CONVERGENCES AND/OR DIVERGENCES OF LABOR LAW SYSTEMS: THE VIEW FROM AUSTRALIA

Ron McCallum†

When asked to describe Australian employment law, most foreign observers will explain that a unique form of compulsory conciliation and arbitration grew up as the centerpiece of this nation's labor laws whereby wages and terms and conditions of employment are determined by interest arbitration. Some foreign observers will doubtless mention the work of Henry Bournes Higgins who was the second judge of the Commonwealth Court of Conciliation and Arbitration, and who from 1907 to 1921 did so much to establish Australia's brand of conciliation and arbitration.[1] His 1907 Harvester decision[2] brought into existence what became a basic or minimum wage for working men that enabled them to support their wives and children.

Throughout the last one hundred years, Australia together with its sister nation New Zealand developed an indigenous form of conciliation and arbitration for the settling of industrial disputes on an industry basis. Where conciliation failed to settle labor disputes between trade unions and employers, industrial relations commissions (they were formerly styled labor courts) were empowered to exercise compulsory powers of final and binding interest arbitration to prescribe terms and conditions of employment. These arbitrated settlements were embodied in awards that established wage rates and

† Blake Dawson Waldron Professor in Industrial Law and Dean of Law University of Sydney. This short article is derived from the paper I delivered at "Comparative Labor Law: Bridging the Past and the Future," a conference held at the University of California Los Angeles Law School from October 7–9 2005. I thank Professor Emeritus Benjamin Aaron, Professor Katherine Stone, and Mr. Tal Grietzer and the entire staff of the Law School for their hospitality. I also thank Mr. Michael Rawling and Dr Joellen Riley University of Sydney for their assistance. Finally, I thank my wife, Associate Professor Mary Crock, for her untiring encouragement.

1. For his writing, see HENRY BOURNES HIGGINS, A NEW PROVINCE FOR LAW AND ORDER (1922, reprinted 1968); and for a biography see JOHN RICKARD, H.B. HIGGINS: THE REBEL AS JUDGE (1984).

2. Ex Parte H v. McKay (1997) 2 C.A.R. 1.

work rules with which all employers in the relevant industry were bound to comply when employing labor. Throughout most of the twentieth century, these awards settled terms of employment on an industry basis that took competition out of labor conditions for employers in the relevant sector of the labor market.

No national system of laws, and especially of employment laws, is a closed box impervious to external influences. It does appear to me that there is a tension between, on the one hand, the circulation throughout market economy countries of labor law and relations ideas and changing patterns of employment, as against, on the other hand, the ebb and flow of national economic and political forces.[3] This tension, I suggest, in large part explains why national labor law mechanisms go through periods of convergences and divergences from one another. As I shall argue, Australian labor law has been subject to influences from foreign laws and ideas from the date of its settlement by Europeans in 1788 right up to the present time. While compulsory conciliation and arbitration played a central role in Australia throughout the last century, there have been periods when its labor laws have been influenced by external ideas that have caused them to converge with those of other market economy countries and especially from those developed nations who share the heritage of the common law.

In late 2005, the Australian Parliament passed legislation bringing this century of conciliation and arbitration to an end.[4] A new regime of deregulated labor law has been put in place. The concepts and ideas underpinning these new laws, I suggest, have been derived from the deregulated labor law mechanisms of Great Britain and to a lesser extent the United States.

Given these dramatic changes to Australian labor law, it is timely to ask, how unique has Australian labor law actually been throughout the history of this nation? It is my view that although compulsory conciliation and arbitration have played a special and unique role in Australia, this nation's labor laws have been shaped by foreign laws and ideas to a significant extent, especially from Great Britain and the other developed common law countries.

3. Although his analysis is more than three decades old, these tensions are best explained by Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974).

4. Workplace Relations (Work Choices) Act 2005 (Cth).

I. AUSTRALIA'S COLONIAL PERIOD 1788–1900

Australia was first colonized by Europeans in 1788. In that year, Great Britain established a settlement at Sydney, now Australia's largest city. The purpose of this colony that became known as New South Wales was to set up a penal settlement to which Britain could export its surplus prison population. Later colonies of free settlers were established, and throughout most of Australia the transportation of convicts ceased in 1850.[5] With the discovery of gold in eastern Australia in the middle of the nineteenth century, Australia received an influx of settlers that diminished the influence of the nation's convict origins.

