274. See also Adam Smith, *The Wealth of Nations Books I-III* (1986) 133-6; David Ricardo, *Principles of Political Economy and Taxation* (1996) 17-9, 23-9; John Locke, *Treatise of Civil Government and a Letter Concerning Toleration* (1937) 100; John Stuart Mill, *Principles of Political Economy* (1871) 63, 277.

<sup>31</sup> Karl Marx, *Capital: Volume Three* (David Fernach trans, 1981 ed) 956 [trans of: *Das Kapital*].

<sup>32</sup> *Ibid* 927.

<sup>33</sup> Evgeny Pashukanis, *Law and Marxism, A General Theory* (1978) 68.

from providing any benefit to workers that infringes on making profits for shareholders, corporate law is silent on the relationship between the corporation and workers.<sup>34</sup>

Beyond the imposing skyscrapers housing corporate headquarters that act to disguise the true nature of the production process, the real business of a profit system is executed in prosaic buildings that are monuments to efficiency, productivity, coercion and domination. By disregarding the inseparable connection between law and the social order, Orwell and Justice Heydon conceal from consideration the world of atomised market individuals subordinate to power relations that benefit the few at the expense of the majority.

This part of the article began by noting Justice Heydon's view that there is a close relationship between legal rules and the rule of law. According to Justice Heydon, legal rules exist in an autonomous apolitical sphere and those judges who incorporate extra-legal forms of reasoning into their judgments politicise the adjudication process and undermine the rule of law. Justice Heydon used George Orwell's left-wing credentials to support his apolitical legalism. But Justice Heydon's attempt to bolster his case for an apolitical legalism by eliciting the authority of a famous author falters once it is understood that Orwell was a fellow positivist who unplugged law from its social context.

Hayek, who might have seemed an obvious choice for supporting the cause, is not used by Justice Heydon to endorse his concept of the rule of law despite their shared conservatism. This omission may be due to the fact that while Hayek was an unrepentant conservative who believed that legal rules were of prime importance to the rule of law, his expansive analysis embraced the view that this juridical category was an integral part of market individualism.

Finally, I examined the wage contract and argued that the rule of law principle that states rules must apply equally to all is not a guiding principle in this core social relationship. This point raises the issue of whether legal positivism obscures the nature of social relations and by doing so operates to preserve unequal and exploitative practices that result in a democratic deficit.

The next section deals with Windschuttle's conceptual analysis of the rule of law but by analogy it casts further light on the nature of Justice Heydon's view of this legal category.

### III WINDSCHUTTLE AND THE HISTORICAL NATURE OF THE RULE OF LAW

For Windschuttle the rule of law has a positivist, commonsense meaning. It was a legal category that cast a palpable and beneficial shadow over colonial settlers on

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<sup>34</sup> *Parke v Daily News Ltd* [1962] Ch 927.

the edge of Asia. Along with enlightened Protestantism, the rule of law demonstrated the benefits of British imperialism.<sup>35</sup> For Windschuttle, oppression and dispossession are not categorical imperatives of imperial annexation. Any indigenous pain suffered at the foundation of Australia was assuaged by the paternalism of settlers. Paternalism was an ancillary product of Protestantism and the rule of law's injunction against arbitrary power. That 'the British brought the common law, railways and civilisation' is the refrain of supporters of imperialism. Windschuttle echoes this refrain. In his account of the early history of colonial Australia and its impact on Aborigines there is no concession to the complexities and contradictions of the rule of law and empire. There is silence on the domination and exploitation inherent in imperial expansion and the rule of law's complicity in repression of Aborigines and those impoverished whites outside the circle of power.

Windschuttle notes that in occupying a territory, native and colonial subjects came under the umbrella of English law.<sup>36</sup> He points out that the Colonial Secretary in London instructed all colonial Governors 'not only to subject the Aborigines to the rule of law but to guarantee them its protection as well'.<sup>37</sup> Windschuttle claims that this state of affairs ensured it was the 'rule of law that made every British colony in its own eyes, and in truth, a domain of civilisation'.<sup>38</sup> Expanding on this theme, Windschuttle notes:

Ever since they were founded in 1788, the British colonies in Australia were civilised societies governed by both morality and laws that forbade the killing of the innocent. The notion that the frontier was a place where white men could kill blacks with impunity ignores the powerful cultural and legal prohibitions on such action. For a start, most colonists were Christians to whom such actions were abhorrent. But even those whose consciences would not have been troubled knew it was against the law to murder human beings, Aborigines included, and the penalty was death.<sup>39</sup>

For Windschuttle the upshot is obvious and he drives the point home. Law and religion combined to promote a beneficent takeover of Australia. Talk of mass killings is a product of politically motivated historians. He states unequivocally 'of all the colonists that the Aborigines had they were fortunate they got the best colonists in the world, which were the British'.<sup>40</sup> According to Windschuttle's account, the British colonists used deadly force only as a last ditch measure when confronted by the criminal and violent behaviour of Aborigines.

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<sup>35</sup> Windschuttle, above n 1, 186.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

<sup>39</sup> Keith Windschuttle, 'The Myths of Frontier Massacres in Australian History: Part II: The Fabrication of the Aboriginal Death Toll' (2000) 44 *Quadrant* 23.

<sup>40</sup> Sunday, Channel Nine, 'Fabricating Aboriginal History' (Programme aired 25 May 2003) <<http://sunday.ninemsn.com.au>>.

Windschuttle's rosy view of British imperial rule ignores episodes of African slave trading, the smuggling of opium into China and numerous other inhumane ventures that were as brutal and chilling as any undertaken in the history of empire. Edward Said has argued:

Every single empire, in its official discourse, has said that it is not like all the others, that its circumstances are special, that it has a mission to enlighten, civilize, bring order and democracy, and that it uses force only as a last resort. And sadder still, there always is a chorus of willing intellectuals to say calming words about benign or altruistic empires.<sup>41</sup>

Windschuttle's historiography creates a false autonomy between the rule of law and the social milieu of early colonial Australia. His work pinpoints the mistaken assumptions that proliferate when the theory of positivism posits that law is an autonomous body of legal categories bound together by apolitical rules.

David Neal's work is an antidote to Windschuttle's false premises. More importantly for the purposes of this work, Neal puts pay to the legal positivist position encapsulated by Windschuttle and Justice Heydon which seeks to decontextualise the rule of law. Neal identifies part of the backdrop to the introduction of the rule of law in early colonial Australia when he notes how 'politics took a legal form' in early New South Wales.<sup>42</sup> This is an important insight and a debt of gratitude is owed to Neal for drawing a link between the rule of law and politics in early New South Wales.

