PLUNDER DOWNUNDER: TRANSPLANTING THE ANGLO-AMERICAN LABOR LAW MODEL TO AUSTRALIA

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I. INTRODUCTION

In this paper I wish to explore an aspect of comparative labor law by examining the approaches to national labor law policy by the national governments of the three great common law federations of Australia, the United States, and Canada. The question that I have set myself is, to what extent have the federal constitutions of these three nations shaped their labor relations policies, especially in this era of globalization and labor law deregulation? In other words, what effects have the distributions of legislative powers between the federal and state or provincial governments had on labor law flexibility and deregulation in the United States, in Canada, and in Australia? After all, it was the late Otto Kahn-Freund who reminded us some thirty years ago that the distribution of political powers in nations would impact upon the reach and scope of their national labor laws.[1]

The extent to which the distribution of legislative powers by federal constitutions shape labor law has recently arisen in Australia where our federal government wishes to take a different constitutional

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1. Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974).

approach to deregulate Australian labor law to bring us more into line with U.S. employment laws and those of Great Britain. In recounting these proposed changes in Australia, I wish to compare and to contrast the ways in which the constitutions of those two other great common law federations of the United States and Canada have shaped their labor laws.

II. THE ANGLO-AMERICAN DEREGULATED LABOR LAW MODEL

In a recent article in the *Comparative Labor Law and Policy Journal*, Sanford Jacoby compares and contrasts on the one hand, the Anglo-American model of deregulated labor law, with, on the other hand, the more regulated and more consultative labor laws operating in France, Germany, and Japan.[2] He speculates on whether the Anglo-American labor law model, which has been sustained on the ideas of neo-classical economists, will expand into other market economy countries. Neo-classical economic ideas and neo-liberal deregulatory ideologies are indeed infectious in our globalized world. However, for these ideas to take root and to lead to a deregulated labor relations regime in a federation, usually it will be the case that the national government will need to possess the legislative powers to implement these changes. For example, it has been far easier for common law countries like Great Britain and New Zealand to deregulate because of their unitary governments. Great Britain is a unitary state (devolution did not arise until the late 1990s) with the Westminster Parliament having plenary powers to enact laws. When Prime Minister Margaret Thatcher came into office in 1979, she faced few legal difficulties in deregulating British labor law. After all, since the enactment of the Trade Disputes Act of 1906, the law had played an abstentionist role in British labor relations.[3] In other words, there was little English labor law machinery that would need to be demolished to make way for labor law deregulation. In a series of statutes in the 1980s and early 1990s the Thatcher and Major Governments deregulated British labor law and diminished the role of trade unions.[4] However, in federations where legislative powers are

2. Sanford Jacoby, *Economic Ideas and the Labor Market: Origins of the Anglo-American Model and Prospects for Global Diffusion*, 25 COMP. LAB. L. & POL'Y J. 43 (2003).

3. *See* PAUL DAVIES & MARK FREEDLAND, LABOUR LEGISLATION AND PUBLIC POLICY: A CONTEMPORARY HISTORY 43–60 (1993); OTTO KAHN-FREUND, LABOUR AND THE LAW (2d ed. 1977).

4. For details, see SIMON AUERBACK, LEGISLATING FOR CONFLICT (1990); DAVIES & FREEDLAND, *supra* note 3, at 526–639; Lord Wedderburn, *Freedom of Association and Philosophies of Labour Law*, 18 INDUS. L.J. 1 (1989).

shared between central and local governments, sharp changes of direction are more difficult to accomplish.

In the following section, I shall sketch some background information on Australia's labor laws, on the mild deregulatory changes that have occurred over the last dozen years, and shall describe the sharp deregulatory changes to federal labor law that were announced by the Prime Minister in May 2005. The operations of the United States and Canadian constitutions on national labor law policy will be the subjects of Sections IV and V. In the penultimate section, the plans of the Australian federal government to utilize a fresh constitutional approach will be explained. Finally, I shall try and pull all of these constitutional threads together.

III. THE AUSTRALIAN LABOR LAW SCENE

As is well known, at the beginning of the twentieth century, the Australian governments established labor courts—that later became industrial relations commissions—to settle labor disputes by conciliation and arbitration. This legislation was in response to the occurrence of labor disputes in the last decade of the nineteenth century. The politicians of the day believed that the state should intervene to settle industrial disputes to bring about industrial peace and to protect vulnerable workers.[5] It was hoped that the labor courts could settle most disputes by conciliation. However, where conciliation failed, the labor courts and commissions were given powers to settle labor disputes by final and binding interest arbitration. The settlements by the labor courts and commissions were embodied in rulings that became known as awards that were enforceable laws under the labor relations statutes. Awards prescribed market rates of wages and other work rules with which all employers were bound to comply when employing labor in that industry or occupation. Throughout most of the last century, the labor courts and commissions handed down test case decisions on wages and work rules. These test case decisions awarded national or regional increases in wages, and other employee benefits like annual leave, overtime rates, redundancy pay, pension payments (known in Australia as superannuation payments), and even twelve months'

5. For details, see FOUNDATIONS OF ARBITRATION: THE ORIGINS AND EFFECTS OF STATE COMPULSORY ARBITRATION, 1890–1914 (Richard Mitchell & Stuart MacIntyre eds., 1989); Leroy Merrifield, *The Origin of Australian Labour Conciliation and Arbitration*, *in* IN MEMORIUM, SIR OTTO KAHN-FREUND, 17.11.1900–16.8.1979: INTERNATIONAL COLLECTION OF ESSAYS: COLLECTION INTERNATIONALE D'ETUDES 173 (F. Gammilescheg et al. eds., 1980).

unpaid parental leave.[6] By this means, increases in national productivity were distributed throughout the working community on a relatively egalitarian basis.

By the beginning of the 1990s, however, it was clear that the pressures of economic globalization, coupled with new information technologies, meant that the setting of wages and work rules on an industry basis was no longer sustainable. To enable individual employers to become more competitive, it was recognized that it would be more appropriate to have wage rates determined at the level of the employing enterprise. Several of the Australian states and New Zealand deregulated their labor law regimes to varying degrees in the early 1990s.[7] Two successive federal governments, of different political persuasion, shifted the setting of wages and work rules to the employing enterprise, while at one and the same time retaining federal awards as a safety net of minimum labor standards measures. In 1993, the Keating Australian Labor Party federal government began this process of change, and in 1996, the Howard Liberal Party and National Party Coalition federal government—which, in common parlance, is a conservative administration—continued this process of increasing the flexibility of federal labor law. Throughout most of the 1990s, Australian labor law scholarship was focused upon assessing and evaluating these alterations.[8]

Under the present law, which is embodied in the Workplace Relations Act 1996, awards no longer prescribe market wage rates,

6. For details, see generally THE NEW PROVINCE FOR LAW AND ORDER: 100 YEARS OF AUSTRALIAN INDUSTRIAL CONCILIATION AND ARBITRATION (Joe Isaac & Stuart MacIntyre eds., 2004).

7. *See* THE AUSTRALASIAN LABOUR LAW REFORMS: AUSTRALIA AND NEW ZEALAND AT THE END OF THE TWENTIETH CENTURY (Dennis Nolan ed., 1998) [hereinafter Nolan, *Australasian*]; Ron McCallum & Paul Ronfeldt, *Our Changing Labour Law*, *in* ENTERPRISE BARGAINING, TRADE UNIONS, AND THE LAW 1 (Ron McCallum & Paul Ronfeldt eds., 1995).

8. For comment on the 1993 changes, see *The Industrial Relations Reform Act 1993 (Cth)* which amended the *Industrial Relations Act 1988 (Cth)*, 7 AUSTL. J. LAB. L. (SPECIAL ISSUE) 105–226 (1994) [hereinafter *Australian Journal of Labour Law 1994*]; Ron McCallum, *The Internationalisation of Australian Industrial Law: The Industrial Relations Reform Act 1993*, 16 SYDNEY L. REV. 122 (1994) [hereinafter McCallum, *Internationalisation*]; McCallum & Ronfeldt, *supra* note 7, at 1. For comment on the 1996 alterations, see EMPLOYMENT RELATIONS, INDIVIDUALISATION AND UNION EXCLUSION: AN INTERNATIONAL STUDY (Stephen Deery & Richard Mitchell eds., 1999); Nolan, *Australasian*, *supra* note 7; JOELLEN RILEY, G.J. MCCARRY & MEGAN SMITH, WORKPLACE RELATIONS: A GUIDE TO THE 1996 CHANGES (1997); Therese MacDermott, *Australian Labour Law Reform: The New Paradigm,* 6 CAN. LAB. & EMP. L.J. 127 (1998); Therese MacDermott, *Industrial Legislation in 1996: The Reform Agenda*, 39 J. INDUS. REL. 52 (1997); Richard Mitchell & Joel Fetter, *Human Resource Management and Individualisation in Australian Labour Law*, 45 J. INDUS. REL. 292 (2003); *Workplace Relations and Other Legislation Amendment Act 1996 (Cth) which amended the Industrial Relations Act 1988 (Cth) and which also re-named this statute as the Workplace Relations Act 1996 (Cth)*, 10 AUSTL. J. LAB. L. (SPECIAL ISSUE) 1–157 (1997).

but instead have been confined to a set of minimum wages and other minimum standards of employment. Employees and employers may engage in collective bargaining, however, this form of bargaining in the antipodes is rather different from the North American version because few of the protections that assist United States and Canadian workers to collectively bargain operate in Australia.[9] For example, there is no union representation or union recognition process. Provided one union member is employed in an enterprise, that enterprise and the union may make a collective agreement. There is no express duty on employers to bargain in good faith. The Workplace Relations Act 1996 makes it plain that it is up to the employer to choose whether or not to bargain with a trade union. Employers are free, if their employees acquiesce, to embody their employment arrangements in a collective agreement between the enterprise and the employees without the participation of a trade union. Before a collective agreement may operate, however, it must be certified by the Australian Industrial Relations Commission, which will examine its provisions to ensure that the workers are not disadvantaged as against the minimum labor standards prescribed in the relevant award. This test is known as the "no disadvantage" test. Individual employers and employees may also conclude statutory individual agreements known as Australian workplace agreements that must also comply with a somewhat more elastic no disadvantage test.[10]

On May 26, 2005, the Prime Minister of Australia, John Howard, unveiled in the Australian Parliament his Government's plans to sharply deregulate Australia's already flexible federal labor laws.[11] The Prime Minister's vision is to break with Australia's past laws, which were largely based upon the dominance of labor courts and commissions and industry trade unions, and instead to adopt a more deregulated model whereby collective and individual agreements will be valid provided only that they adhere to a core of legislated minimum conditions of employment. These conditions are the minimum wage, ordinary weekly hours of work averaged over each year, four weeks' annual leave, sick leave, and twelve months' unpaid parental leave. If employees want other standard safety net award

9. *See* Ron McCallum, *Trade Union Recognition and Australia's Neo-Liberal Voluntary Bargaining Laws*, 57 RELATIONS INDUSTRIELLES 225 (2002).