The rule of law was not simply unloaded in Botany Bay as part of the pantheon of British civilisation. It was not an exogenous product that was part of the cargo of ships. Its contours were shaped in the crucible of the social struggles that gripped early colonial life. The rule of law is not a thing or abstract entity; it is crafted by a historically defined ensemble of social relations. In light of this insight it is necessary to note that depicting the rule of law as a corollary of legal rules, or as part and parcel of the juridical baggage of British civilisation, or as in E P Thompson's case, an 'unqualified human good', perpetuates the fetishism of law that is the hallmark of positivist theory.<sup>43</sup> While it is important not to underestimate the benefits of formal equality, it is indubitably the case that uncoupling analysis of the rule of law from economic and political factors is an exercise in the atomistic and impressionistic thinking that characterises positivism.

In his analysis, Neal steadfastly resists uncoupling the rule of law from social relations by exploring to some degree how rule of law precepts were a handmaiden

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<sup>41</sup> Edward Said, 'Preface to Orientalism' (2003) 650; Al-Ahram Weekly Online <<http://www.weekly.ahram.org.eg>>.

<sup>42</sup> David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (1991) 21.

<sup>43</sup> E P Thompson, *Whigs and Hunters: The Origin of the Black Act* (1990) 266.

to commercial life. Neal notes commercial life in early New South Wales would have been chaotic if a society based on convicts who at some stage would be emancipated, and settlers free at the outset, were not able to assert equal legal rights in order to support property and contractual rights.<sup>44</sup> He might have added that statutory domination and extra-economic coercion are the hallmarks of serfdom, but in a burgeoning capitalist society equality of legal rights was required to reflect the equality of buyers and sellers of labour hours in an open market place.

In an embryonic commercial society with producers becoming increasingly reliant on the market for everything they needed, the system of convictism based on forced labour came under pressure. As market relations expanded, a capitalist class structure combining different fractions of capital emerged in early colonial Australia and the rule of law became the touchstone for those battling for market dominance. Neal's conceptual analysis fails to illuminate fully how the rule of law was a component part of the struggle between competing groups seeking to subordinate the state to their control in order to create the political conditions necessary for economic supremacy. But Neal's holistic analysis is sufficiently developed to substantiate the view that law is politics in another voice and that the essence of politics is the struggle between social groups for control of the economy and state.

Law is an integral part of the pursuit and retention of state power and domination of the state enables the hegemonic economic group to organise the reproduction of social relations to benefit its pecuniary interests. If only more by allusion than analysis, Neal identifies the politics inherent in the origin of the rule of law in the Australian colonies. In the process, Neal assists in crystallising the conceptual poverty of the historical and legal positivist conception of the nature of the rule of law in Australia.

Issues central to the rule of law, such as the independence of the judiciary and trial by jury, were first confronted in New South Wales. These issues were cast in a legal rights framework but this masked a political class struggle. At bottom, the conflicts dividing the different social groups in the colony over issues impacting on liberty and property were canalised into a battle over the rule of law.

The rule of law operated as a sphere of concentrated economics and politics. In New South Wales, the wealthy free settlers attempted to exclude those with a convict stain or lowly status from trial by jury or from becoming members of the magistracy once they had been emancipated from their convict status.<sup>45</sup> In a sense, the wealthy settlers were clamouring for an exception to the general principle that rules must apply equally to all members of society. It was a corruption of the liberal

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<sup>44</sup> Neal, above n 42, 6.

<sup>45</sup> Ibid 81.



conception of the rule of law. But it was a perfectly logical perversion given the balance of forces in the colony and the contest for state power.

A line of Governors was drawn into the power struggle between social groups hell-bent on promoting their competing visions of the rule of law. For example, from the beginning of his tenure in 1809, Governor Macquarie adopted a liberal conception of the rule of law that facilitated support for the emancipated convicts' claim for a place in the magistracy and the right of ex-convict lawyers to appear before them.<sup>46</sup>

In effect, and contrary to Windschuttle's view, the rule of law was wielded as a political instrument in early New South Wales. It became the focal point of the economic and political struggle gripping the colony. This struggle revolved around competing groups using the rule of law either to conserve or to redistribute state power. An embryonic native bourgeois class was developing and the wealthy free settlers were seeking to dominate the state in order to promote and protect their economic interests. They wanted to disenfranchise legally not only poor ex-convicts, but also those emancipists bent on becoming full members of the developing bourgeois class.

In New South Wales, there was an intra-class struggle that hinged on the wealthy free settlers subordinating the state to their control, so that the emancipists seeking to join the propertied class would be outside the hegemonic bloc that guided state policy. The rule of law was used as a weapon to preclude one fraction of the property class gaining a foothold on political power. Governors like Bligh, Macquarie, Brisbane and Bourke were drawn into the maelstrom.<sup>47</sup> They were eyewitnesses to the damage being caused to the social fabric as emancipist wealth was growing exponentially, but ex-convicts were denied the right to serve on juries or gain political franchise once a parliamentary system eventuated.<sup>48</sup>

The Governors were not driven by altruistic motives in supporting legal rights for emancipated convicts. They realised far more clearly than distant bureaucrats in the Colonial Office, who were lulled into a false sense of security by the lobbying power of the wealthy settlers, that Britain's ultimate control of an increasingly profitable satellite was at risk if the emancipists' legal claims went unheeded.<sup>49</sup> In other words, if the colony was not to slip out of Imperial control the Governors, as representatives of British rule, had to side with the emancipists. The emancipists could act as a bulwark against the potential loss of another British colony to upstart colonialists. The grateful emancipists who formed the liberal wing of the native capitalist class were less likely to join or initiate any movement for national independence when it was obvious that it was not the Governors but wealthy free

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<sup>46</sup> Ibid.

<sup>47</sup> Ibid 128.

<sup>48</sup> Ibid 169.

<sup>49</sup> Ibid 128, 183.

settlers who were consciously denying them their legal rights. The Governors' populist campaign for legal rights gained them ideological kudos. They could pose as disinterested champions of legal rights in the colony, while at the same time dividing the native capitalist class and thus perpetuating British rule.

In effect, the prize at stake in the politico-legal struggle fought with rule of law maxims touching on the composition of the judiciary, operation of the jury system and equality before the law was state and economic power. The upshot was that the British Empire emerged victorious from the upheaval in New South Wales. Once the legal aims of the emancipists were realised as transportation ceased and trial by jury and then the political franchise became entrenched, they settled for being members of a client state incorporated within the British Empire.

The social struggle revolving around conservative and liberal conceptions of the rule of law had nothing in common with the idealised version promoted by Windschuttle. It also bears no reference to the juridical fetish concept of the rule of law promulgated by Justice Heydon. The rule of law in its earliest colonial manifestation was a product of intra-class conflicts spawned by the role of the British Empire in Australia.

In regard to Tasmania, which features heavily in Windschuttle's account, there was a sharp variation on the theme played out in New South Wales. Quite simply, the rule of law failed to surface in the infant period of colonial life that Windschuttle canvasses. This is a stunning blow to Windschuttle's conceptual analysis and his hymn of praise to the civilising mission of the British Empire. A naked quest for expropriating land was executed and not even the shadow of the rule of law mediated this process. Economic development in Tasmania was at a different stage from that prevailing in New South Wales, as the landed oligarchy was not confronting a burgeoning group of bourgeois entrepreneurs eager to establish a foothold in the state apparatus. There was not the same phenomenon of disaffected members of an emergent commercial class eager to link liberty, property and the rule of law to promote their political status. Thus, a fundamental condition for the emergence of the rule of law was absent in Tasmania.

The landed oligarchy benefited from facilitative laws passed by Governor Arthur which increased the pace of monopoly land ownership.<sup>50</sup> Small landholders succumbed to the combined economic and legal pressure exerted by wealthy landowners and colonial administrators and their holdings were absorbed by large scale landed estates.<sup>51</sup> Cattle barons were able to swamp the government, as there was no alternative fraction of capital for the government to call upon as a counterpoint to the policy push of the land-grabbers.

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<sup>50</sup> James Boyce, *Van Diemen's Land* (2008) 181.

<sup>51</sup> *Ibid* 220.

The pastoral barons were the real legislators in Tasmania. As Boyce notes, they

largely controlled the administration of justice in their localities, and there was little prospect of a land-owner pushing for the prosecution for murder or violence of a worker defending his master's stock or property from an Aborigine. The chances of the government being able to do so independently were even less. No wonder it never happened.<sup>52</sup>

John Hirst, the conservative historian, chides Windschuttle for focusing on the number of Aborigines killed during the annexation of Tasmania. Hirst surmises that even if Windschuttle's death toll figure is accurate, this number-crunching form of history pales into insignificance when contrasted with the reality that 'forty years after the European settlement, all the Tasmanian Aborigines had either perished or had been removed to offshore islands'.<sup>53</sup>

Windschuttle's bone-chilling history not only sanitises the image of the British Empire; it also skirts the long term stark facts of Imperial conquest. The Imperial class in London did not challenge the pastoral barons or make imprecations to adopt the rule of law because the pastoral barons offered no challenge to Imperial economic policy. A G L Shaw, a conservative historian, sardonically notes that '[t]he English government "forgot" to establish law courts'.<sup>54</sup> Hard cash took priority over the establishment of law courts. A lawless frontier society in Tasmania was tolerated by Whitehall and London finance capital because it did not impede capital accumulation. Tasmania was an early export platform serving the London wool market and a valuable location for Empire capital investment.<sup>55</sup> The dictates of capital accumulation and profit maximisation, and not the implementation of an exogenous ideal such as the rule of law, were always London's guiding principles when dealing with Empire issues. That respected conservative historians such as Hirst and Shaw have pointed out the lawless nature of Tasmania, in contrast to the homage paid by Windschuttle to the role of the rule of law, raises the issue that one of the hallmarks of Windschuttle's work is the selective use of facts and an interpretative method guided by the political bees in his bonnet. These selective facts may be as misleading as the facts that Windschuttle labels as fabricated when used by historians of the left. In brief, Windschuttle's historiography is not innocent of political and philosophical presuppositions, and his prejudices and assumptions need to be considered when weighing up his claim to the status of Olympian detachment when examining facts.

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<sup>52</sup> James Boyce, 'Fantasy Island' in Robert Manne (ed), *Whitewash: On Keith Windschuttle's Fabrication of Aboriginal History* (2003) 36.

<sup>53</sup> John Hirst, *Sense & Nonsense in Australian History* (2005) 81.

<sup>54</sup> A G L Shaw, '1788-1810' in F K Crowley (ed), *A New History of Australia* (1977) 33.

<sup>55</sup> Brian Fitzpatrick, *The British Empire in Australia* (1949) 40; M Roe, '1830-1850' in F K Crowley (ed), *A New History of Australia* (1977) 104.

The real triumph of thinkers such as Windschuttle and Justice Heydon is their success in obscuring the role of a power structure in the establishment of the rule of law. In this section, I have argued that it is to historical forces and not legalism that we must look for the origins and operation of the rule of law in Australia. The final part of this work will focus on an important labour law case and explore how Justice Heydon's legal positivism operates to exclude from conscious attention the theoretical mainsprings of his judicial method. It will also examine how this camouflaging facilitates the allocation of political power to a privileged group in contemporary Australia. By examining Justice Heydon's judicial method at work in an actual case, I will highlight that, contrary to the claims of legal positivism, the law is not an autonomous sphere of concepts but instead an integral part of a political and economic system.

#### JUSTICE HEYDON AND THE DOCTRINE OF MANAGERIAL PREROGATIVES

For legal positivists, statutory interpretation is not a contested terrain. The positivists' view is that the unambiguous wording of a statute applied to the facts is the alpha and omega of the interpretive task of the judiciary. Any statutory rule that is applied is simply the efflux of a grammatical exercise aimed at finding the plain words of the statute. This approach to statutory interpretation boils down to a form of linguistic determinism that excludes from consideration any notion that language can only be understood in its inseparable connection with the history of society. Positivist methodology leaves unexamined the issue of language as a vehicle for expressing ideas and the fact that social and political values are not divorced from linguistic material. In sum, the judicial definition of words is not determined simply by linguistic and logical rules abstracted from the social world, for the meaning that judges give to words is suffused with choices embodying social, political and ideological variables.

The notion that statutory interpretation is an objective exercise undertaken by neutral and apolitical umpires is severely tested in industrial matters. In a statutory interpretation case dealing with the settlement of an industrial dispute, enlisting language to hide judicial theoretical assumptions below the surface is a Sisyphean task. The problematic nature of labour law cases for a theory that espouses law as an autonomous sphere, separate from the political and economic base, is evident when the workplace is viewed as the constitutive principle of society. Quite simply, any judicial decision touching on the workplace impacts on property and power relations.