10. Mitchell & Fetter, *supra* note 8.

11. John Howard, Prime Minister of Austl., Prime Ministerial Statement: Workplace Relations, Address to Parliament of Australia (May 26, 2005), http://www.pm.gov.au/news/speeches/speech1446.html.

conditions such as overtime rates and redundancy pay, they will have to bargain for them. The Australian Industrial Relations Commission will lose its powers to certify collective agreements made with or without trade unions, and no longer will it be able to set minimum wages. A new body titled the Australian Fair Pay Commission, whose composition is likely to be dominated by neo-classical economists, will in future set our minimum wage. The Prime Minister added that the reach of the statutory unfair termination laws would be shrunk in order to enable businesses to employ more workers. Once implemented, only employees whose employer employs more than one hundred persons will be able to seek a remedy for unfair dismissal.[12]

The Prime Minister has made it clear that greater flexibility is needed to boost national productivity and to catch up with countries like the United States.[13] He wishes the modern Australian employee to become an enterprise worker who directly deals with the employer without the intervention of industrial relations commissions or trade unions. In my view, our Prime Minister hopes that these changes will encourage employers to conclude workplace agreements with their individual employees, which will inevitably lead to a further decollectivisation of Australian labor law.[14]

In order to enact this new labor law regime, the federal Government wishes to adopt a new constitutional approach. It wishes to use its powers to make laws with respect to corporations, to govern all employment in Australia by corporations. If successful, these new laws will cover four-fifths of Australia's workers and this will greatly weaken the more tightly regulated state labor law systems. Before assessing the government's chances to implement this new constitutional foundation for its laws, I shall examine the constitutional approaches to labor law by the United States and Canada to see what Australia can learn from these other federations.

12. For further details on these changes by the Government, see Australian Government, Workchoices: A New Workplace Relations System (Oct. 9, 2005), https://www.workchoices.gov.au/NR/rdonlyres/C80251CC-14D6-4977-A824-26F1140EF30C/0/A_NewWorkplace_Relations_System.pdf [hereinafter *Workchoices*]. For academic comment, see David Peetz, *Coming Soon to a Workplace Near You—The New Industrial Relations Revolution*, 31 AUSTL. BULL. LAB. 90 (2005).

13. John Howard, Prime Minister of Austl., Workplace Relations Reform: The Next Logical Step, Address to the Sydney Institute (July 11, 2005), *available at* http://www.pm.gov.au/news/speeches/speech1455.html.

14. *See supra* note 12, and accompanying text.

IV. UNITED STATES LABOR LAW AND THE CONSTITUTION

Before the United States "New Deal" labor law legislation of the 1930s, most labor laws had been enacted by the states. The story of the passage by the United States Congress of the National Labor Relations Act (the Wagner Act) in 1935 is too well known to North Americans to repeat here.[15] Equally well known is how the United States Supreme Court upheld the Wagner Act in 1937 when it handed down *National Labor Relations Board v. Jones and Laughlin Steel Corporation*.[16] The Wagner Act was upheld under the interstate commerce clause of the United States Constitution that gives the Congress power "To regulate Commerce with foreign Nations, and among the several States."[17] What the Wagner Act and its subsequent amending statutes created was a collective bargaining mechanism whereby employees of enterprises could, via a representation vote, choose whether or not to be represented by a trade union for the purposes of concluding a collective agreement with their employing undertaking. There were indeed powerful reasons for the Congress and the Supreme Court to utilize the interstate commerce clause to create a single labor law regime for the nation. First, in 1935 most United States trade was internal and far less export oriented than it is today. In other words, it made good sense to establish a single labor law mechanism for the common market of the United States. Second, unlike the Australian states and most of the Canadian provinces, which are largish entities, many of the states of the United States are small, and in 1935 it does appear to me that many of them must have lacked the resources to establish their own labor law systems. To this antipodean observer, it is of interest that over the last seventy years, the interstate commerce clause has upheld not only United States labor legislation, but also many other federal programs, without requiring close adherence to actual interstate trade and commerce. As the American constitutional scholar Laurence Tribe puts it,

> Since 1937, in applying the factual test of *Jones* & *Laughlin* to hold a broad range of activities sufficiently related to interstate commerce to justify congressional action, the Supreme Court has exercised little independent judgment, choosing instead to defer to

15. *See* ARCHIBALD COX ET AL., LABOR LAW: CASES AND MATERIALS 78–87 (13th ed. 2001); ROBERT GORMAN & MATTHEW FINKIN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 4–8 (2d ed. 2004); MICHAEL HARPER ET AL., LABOR LAW: CASES, MATERIALS AND PROBLEMS 82–89 (5th ed. 2003); BENJAMIN TAYLOR & FRED WITNEY, LABOR RELATIONS LAW 142–99 (3d ed. 1979).