Burke, the founder of modern conservatism, understood the defining role of the workplace. He understood that the workplace was the crucible of the economic hierarchies and social structures that defined the society he endorsed. For Burke, the wage relation was a part of the 'chain of subordination' that linked employers and

employees.<sup>56</sup> This chain of subordination distributes individuals into social classes and this natural state of affairs is sustained by institutions that preserve the economic hierarchies that have stood the test of time. In this conceptual framework, the law is a core institution for sustaining a set of extant social relations. Law has an economic objective, for it is harnessed to the cause of upholding socio-economic hierarchies. It is thus inescapably a mechanism for allocating political power. Consciously or unconsciously, the assumptions guiding the bulk of judicial judgments in labour law cases are based upon Burke's philosophy of the workplace. Law yokes the employer and employee together and strives to create the harmony necessary to sustain the economic structure.

The Burkean philosophy of the workplace has been the key policy consideration guiding the High Court of Australia in labour law cases. A Burkean organicism notion that accepts economic hierarchies as a force of nature has permeated the unreflective conservatism of the bulk of High Court judges throughout the doctrinal history of labour law cases. The complicity of industrial law in consolidating economic hierarchies is characterised by the doctrine of managerial prerogatives.

This doctrine plays a fundamental role in preserving the economic status quo. Creighton, Ford and Mitchell have noted that in Australia the doctrine was a product of judicial interpretation and thus its origins are not to be located in constitutional or legislative texts.<sup>57</sup> It was, quite simply, judge-made law. Not only was its inception an act of unbridled judicial activism, it also personified the common law tradition of chronic hostility towards those who sell their labour power to capital.<sup>58</sup> Linguistic pyrotechnics were used to enshrine the judicial idea of a managerial autocracy. The doctrine of managerial prerogatives obviated the rule of law credo that rules must be applied equally to all citizens. The doctrine of managerial prerogatives operates to create a category of subjects that come purely within the domain of management and are outside the scope of the Australian Industrial Relations Commission's jurisdiction. It was a doctrine crystallised by Justice Barton in *The Australian Tramway Employees' Association v The Prahran And Malvern Tramway Trust* in 1913.<sup>59</sup> Justice Barton was unambiguous in claiming that the function of the doctrine was to delegate to each captain of industry

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<sup>56</sup> Edmund Burke, 'Thoughts and Details on Scarcity' in *The Works of Edmund Burke: Volume VII* (1808) 384.

<sup>57</sup> W B Creighton, W J Ford and R J Mitchell, *Labour Law: Text and Materials* (1993) 484.

<sup>58</sup> The judicial acceptance of managerial prerogatives is evident in the common law in the operation of the numerous implied terms contained in the employment contract. These court imposed terms are automatically incorporated into the labour contract and the obligations of the employee that include obedience, loyalty and fidelity far outweigh the obligations of the employer. Fox notes that these implied terms reserve 'full authority of direction and control to the employer.' See A Fox, *Beyond Contract: Work, Power and Trust Relations* (1974) 188.

<sup>59</sup> (1913) 17 CLR 680 ('*Union Badge case*').

sole authority about ‘what to do with his own property and therefore the conduct of [the business] belongs to the employer, who takes the risks of the enterprise’.<sup>60</sup> The doctrine is a prime example of conservative legalism, for it entrenches the Burkean vision of hierarchical conditions in the workplace. It is a doctrine that protects management by creating an exclusion zone containing a category of subjects that cannot attract the jurisdiction of the Commission. In restricting the ambit of arbitration powers it consolidates class power, entrenches managerialism and sanctifies the sovereignty of private property rights whilst traducing democratic values.

*Electrolux Home Products Pty Ltd v Australian Workers’ Union* (‘*Electrolux*’)<sup>61</sup> will be scrutinised in order to provide a case study of the legal positivism that underpins Justice Heydon’s judicial method, and to discern whether the legal reasoning he employed in this matter tallies with the apolitical legalism that he regards as an essential component of decision-making.<sup>62</sup> The *Electrolux* case involved a group of unions filing a proposal to insert a clause in an enterprise agreement that allowed Electrolux to deduct a bargaining agent fee from non-union workers. In a nutshell, this was a payroll levy for the unions representing non-union workers in enterprise bargaining negotiations. In a six-to-one decision the High Court ruled that bargaining agent fees could not be included in an enterprise agreement. The judicial interpretation of two statutory sections of the *Workplace Relations Act 1996* (Cth) (‘the Act’) were of prime importance. To begin with there was the issue of whether the unions’ industrial action in support of the payroll levy was ‘protected action’ within the terms of s 170ML(2). This section was designed to provide legal immunity against the taking of industrial action in support of claims contained in a proposed agreement. The caveat was that ‘protected action’ would be legally immune only when all the claims pertained to the relationship between an employer and its employees. In *Electrolux* this put the bargaining agent’s fee firmly in the spotlight, for the employer argued that this claim was incapable of being included in an enterprise agreement. The issue in s 170ML(2) was intertwined with the proposition explored in relation to s 170LI(1). In this latter section the issue in contention was whether the bargaining agent fee clause in the proposed agreement was ‘about matters pertaining to the relationship’ between Electrolux and the workers intended to be covered by the enterprise agreement. In short, did the clause infringe s 170LI(1) of the Act? The critical question in the judicial interpretation of s 170LI(1) was whether the proposed agreement that contained a bargaining agent fee was ‘about matters pertaining to the relationship’ between an employer and its employees. It was held that the unions’ clause breached both of the pertinent sections of the Act. Thus, the industrial action pursued to enforce the proposed agreement was legally unprotected as a bargaining agent fee did not pertain to the relationship between Electrolux and the workers. It

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<sup>60</sup> Ibid 689.

<sup>61</sup> (2004) 221 CLR 309.

<sup>62</sup> When referring to Heydon J it should be taken as referring to the joint judgment with Gummow and Hayne JJ.

was a decisive ruling in favour of Electrolux. For Electrolux, the ruling provided authorisation to sue the unions for damages. Perhaps predictably, Justice Kirby was the dissenting judge.

In the *Electrolux* case, Justice Kirby exposed the flawed reasoning of the majority. Justice Kirby was perplexed by his fellow judges on the High Court overturning the decision of the labour law specialists in the Full Court of the Federal Court. Justice Kirby believed a reading of the statutory text clearly supported the view of the Full Court of the Federal Court.<sup>63</sup> As a former Deputy President of the Australian Conciliation and Arbitration Commission, Justice Kirby was alert to the negative ramifications for the arbitration system flowing from the defeat of the unions in this case. He was keenly aware that the High Court majority in *Electrolux* used a technical approach to conceal their judicial ideology.

To some degree, Justice Kirby understands that in order to make intelligible the facts involved in disputes between capital and wage labour it is necessary to excavate below the surface and take a step beyond the visible functioning of this relationship. He is oblivious to the process that ensures the value of a wage is less than the total product of labour, and how the surplus labour extracted from workers is appropriated by the owners of capital and realised as profits. However, he studied economics as an undergraduate and, without forgetting the role of Justice Higgins, he is the first High Court judge to have a conscious and erudite understanding that legal reasoning is inextricably linked to socio-economic forces.<sup>64</sup>

While applauding Justice Kirby's economic literacy, it is crucial to observe that he imbibed neo-classical economics as a student, and that the narrow focus of this theory ensures his economic analysis of law is misconceived. For example, he refers to the influence of Posner and the Law and Economics school on shaping his approach to an economic analysis of law.<sup>65</sup> But it is apparent that he fails to grasp how Posner's and the Law and Economics school's support of neo-classical economics is closely connected to their conservative political and philosophical convictions. In short, Posner and his apostles' view of legal concepts as an expression of neo-classical economics results in the intertwining of an economic and philosophical theory.

Sadly, Justice Kirby appears oblivious to the political ramifications of the Law and Economics school and how its legal philosophy is contrary to the welfare liberal model that he champions. Operating with a restricted understanding of the reactionary politics of law implicit in the economic precepts propounded by Posner and the Law and Economics school, Justice Kirby is barred by his own allegiance to

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<sup>63</sup> *Electrolux* (2004) 221 CLR 309, 381.

<sup>64</sup> Justice Michael Kirby, 'Law and Economics in the Courts: Is There Hope?' in Megan Richardson and Gillian Hadfield (eds), *The Second Wave of Law and Economics* (1999) 114.

<sup>65</sup> *Ibid* 116.

neo-classical economics from perceiving the political and philosophical implications of this economic theory. Quite simply, Justice Kirby is precluded from perceiving the philosophical baggage attached to an economic theory that postulates the individual is the basic unit of analysis and the primacy of exchange or market relations. Thus, he is prevented by the limits of his analytical framework from perceiving the overall working of a capitalist economy and from perceiving not only how the wage contract is the basis for all the illusions connected to legal equality, but also how it masks the essential feature of capitalism, that is, economic exploitation. The wage contract is a classic example of an exchange or market relation but it has a dual capacity in that its essential characteristic is exhibited not in the exchange sphere, but in the production process. Here, profit making is the sovereign principle and mystifying features such as legal equality are subservient to the structural factors that generate a class structure and determine the operation of the capitalist economic system.

But even after taking full note of the misguided epistemological principles that guide Justice Kirby's economic analysis of law, it is plainly the case that he has sufficient grasp of the internal dynamics of his society to know that when a judge deals with facts that are a manifestation of the visible relationship between capital and labour it is a recipe for poor judging. His intensive practical experience in labour law has equipped him to understand that the imprimatur of legal equality cannot be accepted *per simpliciter* as depicting the full picture of the capital-wage labour relationship. Notwithstanding the theoretical flaws that are part and parcel of his liberalism, which only allow him a partial insight of how the wage contract operates, Justice Kirby is a more incisive thinker than the positivist majority in *Electrolux*, and he exhibits this by looking at the facts in the case within the broader context of a social relationship that is undergoing a structural transformation.

In *Electrolux*, Justice Kirby takes aim at those who utilise a positivist theory of law, and in practice deny the liberal notion that legal rules must apply equally to all. At the very least, Justice Kirby exhibits in *Electrolux* an intuitive understanding that judicial decisions in labour law cases impact on the balance of power in the workplace and that misguided rulings dilute the liberal principle of legal equality.

Justice Heydon makes no bones about where he demurs from the Full Court of the Federal Court in his judgment in the *Electrolux* case and why its decision in support of the unions' claim should be set aside. He expressed bemusement about the Full Court sidestepping consideration of s 170LI(1) and focusing solely on s 170ML(2).<sup>66</sup> In fact, the Full Court pushed aside consideration of s 170LI(1) because it believed there were policy factors at stake.<sup>67</sup> The Full Court believed that a genuine bundle of claims had been lodged with *Electrolux*. Even *Electrolux* conceded that the unions' proposed agreement contained claims that the unions

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<sup>66</sup> *Electrolux* (2004) 221 CLR 309, 366.

<sup>67</sup> *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Electrolux Home Products Pty Ltd* (2002) 118 FCR 177, 195.



were genuinely pursuing.<sup>68</sup> The social reality was that all the parties accepted the claims were genuine. This genuineness, according to the Full Court, sufficed to provide the mantle of legality to the industrial action. Focusing on s 170ML(2) was the swiftest and most sensible course for breaking the logjam and getting the matter before the Commission. If s 170ML(2) provided legal immunity for industrial action to support the claims being pressed, then it could also double as a safety valve that would contain the conflict and hasten the intervention of the umpire. This was the backdrop to the Full Court declaring that s 170ML(2) legitimised the industrial action.

If the reasoning of the Full Court had prevailed in the High Court, the matter would have been put in the hands of the Commission and the umpire would have decided whether to reject or accept the controversial payroll levy claim as a component part of the enterprise agreement. The benefit of this approach is that it would have cauterised the antagonism that had been generated between the parties over the bargaining agent fee by canalising resolution of the conflict onto the shoulders of an umpire. None of this impressed Justice Heydon. He wanted to engage in the 'construction of the phrase ... critical for this case'.<sup>69</sup>

Justice Heydon's hair-splitting statutory construction of this phrase is a copybook example of legal positivism. The phrase is examined within the narrow boundaries of a linguistic analysis that treats legislative language as unambiguous and bereft of scope for judicial policy considerations to be a factor in decision-making. By using this form of statutory construction, Justice Heydon's political ideology remains unexpressed, but nonetheless it permeates his decision-making. By adopting a linguistic determinist approach, the ambit of law is reduced to language and this reduces the scale of facts that are judicially examined. Ostensibly, this approach is free from social, political and ideological indicia, but these are only pushed outside of conscious attention and hidden below the surface where they form the unconscious basis of judicial decision-making. In effect, Justice Heydon smuggles his unexpressed and unarticulated conservative notions of policy through the back door by his adoption of a literalist form of statutory interpretation.<sup>70</sup> Not surprisingly, the key phrase fixed upon was contained in s 170LI(1) and it necessitated judicial interpretation of the words 'about matters pertaining to the relationship' between Electrolux and the workers intended to be covered by the enterprise agreement. This was a phrase that packed a deadly punch for the unions' case, for it opened the pathway to consideration of the doctrine of the managerial prerogatives. Yet, strangely, this phrase and its causal relationship to managerial prerogatives is in a sense the truth that dare not speak its name. Quite simply, the

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<sup>68</sup> Ibid.