16. 301 U.S. 1 (1937).

17. Art. I, § 8, cl. 3; and for comment, see LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 305–10 (2d ed. 1988).

> the expressed or implied findings of Congress to the effect that regulated activities have the requisite "substantial economic effect."[18]

The United States pre-emption doctrine has arisen from interpretations of the supremacy clause of the United States Constitution.[19] As an outsider, it is difficult to disentangle all of its threads. Suffice to say that the pre-emption doctrine utilizes the intent of Congress to chart the reach and scope of federal laws. In the labor law field, the pre-emption doctrine operated to nullify most state labor laws that in any way directly impinged upon federal labor law.[20] In a thoughtful paper, which was published in 1990, Michael Gottesman argued that the pre-emption doctrine had encroached too far into the province of lawful state labor legislation,[21] however, his views have made little headway with the United States Courts. In recent Supreme Court judgments, the judges seem to be requiring Congress to spell out its intent in clearer language, but if it does so, then the pre-emption doctrine will operate to give full reign to the federal program. It does appear to this antipodean scholar that for the foreseeable future, the states will possess very limited capacity to alter labor law policy, except where federal labor law has left a deliberate gap, such as the coverage of agricultural workers. Put briefly, the United States Congress can do what it likes with respect to national labor law policy.

Since the 1970s, the reach and scope of United States collective bargaining law has diminished so that now less than 10% of the private sector workforce is covered by collective arrangements. Again, the tale of this decline is well known to Americans. Suffice to say that much has changed over the last seven decades. The nature of work has greatly altered,[22] with a decline in manufacturing and a concomitant rise in employment in the service sector of the economy. The collective bargaining mechanism, which requires a majority of employees in the bargaining unit to choose to be represented by a trade union in a representation vote, has not worked well in the new economy. Even where a trade union overcomes this representation

18. TRIBE, *supra* note 17, at 309.

19. Art. I, § 10.

20. *See*, *e.g.*, San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236 (1959); and for comment, see COX, *supra* note 16, at 936–64; GORMAN & FINKIN, *supra* note 15, at 1078–1124; HARPER, *supra* note 15, at 917–79.

21. Michael Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE J. ON REG. 355 (1990).

22. *See* KATHERINE STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE (2004).

vote hurdle, it may not be able to conclude a collective agreement. After all, in bargaining, employers are free to replace striking workers with replacement employees,[23] and where employers do commit unfair labor practices, the enforcement of any remedies are too slow and cumbersome to be of practical value in most situations. These factors, together with a conservative judiciary and an unwilling Congress, have lead to the shrinkage of collective bargaining in the United States.[24] Added to this, the doctrine of employment at will, which enables employers to terminate without notice or for any reason whatsoever,[25] appears to me to place American workers in a vulnerable position in the labor market. Many scholars have advocated modernizing the collective bargaining laws,[26] while others have argued that alternative employee representation strategies should be utilized.[27] However, neither the Congress nor the courts have taken much notice of their thoughtful pleas.

In truth, the current United States deregulated model has not been produced by congressional legislation backed up by court decisions. Rather, its emergence has been the product of economic changes and the operation of labor market forces of supply and demand, which has been largely unchecked by statutory or curial limitations.

V. CANADIAN LABOR LAW AND THE CANADIAN CONSTITUTION

I need spend less time on Canada because, unlike Australia and the United States, for the last eighty years most of the action has been at the provincial level with the federal government playing a subsidiary role in the shaping of labor legislation, though the

23. *See* Mastro Plastics Corp. v. National Labor Relations Board, 350 U.S. 270 (1956); National Labor Relations Board v. Mackay Radio and Telegraph Co., 304 US 333 (1938).

24. *See* Dennis Nolan, *Change without Labour Law Reform in the United States*, *in* THE AUSTRALASIAN LABOUR LAW REFORMS: AUSTRALIA AND NEW ZEALAND AT THE END OF THE TWENTIETH CENTURY 72 (Dennis Nolan ed., 1998).

25. Sanford Jacoby, *The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis*, 5 COMP. LAB. L. 85 (1982).

26. *See* WILLIAM GOULD, AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW (1993); Paul Weiler, *Enhancing Worker Lives Through Fairer Labor and Worklife in Comparative Perspective*, 25 COMP. LAB. L. & POL'Y J. 143 (2003); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983).

27. *See* STONE, *supra* note 22, at 196–242; PAUL WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW (1990); Janice Bellace, *Labor Law for the Post-Industrial Workplace: Breaking the New Deal Model in the USA*, *in* LABOUR LAW AT THE CROSSROADS: CHANGING EMPLOYMENT RELATIONSHIPS: STUDIES IN HONOUR OF BENJAMIN AARON 11 (Janice Bellace & M.J. Rood eds., 1997); Clyde Summers, *Industrial Democracy: America's Unfulfilled Promise*, 28 CLEV. ST. L. REV. 29 (1979).

administrative and persuasive powers of any federal government should never be underestimated.

The Canadian Constitution came into force in 1867, just after the conclusion of the American civil war. It does appear that its framers did not wish to establish strong provincial governments that could lead to Canadian turmoil. Accordingly, they sought to establish a strong central government and only give local powers to the provinces.[28] This was achieved by sections 91 and 92 of the Constitution. Section 92 gave the provincial governments a list of exclusive legislative powers that were local in nature, including a power to make laws about "s92(13) Property and civil rights within the Province." Section 91 bestowed upon the federal government a broad residual power. Section 91 states in part that the Canadian Parliament is empowered

> [T]o make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, . . . (2) The Regulation of Trade and Commerce.