<sup>69</sup> *Electrolux* (2004) 221 CLR 309, 361.

<sup>70</sup> The phrase 'inarticulate major premises' pithily expresses the practice of judges reading their own inarticulate ideological premises and policy preferences into common law cases and statutory interpretation. See J A G Griffith, *The Politics of the Judiciary* (1977) 180.

doctrine of managerial prerogatives is never referred to by Justice Heydon even though it is of cardinal importance to the motor force of his reasoning.

The phrase ‘relating to industrial matters’ that became the fulcrum of Justice Heydon’s decision has, with minor changes of wording, been a component part of arbitration legislation since its inception in 1904.<sup>71</sup> Judges have exhibited remarkable interpretive skill in transmuted the phrase into the doctrine of managerial prerogatives. Justice Heydon milked the phrase to conclude that, as arbitration powers are limited to settling disputes about industrial matters, a bargaining agent fee fell outside the scope of the category of subjects deemed permissible by the statute. The first authority noted by Justice Heydon to support his position is the 1913 *Union Badge case*.<sup>72</sup> Justice Barton’s ghost lives on and, although he was in the minority in that case, his doctrine eventually triumphed and resonates today. In *Electrolux*, Justice Heydon lists cases that support a union payroll levy falling outside the scope of industrial matters and thus outside the employer-employee relationship.<sup>73</sup> The bottom line was that Justice Heydon decided a union payroll levy referred solely to the relationship between unions and employees. Therefore, it was foreign to the relationship between employer and employees. In essence, *Electrolux* was being called upon to act as a financial agent for the benefit of the unions, and it could be argued that this arrangement was inimical to the relationship between employer and employees.

Justice Heydon sidestepped any investigation of the shop-floor relations at *Electrolux* that could have provided a practical basis for deciding whether the deduction of union dues was the epitome of an industrial matter. For example, he could have factored into his reasoning that a payroll levy imposed on non-union workers provided unions with the resources to counteract to some degree the inequality of bargaining power involved in negotiating an enterprise agreement. This line of reasoning would have recognised the inseparable link between a bargaining agent’s fee claim and the negotiation process that formed a prelude to an enterprise agreement. The social vacuum at the heart of Justice Heydon’s legal fundamentalism precludes him from any consideration of the expansive nature of the contemporary employment relationship. Work is central to most people’s lives and it impacts on every sphere of life, including the quality of lifestyle possible beyond the time spent selling labour hours to employers. Instead of a rich contextual analysis aimed at integrating law with the social sciences, and with industrial reality as the organising principle, Justice Heydon turned to past decisions that were pressed into service in the most formalistic fashion to declare that a bargaining agent fee claim was not capable of being construed as an industrial

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<sup>71</sup> *Electrolux* (2004) 221 CLR 309, 369.

<sup>72</sup> (1913) 17 CLR 680.

<sup>73</sup> *R v Portus; Ex parte ANZ Banking Group Ltd* (1972) 127 CLR 353 (‘*Portus*’); *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96 (‘*Re Alcan*’).

matter. Thus the unions' case was placed beyond the regulatory scope of the Commission.<sup>74</sup>

By way of contrast, in the course of his judgment in *Electrolux*, Justice Kirby notes that statutory construction is a contested field.<sup>75</sup> He notes wryly that if a positivist approach is taken, the statutory construction of s 170LI(1) by the majority of his colleagues is arguable.<sup>76</sup> However, their construction of s 170LI(1) is itself arguable only within a political context. As Justice Kirby states, '[d]ifferences of interpretation suggest, or demonstrate, differing starting points or values that influence the decision-maker, consciously or unconsciously'.<sup>77</sup> Justice Kirby identifies the source of the values and the hidden basis of Justice Heydon's judgment in *Electrolux* as his commitment to the doctrine of managerial prerogatives. Justice Kirby notes the influential role of Barwick CJ in perpetuating the stranglehold of this doctrine. He quotes Barwick CJ boldly declaring that 'the management of the enterprise is not itself a subject matter of industrial dispute'.<sup>78</sup> He follows this reference to Barwick CJ with the stinging observation that '[w]ith respect, there are reflections of similar views in some of the reasons now offered in disposing of these appeals'.<sup>79</sup> This is a barb aimed squarely at Justice Heydon. In *Electrolux*, Justice Heydon characterised a union payroll levy as a subject matter incapable of pertaining to the relationship between employer and employee. The upshot of this characterisation of a union payroll levy is Justice Heydon's endorsement of the doctrine of managerial prerogatives.

Justice Kirby takes issue with the interpretation of the *Portus*<sup>80</sup> and *Re Alcan*<sup>81</sup> cases proffered by Justice Heydon as guides to his decision that a bargaining agent fee was outside a class of matters capable of constituting an industrial matter. Justice Kirby distinguishes *Portus* and *Re Alcan* by noting that s 170LI(1) must be read in light of a different constitutional foundation and statutory context. Section 170LI(1) in *Electrolux* was based on the corporations power, and not the conciliation and arbitration power. Justice Heydon is silent on the different constitutional footing when following past authority. This larger constitutional foundation gives greater scope to what constitutes an industrial matter. Employees under the corporations power were inescapably part of the corporation that employed them and thus a bargaining agent's fee was a subject matter that qualified as an industrial matter. The added dimension of reference to a corporation was also a linguistic issue. Justice Kirby takes Justice Heydon to task on his chosen ground of reasoning. He pinpoints the more expansive wording of the critical phrase in s 170LI(1) compared

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<sup>74</sup> *Electrolux* (2004) 221 CLR 309, 369-70.

<sup>75</sup> *Ibid* 382.

<sup>76</sup> *Ibid*.

<sup>77</sup> *Ibid*.

<sup>78</sup> *Ibid* 384.

<sup>79</sup> *Ibid*.

<sup>80</sup> (1972) 127 CLR 353.

<sup>81</sup> (1994) 181 CLR 96.

with legislative provisions promulgated under the conciliation and arbitration power, and how this broader constitutional and statutory context ‘was designed to enhance the permissible scope of the agreement and the connection between its subject matter and the employment relationship’.<sup>82</sup> The outcome of Justice Kirby’s interpretation was that the unions’ claim was capable of coming under the regulatory mandate of the Commission.

In Justice Kirby’s expansive reading of s 170LI(1), the legislative context of the provision is one of facilitating free-market principles in the sphere of buying and selling labour power. The object of the Act is to promote in the labour market a political commitment to the ideals of individual freedom. Justice Kirby notes that the era of compulsory arbitration and the award system is atrophying.<sup>83</sup> Its replacement by a neo-liberal enterprise bargaining system has resulted in individuals being required to maximise their own material self-interest. Justice Kirby suggests that in a free market climate artificial restrictions on enterprise agreements infringe the concept of unfettered bargaining. According to Justice Kirby, as part of the negotiation process between buyers and sellers of labour, resort to industrial action should be viewed as promoting an era of competitive individualism.<sup>84</sup>

Thus, a broad interpretation of key provisions supporting industrial action in cases such as *Electrolux* supports the purpose of the legislation. And if unions are part of the negotiating process then, to maximise individual wages and conditions in a neo-liberal climate of ‘user pays’, they should be financially compensated for their endeavours by unionists and non-unionists alike. To deny the unions financial muscle impacts dramatically on the employment relationship. It weakens the capacity of unions to seek to maximise the price of labour power. The union payroll levy is a quintessential example of matters pertaining to the employment relationship in an age when unions have increasingly played a role in assisting individuals to maximise their own material self-interest.

Justice Kirby passes no comment on either the vices or virtues of legislation that is designed to facilitate an expansion of neo-liberal market practices. His focus is on highlighting the purposes and policies behind the legislation and perceiving that the bargaining agent’s fee constitutes an industrial matter in an era of the structural transformation of workplace relations. Implicit in Justice Kirby’s reasoning is the view that the positivist approach of Justice Heydon is myopic in the sense that the overarching desire to perpetuate the doctrine of managerial prerogatives ended up narrowing the policy aims of the legislation.

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<sup>82</sup> *Electrolux* (2004) 221 CLR 309, 387.

<sup>83</sup> *Ibid* 376.

<sup>84</sup> *Ibid*.

In effect, the legislation at issue in *Electrolux* was directed at supporting the neo-liberal programme of revamping the workplace in order to boost profits and productivity. Given the economic objectives underlying the legislation, Justice Kirby reasoned that this schema could easily have incorporated as an industrial matter the role of bargaining agents to assist individuals in haggling over the price of labour power. From the viewpoint of liberalism, Justice Kirby's judgment was logical because it allowed for any possible unequal bargaining power between the parties to be mitigated by the bargaining agent fee system that in principle increased the individual liberty for which neo-liberalism has so successfully pressed.

It is tempting to believe that at some future date the use of the corporations power will be the catalyst for eclipsing the doctrine of managerial prerogatives. But legislative and judicial history suggests otherwise. Justice McHugh, the only other judge in *Electrolux* to consider the role of the corporations power, is underwhelmed by Justice Kirby's reasoning that resort to the corporations power has the potential to expand the scope of what constitutes an industrial matter. Justice McHugh simply points out that in *Portus* and *Re Alcan*, each judgment was based on the statutory construction of industrial matters and not the conciliation and arbitration power.<sup>85</sup> He finds that the same applies in the *Electrolux* case in regard to the interpretation of s 170LI(1). It is the statutory construction of the matters pertaining to the relationship between employers and employees that is of cardinal importance and this is not dependent on the scope of the corporations power.<sup>86</sup> Historically, it has been the statutory construction of industrial matters that has provided the oxygen line for the doctrine of managerial prerogatives and, stretching back to Justice Barton, that has been used to restrict the scope of the arbitration power. The inference from Justice McHugh's line of thinking is that reading the corporations power as presaging the death knell for the doctrine of managerial prerogatives is an act of self-delusion. Also, there are sufficient clues in Justice Kirby's *Electrolux* judgment to suggest that he is not a supporter of abolishing the doctrine of managerial prerogatives.<sup>87</sup> He pinpoints some judgments that posited a restriction of the sphere of operation of the doctrine of managerial prerogatives, but he shows no evidence that his liberal spirit is interested in more than circumscribing its scope.<sup>88</sup> But while Justice Kirby has a reformist approach to the doctrine of managerial

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<sup>85</sup> Ibid 344.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid 386-87. One of the key clues is Justice Kirby's support for the *Re Alcan* decision. He defends the decision on textual grounds noting that it turned on the legislative language. The traces of positivism in his makeup and his unflagging support for the Mason Court cloud Kirby J's judgment. *Re Alcan* was a union payroll levy case and in effect the case turned on the endorsement of the doctrine of managerial prerogatives and linguistic determinism was marshalled to preserve its existence.

<sup>88</sup> Ibid 386. The cases noted by Justice Kirby that restrict the scope of managerial prerogatives are: *Re Manufacturing Grocers' Employees Federation of Australia; Ex parte Australian Chamber of Manufactures* (1986) 160 CLR 341; *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* (1987) 163 CLR 117.

prerogatives, Justice Heydon has a different agenda. While on the surface Justice Heydon engaged in linguistic determinism in *Electrolux*, the motor force of his reasoning was bent on providing a legal exclusion zone that precludes workers and unions from trespassing on the prerogatives of capital. The perpetuation of the doctrine of managerial prerogatives was the hidden basis of Justice Heydon's judgment in *Electrolux*, and Justice McHugh, perhaps unwittingly, has provided the rationale for future positivist judges to engage in grammatical exercises that purport to be apolitical and value-free when they undertake a statutory construction of the phrase 'industrial matters'. Another sobering aspect of Justice Heydon's adherence to the doctrine of managerial prerogatives in *Electrolux* is the unconscious manner in which his judicial method undermines the rule of law principle that rules must be applied to all equally. For a self-proclaimed champion of the rule of law and advocate of apolitical legalism, this component of his judgment in *Electrolux* is bizarre to say the least.

The business lobby organisation, Australian Industry Group, funded the *Electrolux* case and it understood fully the political power ramifications of this decision.<sup>89</sup> Justice McHugh noted in *Electrolux* that the High Court 'has consistently held that the rejection of demands of an academic, political, social or managerial nature does not create a dispute about matters pertaining to the relationship between employer and employee.'<sup>90</sup> The Australian Industry Group views *Electrolux* as a landmark case that has bolstered the managerial prerogative principle noted by Justice McHugh and his majority peers, and considers that the existence of a narrow boundary around the taking of industrial action is now incontrovertible.<sup>91</sup> Moreover, the Australian Industry Group is utilising *Electrolux* to pressure the Rudd government into accepting that the High Court's support for a narrow approach on matters pertaining to the employment relationship must be translated into restrictions on what may be included in enterprise agreements.<sup>92</sup> The Australian Industry Group is also eager to proclaim that it has the imprimatur of the High Court in *Electrolux* to support the proposition that social, political and managerial issues are excluded from matters pertaining to the employment relationship.<sup>93</sup> Business lobby groups exist to influence government and legal decisions in their favour. In *Electrolux*, courtesy of Justice Heydon and his majority peers, business reinforced its political power base at the expense of trade unions.