It is important to appreciate that there is no intertwining of powers between the federal and provincial governments. This is because the powers possessed by the provinces are exclusive and cannot be trespassed upon by the federal parliament. Similarly, the section 91 powers of the federal parliament may not be encroached upon by the provincial parliaments. Over the last century and a half, first the Privy Council and later the Supreme Court of Canada[29] have read the enumerated exclusive powers of the provinces in a broad manner and have in most instances restrictively interpreted the federal peace, order, and good government power. No doubt the Supreme Court of Canada has taken note of the size of the nation and of the differences between the regions and the provinces, and of course the fact that the province of Quebec is a French speaking political entity.[30]

28. LESLEY ZINES, CONSTITUTIONAL CHANGE IN THE COMMONWEALTH 77–78 (1991).

29. The Privy Council was the final court of appeal on constitutional matters until 1949 when the Supreme Court of Canada became Canada's ultimate appellate court.

30. ZINES, *supra* note 28, at 77–85.

In 1907, in reliance on its section 91 powers, the Canadian Parliament passed the Industrial Disputes Investigation Act that required industrial disputants to, amongst other matters, submit their differences to compulsory conciliation. Right up to 1925, it was thought that the federal Parliament's section 91 power gave the Canadian Parliament the primary legislative powers over labor relations. However, in that year the Privy Council decided *Toronto Electric Commissioners v. Snider*,[31] which sharply decreased the capacity of the Canadian Parliament to enact national labor laws. In this case, the federal government appointed a conciliation board under the Industrial Disputes Investigation Act to conciliate a dispute between the Toronto Electric Commissioners and their street railway employees. The Electric Commissioners sought an injunction, asserting that the federal government did not possess power to regulate labor relations in areas of economic activity within provincial legislative jurisdiction. The Privy Council held that this labor dispute between the Toronto Electric Commissioners and their employees came within provincial jurisdiction because this labor dispute related to property and civil rights within the provinces pursuant to section 92 (13) of the Canadian Constitution.[32] This ruling placed the vast bulk of private sector labor relations within the legislative powers of the provinces. On occasion, difficult questions arise as to whether an industry or undertaking comes under federal or provincial labor law. As the authors of the 2004 Canadian labor law casebook put it:

> The basic rule is easy enough to state: the provinces have jurisdiction over labour and employment matters in industries that are within provincial legislative authority, and the federal government has jurisdiction over labour and employment matters in industries that are within federal legislative authority. However, in borderline cases it can be very difficult to determine what is federal and what is provincial.[33]

Since the *Snider Case*, the federal government's powers over labor relations have been confined squarely within its section 91 powers. At the present time, approximately 10% of private sector employees are under federal jurisdiction with the remainder coming under the provincial laws.[34] The Canadian government does govern

31. [1925] AC 396.

32. *See* PETER HOGG, CONSTITUTIONAL LAW OF CANADA, 546–51 (1992); LABOUR AND EMPLOYMENT LAW: CASES, MATERIALS AND COMMENTARY ch. 1, § 800 (Labour Law Casebook Group ed., 7th ed. 2004) [hereinafter *Casebook Group*]; F.R. Scott, *Federal Jurisdiction Over Labour Relations—A New Look*, 6 MCGILL L.J. 153 (1960).

33. *Casebook Group*, *supra* note 32, at 85.

34. DONALD CARTER ET AL., LABOUR LAW IN CANADA 62 (5th ed. 2002).

employees in inter-provincial and international trade, in broadcasting and communications, in uranium mining,[35] in some areas of defense, and of course its own employees.[36]

After World War II, the Canadian provincial legislatures enacted labor law regimes that were broadly similar to the United States Wagner Act model.[37] It is these provincial labor relations statutes that govern the vast bulk of Canadian private sector employees.

The Canadian Parliament's section 91 power to make laws for the peace, order, and good government of Canada does enable it to enact overriding labor laws in times of crisis. For example, in 1976 in Re Anti-Inflation Act,[38] the Canadian Supreme Court held valid temporary legislation controlling wages and prices because Canada's double digit inflation was a crisis that required federal intervention.[39] For the last twenty years, the Canadian Charter of Rights and Freedoms, which came into force in 1982, has impacted upon federal and provincial labor law by enhancing individual values of equality and fairness,[40] especially with respect to the operations of grievance arbitration.[41]

Given Canada's constitutional division of legislative powers between the Canadian and provincial governments, the Canadian Federal Parliament would face enormous difficulties in single-handedly adopting the Anglo-American deregulated labor law model. It could perhaps push the boundaries of its section 91 powers to the limits, but it would face strong opposition from the provinces, and especially from Quebec. It is also uncertain whether the Supreme Court of Canada would more broadly interpret the section 91 powers including Canada's trade and commerce power.[42] If a Canadian

35. In order to bring uranium mining under federal jurisdiction, the Canadian Government relied upon section 92(10)(c) of the Canadian Constitution which provides: "(10) Local Works and Undertakings other than such as are of the following Classes: . . . (c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces."

36. CARTER ET AL., *supra* note 34, at 62.

37. *See* CARTER ET AL., *supra* note 34; *Casebook Group*, *supra* note 32; Roy Adams, *A Pernicious Euphoria: 50 Years of Wagnerism in Canada*, 3 CAN. LAB. & EMP. L.J. 321 (1995).

38. [1976] 2 SCR 373.

39. *See* CARTER ET AL., *supra* note 34, at 63; HOGG, *supra* note 32, at 459–61.

40. *See* CARTER ET AL., *supra* note 34, at 63–65; Brian Etheringon, *An Assessment of Judicial Review of Labour Laws Under the Charter: Of Realists, Romantics and Pragmatists* 24 OTTAWA L. REV. 685 (1993).

41. *See*, *e.g.*, British Columbia (Public Serv. Employee Comm'n) v. B.C. Gov't and Serv. Service Employees' Union, [1999] S.C.R. 3; Ont. Human Rights Comm'n v. Simpson-Sears Ltd., [1985] 2 S.C.R. 536. For my own thoughts, see Ron McCallum, *Domestic Constitutions, International Law, and the International Labour Organization: An Australian and Canadian Case Study*, 20 QUEENS L.J. 301 (1995).

42. § 91(2).

Government did wish to sharply deregulate Canadian labor law, it would require strong cooperation from most of the provinces to achieve these aims.

VI. CONSTITUTIONAL CHANGE IN AUSTRALIA

It will be recalled that at the beginning of the twentieth century, in order to bring about industrial peace, the federal and Australian parliaments established labor courts to settle industrial disputes by conciliation and arbitration. The Australian Constitution came into force in 1901, and even though the federal and state governments are parliamentary ones, the Constitution has many similarities to that of the United States. The most striking similarity relates to the distribution of powers between the federal and state governments in both federations. The Australian Constitution bestows a series of enumerated powers on the federal parliament,[43] leaving the residual powers to the state parliaments. Most of these enumerated powers are concurrent in the sense that the state parliaments are not prohibited from enacting laws even though their subject-matter comes within one of the heads of the enumerated powers given to the federal parliament under section 51 of the Constitution.[44]

Section 109 of the Australian Constitution deals with collisions that do occur between federal and state legislation by enunciating what has become known as the inconsistency doctrine. It provides: "When a law of a state is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

Much has been written on the inconsistency doctrine that has exercised the minds of the judges of the High Court of Australia over the last one hundred years.[45] The High Court has made it clear that a direct inconsistency will occur between a federal and a state law where it is either impossible to obey both laws, or where a state law takes away a privilege or a right conferred by a federal law.[46] However, the High Court has also made it clear that inconsistency will arise where

43. §§ 51–52.

44. *See* Ron McCallum, *The Australian Constitution and the Shaping of Our Federal and State Labour Laws*, 10 DEAKIN L. REV. 461 (2005) [hereinafter McCallum, *Australian Constitution*].

45. *See generally* TONY BLACKSHIELD & GEORGE WILLIAMS, AUSTRALIAN CONSTITUTIONAL LAW AND THEORY: COMMENTARY AND MATERIALS 370–401 (3d ed. 2002); Peter Hanks, *"Inconsistent" Commonwealth and State Laws: Centralizing Government Power in the Australian Federation*, 16 FED. L. REV. 107 (1986).

46. *See* Hanks, *supra* note 45, at 112.

the intention of a federal law is to cover a field and a state law seeks to trespass on that field.[47] As long ago as 1930, the High Court gave a broad interpretation to what has become known as the covering the field test. Justice Dixon said:

> The inconsistency does not lie in the mere coexistence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed.[48]

The 1926 decision in *Clyde Engineering v. Cowburn*,[49] is a pertinent example of how the inconsistency doctrine has worked in the labor law field. In this case, it was held that a federal award that provided for a forty-eight hour working week prevailed over a state award that set the working week at forty-four hours. While it was possible to obey both awards by paying workers full wages for forty-four hours each week, the state award was directly inconsistent with the federal award because it took away the right of employers to have their employees work a forty-eight hour week. The High Court further held that the inconsistency arose because it was the intention of the federal award to cover the entire field of wages and weekly working hours. In my view, there are similarities between Australia's covering the field test and the United States pre-emption doctrine, for both seek to ascertain the intention of the federal legislature, be it the Australian Parliament or the United States Congress.

Unlike the constitutions of Canada and the United States, the Australian Constitution does mention labor relations. Section 51(xxxv) of the Constitution, which is known as the "labor power," enables the federal parliament to make laws with respect to, "Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State."

When the Constitution was drafted in the 1890s, the Australian colonies and New Zealand were beginning to experiment with compulsory conciliation and arbitration as the means of achieving industrial peace, so it is not surprising that the Australian Constitution gave the federal parliament power to establish a labor court to settle interstate industrial disputes by conciliation and arbitration.