## CONCLUSION

In E M Forster's '*Howards End*', one of the characters silently implores her partner to desist from living in 'fragments'.<sup>94</sup> Forster repeats variations of the theme that

<sup>89</sup> *The Australian Financial Review*, 6 May 2008, 10.

<sup>90</sup> *Electrolux* (2004) 221 CLR 309, 338.

<sup>91</sup> *The Australian Financial Review*, above, n 89, 10.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

<sup>94</sup> Edward Morgan Forster, *Howard's End* (2000) 188.

‘only connect’ and a state of exaltation will thrive in order to press his case that an atomistic approach to life breeds a false consciousness and destroys the prospect of a rich spiritual and intellectual existence.<sup>95</sup> However, the character enunciating Forster’s ode of hope is pessimistic. She believes that her partner is simply too obtuse to heed such a clarion call. She states that ‘[h]e simply did not notice things, and there was no more to be said’.<sup>96</sup> This soliloquy is a stunning exhibition of Forster’s dialectical imagination. In its richness and depth it is a portrait of an artist summing up the unity and inseparable connection of the social world. For the positivist, life is not about dialectical interconnections. This is not to suggest that the positivist does not notice things. But the things that are noticed constitute the visible expression of social relations.

This fatal attraction to the appearance of things bewitches the historical and legal positivist. It is a fatal quirk that seals the parallel intellectual universes of Windschuttle and Justice Heydon and forms the basis for a meeting of their minds. In Justice Heydon’s case, his impressionistic judicial method reduces the rule of law to a text book conception of law rooted in linguistic determinism. Verbal and textual analysis, and not the history of social relations, are presented by Justice Heydon as the conceptual foundations of the rule of law and democracy. However, the location in a structure of power of the roots of the rule of law and democracy is systematically obscured by this positivist conceptual framework.

The intellectual tragedy of Justice Heydon and Windschuttle is that they notice concrete reality, but through a glass darkly. Despite their neutral and value-free claims, they are conceptual ideologists equipped with a theory that is based on an atomistic approach to social phenomena. Their conceptual agenda gives explanatory priority to ‘rules’ and ‘facts’ and obscures the structure of power that is the locus of the ideas and concepts used in the disciplines of law and history. The relentless enumeration of ‘rules’ and ‘facts’ embodies a philosophy of law and history. It is a positivist conceptual framework and it produces unconvincing historical work and judicial reasoning.

Justice Heydon and Windschuttle inhabit parallel intellectual universes where only what is reflected by their sense organs is real. The fact that appearance and reality can be starkly different is ignored by the theory they adopt. This creates the space for ideological illusions to flourish and, in the case of law, the resulting mystification entrenches the political hegemony of the power elite. Justice Heydon is sealed within the boundaries of a positivist epistemology that treats law as an autonomous set of concepts. These concepts are explicitly regarded as expansive enough to be the tree of life that sustains the rule of law. He argues that the objective methodology embodied in rules and precedent creates the climate that nourishes the rule of law and safeguards it from wreckers armed with extra-legal

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<sup>95</sup> Ibid.

<sup>96</sup> Ibid.

notions. In essence, the rich tapestry of the rule of law that is a product of underlying social and historical forces is treated by Justice Heydon as a child of linguistic determinism. Thus one of the crowning glories of the rise of capitalism and liberalism is depicted as though language is life. A common law or statutory text is regarded as the active agent responsible for regulating human affairs untainted by the mediating role of extra-legal forces. This is the sum of the conceptual poverty exhibited by a High Court judge who fails to integrate law with the social sciences.

Justice Heydon's legal premises have been rebutted on a number of fronts in this work. One of the fronts was his approach in the *Electrolux* case to the doctrine of managerial prerogatives. The analysis presented here of Justice Heydon's reasoning in *Electrolux* pinpointed how juridical logic masks the power politics that circumscribe the operation of this doctrinal issue. The doctrine of managerial prerogatives provides a compelling example of the need to distinguish appearance from reality. This doctrine is a prime example of the inescapable role that the law plays in allocating political power. Windschuttle's historiography has also played a role as a medium of power. His revisionist history of early colonial Australia refurbished the image of the British Empire in Australia. In *The Fabrication of Australian History*, Windschuttle not only rationalises the expropriation of Aboriginal land, but passes over in silence the fact that the colony was founded on a system of production that bore a striking resemblance to slavery. In sum, the most damning indictment of Windschuttle and Justice Heydon is their failure to provide an analysis of reality. They promise a reflection of objective reality but, given their shared positivism, this proves a mirage. The flawed premise of their parallel intellectual universes is a canker that undermines the validity of their work.

Windschuttle and Justice Heydon both claim that facts exist objectively and independently of the observer and fidelity to this epistemological standpoint is a guarantee for attaining the mantle of impartiality. But neither Windschuttle nor Justice Heydon is a neutral looking-glass and their cult of facts merely buries below the surface the cardinal issue that no innocent reading is possible. Instead, their interpretation of data is suffused with theoretical and political presuppositions. Ideas or ideology are a constituent element of politics and are harnessed to the pursuit or preservation of power. Neither Windschuttle nor Justice Heydon exists in an ideological vacuum. Both of them are prominent and influential conceptual ideologists. The siren call of Windschuttle and Justice Heydon is aimed at giving law and history false autonomies from the socio-economic foundations of Australian society. In the process, they play a role in shaping Australian society in a way that suits those who benefit from an intellectual discourse that fixates on surface level analysis. To challenge the historical and judicial method of Windschuttle and Justice Heydon respectively is far more than an academic exercise. It is a practical intervention in the battle of ideas that will help to determine the trajectory of power in Australia. This battle is approaching a crossroads as the rule of law enters a possible twilight zone. The concept of the rule



of law held by Justice Heydon will be subject to a pitiless test when cases regarding potentially oppressive anti-terror laws must be judicially determined. The judicial method of legal positivism based on the claim of objective reasoning and political neutrality will be stretched to its logical limits when dealing with anti-terror laws which have the capacity for cabinet ministers to usurp judicial prerogatives and place under threat the notion of habeas corpus and the separation of powers, both of which are integral to the rule of law. The future may reveal even more starkly that positivism in both its historical and legal guises is an aspect of the dominant ideology and, as such, an emperor without clothes. It is an intellectual edifice built on illusions.