In the early years of the last century, the federal parliament and the parliaments of several of the six states, established labor courts to

47. *See* Clyde Engineering Co. Ltd. v. Cowburn (1926) 37 C.L.R. 466.
48. *See Ex Parte* McLean (1930) 43 C.L.R. 472, 483.
49. *Supra* note 47.

settle industrial disputes. In those days, it was never imagined that the federal machinery could or would oust that of the states. After all, the federal machinery was limited to interstate industrial disputes. Of even greater importance was the restricted interpretation that the High Court of Australia gave to the phrase "industrial disputes" in the labor power. Right up until the decision of *R v. Coldham; Ex Parte the Australian Social Welfare Union*,[50] which was decided in 1983, the High Court gave a narrow meaning to the words "industrial disputes." The judges perceived the labor power as one primarily designed to protect the private sector working class, and hence industrial disputes were confined to disputes in an industry, that is to manual and skilled industrial employees. Many areas of white-collar employment were excluded.[51] After the 1983 *Coldham Case*,[52] industrial disputes were given a broader meaning[53] and new categories of employees came under federal jurisdiction. It was at this uncertain time, when the cold winds of economic globalization began to sweep across Australia, that serious thought was given to establishing a more national federal labor law regime.

The labor power is not the only head of constitutional power on which the federal parliament has relied to enact labor legislation. The Australian Constitution does contain an interstate commerce clause,[54] however, it has never been interpreted in the broad manner of its United States cousin.[55] The Australian interstate commerce clause has been used to uphold federal labor laws governing seamen, long shore men (known in Australia as waterside workers), and the airline industry, but only because of their direct connection with trade and commerce. However, the federal government could be more adventurous with this head of power in the labor relations field.[56] Section 51(xxix) of the Australian Constitution does contain a treaty power (known in Australia as the external affairs power).[57] The treaty power was used in 1993 by the Keating Labour Government to enact

50. (1983) 153 C.L.R. 297.

51. For a discussion of the pre-1983 law, see RON MCCALLUM & RICHARD TRACEY, CASES AND MATERIALS ON INDUSTRIAL LAW IN AUSTRALIA 16–59 (1980).

52. 153 C.L.R. at 312–13.

53. *See* Ron McCallum, *Jones and Laughlin Steel Downunder: New Directions in Australian Federal Labor Law*, 6 COMP. LAB. L. 94 (1984).

54. Section 51(i) gives the federal Parliament power to make laws with respect to "Trade and Commerce with other countries and among the States."

55. LESLEY ZINES, THE HIGH COURT AND THE CONSTITUTION 55–79 (4th ed. 1997).

56. For comment, see David McCann, *First Head Revisited: A Single Industrial Relations System under the Trade and Commerce Power*, 26 SYDNEY L. REV. 75 (2004).

57. Section 51(xxix) gives the federal Parliament power to make laws with respect to "External affairs." For details, see Mary Crock, *Federalism and the External Affairs Power*, 14 MELBOURNE U. L. REV. 238 (1984).

into domestic law several International Labour Organization Conventions to which Australia was a signatory.[58] However, these conventions have not greatly altered the reach and scope of our current labor laws and the 1996 amendments by the Howard Government have relied much less on the treaty power. Finally, section 51(xxxvii) enables the states to refer legislative powers to the federal parliament.[59] In 1996, the Parliament of the State of Victoria referred the vast bulk of its private sector labor relations powers to the federal parliament,[60] but at this point in time it is unlikely that any other state will go down this path. While the Howard federal government is a conservative administration, the Australian Labor Party holds power in all of Australia's six states and two territories.

It is important to appreciate how trade unions have used the labor power over the last one hundred years. In order to come within the jurisdiction of the federal labor court or commission, they have created interstate industrial disputes by delivering written lists of demands on employers in more than one state, and this jurisdictional device has become known as creating paper disputes. Once federal jurisdiction was established by a paper dispute, provided it was a genuine demand, an award could be made, either after successful conciliation or by compulsory interest arbitration. This has meant that trade unions and the Australian Industrial Relations Commission have become necessary elements in federal labor law, which relies primarily upon the labor power for its validity. If Prime Minister John Howard wishes to sharply deregulate federal labor law to create a regime of individual workplace agreements and to diminish the roles of the Commission and the trade unions, a new constitutional basis for this proposed legislation would have to be used.

The Howard federal government has made it clear that in fashioning its new deregulatory labor laws, which were passed by the federal Parliament in December 2005,[61] it has primarily relied on its powers to make laws about corporations to uphold the validity of

58. *Australian Journal of Labour Law* 1994, *supra* note 8, at 105–226; McCallum, *Internationalism*, *supra* note 8; McCallum & Ronfeldt, *supra* note 7, at 1.

59. Section 51(xxxvii) gives the federal Parliament power to make laws with respect to "Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred or which afterwards adopt the law."

60. Stuart Kollmorgen, *Towards a Unitary National System of Industrial Relations? Commonwealth Powers (Industrial Relations Act) 1996 (Vic); Workplace and Other Legislation Amendment Act (No. 2) 1996 (Commonwealth)*, 10 AUSTL. J. LAB. L. 158 (1997).

61. The *Workplace Relations Amendment (Workchoices) Act 2005 (Cth)* was introduced into the House of Representatives on 2 November 2005 and became law on 14 December 2005. It is expected to come fully into force in March 2006.

these laws. The corporations' power is contained in section 51(xx) of the Constitution, which gives the federal parliament power to make laws with respect to "Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth." For the first two-thirds of the twentieth century, this head of power was given a restricted interpretation. However, in the 1971 High Court decision in the *Concrete Pipes Case*,[62] it was held that the corporations' power would uphold anti-trust legislation, which in Australia is known as "trade practices" or "competition legislation."[63] In 1982, the High Court again upheld, with respect to corporations, secondary boycott legislation that prohibited trade unions from engaging in secondary boycott conduct against corporations.[64] Although the High Court held in 1990 that this power did not enable the federal parliament to create corporations,[65] nevertheless, it could not only regulate the activities of corporations, but also persons or bodies who engaged in conduct with corporations.

The federal labor law changes of the 1990s, and especially those made by the Howard Government, have made increasing use of the corporations' power to uphold various aspects of the Workplace Relations Act, including collective agreements and individual workplace agreements made by corporate employers. In 2001 the Federal Court of Australia upheld under this power collective agreements made by incorporated employers and trade unions.[66] Much has been written about the corporations' power and its application to labor law.[67] My concern with making the corporations' power the primary power for federal labor law, about which I have

62. Strickland v. Rocla Concrete Pipes Ltd. (1971) 124 C.L.R. 468.

63. Trade Practices Act, 1974.

64. Actors and Announcers Equity Ass'n v. Fontana Films Ltd. (1982) 150 C.L.R. 169.

65. New South Wales v. Commonwealth (1990) 169 C.L.R. 482.

66. Quickenden v. O'Connor and Ors (2001) 109 F.C.R. 243.

67. *See*, *e.g.*, BLACKSHIELD & WILLIAMS, *supra* note 45, at 703–33; BREEN CREIGHTON & ANDREW STEWART, LABOUR LAW 105–08 (4th ed. 2005); MARILYN PITTARD & RICHARD NAUGHTON, AUSTRALIAN LABOUR LAW: CASES AND MATERIALS 522–40 (4th ed. 2003); Bill Ford, *Reconstructing Australian Labour Law: A Constitutional Perspective*, 10 AUSTL. J. LAB. L. 1 (1997); Anthony Gray, *Precedent and Policy: Australian Industrial Relations Reform in the 21st Century Using the Corporations Power*, 10 DEAKIN L. REV. 440 (2005); McCallum, *Australian Constitution*, *supra* note 44; Andrew Stewart, *Federal Labour Law and New Uses for the Corporations Power*, 14 AUSTL. J. LAB. L. 145 (2001); George Williams, *The First Step to a National Industrial Relations Regime? Workplace Relations Amendment (Termination of Employment) Bill 2002*, 16 AUSTL. J. LAB. L. 94 (2003); Ron McCallum, Justice at Work: Industrial Citizenship and the Corporatisation of Labour Law, Address for the Kingsley Laffer Memorial Lecture (Apr. 11, 2005), http://www.econ.usyd.edu.au/wos/worksite/McCallum_laffer.pdf [hereinafter McCallum, *Kingsley Lecture*].

written in detail elsewhere,[68] is that in time federal labor law will become little more than a sub-set of corporations law. Its utility and validity will no longer turn primarily upon whether it assists employees to obtain fair wages and working conditions, but rather whether these laws assist corporations to be more productive in our globalized world.[69]

Not only will the corporations' power leave the federal Parliament free to greatly diminish the roles of the trade unions and the Australian Industrial Relations Commission, but it may also enable the federal Parliament to greatly lessen the scope of the remaining five state labor law mechanisms. Much will depend on how the High Court interprets not only the reach of the corporations' power, but also the scope of the inconsistency doctrine with its covering the field test. If the High Court interprets the covering the field test as broadly as the United States Supreme Court interprets its pre-emption doctrine with respect to United States federal labor law, then the role of the Australian state systems will have been greatly diminished. Much will depend upon the forthcoming Howard government legislation and on the subsequent decision of the High Court. The state Australian Labor Party governments and the trade unions have signaled that once it is passed by parliament, they will mount a High Court challenge to this legislation.

VII. CONCLUSION

From this brief survey of these three common law federations, it is clear that the manner in which the legislative powers have been distributed, together with their interpretation by their respective courts, have shaped federal labor law policy in these three nations. For the United States, it has been the Supreme Court's interpretation of the interstate commerce clause and the pre-emption doctrine, which has given the federal Government overwhelming labor law control. However, owing to both the nature of United States labor law legislation, and to its interpretation by a conservative judiciary, a deregulated labor law model has emerged with few legal constraints upon managerial power. In Canada, however, it has been primarily the distribution of legislative powers between the federal and provincial governments, and the manner in which sections 91 and 92 of the Constitution have been interpreted by the courts, which has

68. McCallum, *Australian Constitution*, *supra* note 44; McCallum, *Kingsley Lecture*, *supra* note 67.

69. *See* Gray, *supra* note 67.

lead to the Canadian Parliament having only limited control over labor relations. When Canada and the United States are contrasted, it is the Canadian provinces that possess real clout over labor law, whereas the United States Congress holds sway over United States national labor law policy.

Finally, Australia appears to possess the most detailed distribution of legislative powers of the three common law federations, especially with respect to labor relations. For the last one hundred years, owing to the nature of the labor power, and to its interpretation by the High Court, the federal and state governments have shared labor law responsibilities. The Howard federal government has embarked on a bold experiment to use its legislative powers over corporations to create a new deregulated labor law regime that could cover more than 80% of the Australian workforce. If the High Court upholds this new approach, then the Australian corporations' power could play a similar role that the United States interstate commerce clause played some seventy years ago in giving the United States a national collective bargaining regime. If not, then Australia will, for the foreseeable future, have its labor laws shared between its federal and state governments.