As was the case with the American colonists a century and a half earlier, the English settlers in Australia brought with them the English common law. At first, the penal colony at Sydney was under military rule; however, matters were regularized when the English Parliament passed the Australian Courts Act of 1828.[6] Under this statute, eastern Australia received all British common law and statutory law that was then in force.[7] This included the infamous English 1825 Combination Act that was used against trade union collective action.[8] The more westerly colonies of South Australia and Western Australia were initially governed by English law in accordance with common law principles.

In the area of labor law, it was natural for these fledgling colonies to adopt the English master and servant legislation.[9] However, as the nineteenth century progressed, the colonies gradually enacted their own master and servant statutes that gave employers and local magistrates power to control workers and to fine employees who absconded from their employers.[10]

Throughout the first three quarters of the nineteenth century, British trade unions were illegal organizations because their anti-

5. Convicts were transported to the colony of Western Australia up until 1868.

6. The Australian Courts Act 1828 (UK).

7. For a detailed discussion on Australia's adoption of English common law, see BRUCE KERCHER, AN UNRULY CHILD: A HISTORY OF LAW IN AUSTRALIA 73–75, 103–23 (1995).

8. For a discussion of the operation of the Combination Acts in the United Kingdom, see JOHN ORTH, COMBINATION AND CONSPIRACY: A LEGAL HISTORY OF TRADE UNIONISM 1721–1906, (1991); and with respect to Australia see Bilby v Hartley (1892) 4 QLJ 137 as cited in EDWARD SYKES, STRIKE LAW IN AUSTRALIA 113, 104–13 (2nd ed. 1982).

9. *See* JOHN PORTUS, THE DEVELOPMENT OF AUSTRALIAN TRADE UNION LAW 90–94 (1958).

10. *See* Michael Quinlan, *'Pre-Arbitral' Legislation in Australia and its Implications for the Introduction of Compulsory Arbitration*, *in* THE ORIGINS AND EFFECTS OF STATE COMPULSORY ARBITRATION 1890–1914, 25, 25–38 (Stuart MacIntyre & Richard Mitchell eds., 1989).

competitive activities were in restraint of trade and also because collective strikes amounted to criminal conspiracies. With the pressures of industrialization and owing to the demands of workers, the English Parliament legalized trade unions when it enacted the Trade Union Act of 1871.[11] Again, it was natural for the Australian colonies to follow suit so that by 1902, all of the Australian colonies had passed their own trade union statutes.[12] The British Conspiracy and Protection of Property Act of 1875[13] immunized trade unions from criminal conspiracy, but created a new offense of watching and besetting. Again, the Australian colonies, save for New South Wales, fully adopted this British statute.[14]

Throughout the nineteenth century, Australia was largely an agrarian nation, and it was not until late in that century that small scale industry became important. However, the colonial parliaments did enact factory legislation that was modeled on the British factory statutes. Commencing with Victoria in 1885,[15] the Australian colonies adopted the nineteenth century British factory legislation that dealt with various safety measures including the fencing of dangerous machinery.[16]

It is readily apparent that toward the close of the colonial period, that is, in the early 1890s, Australian labor law largely mirrored the labor laws of Great Britain. Indeed, given its small population throughout most of the nineteenth century, it would have been surprising if Australia had not adopted the labor laws of the mother country.

II. ONE HUNDRED YEARS OF COMPULSORY CONCILIATION AND ARBITRATION

During the last decade and a half of the nineteenth century, the notion that labor disputes could be resolved by conciliation and arbitration was sweeping throughout the industrialized world. Conciliation was more popular than was arbitration, and conciliation statutes were enacted in Britain, in some Canadian provinces and in

11. Trade Union Act 1871 (UK), which was importantly amended in 1876.
12. For details, see PORTUS, *supra* note 9, at 95–99.
13. Conspiracy and Protection of Property Act 1875 (UK).
14. *See* SYKES, *supra* note 8, at 113–15, 128–51.
15. *See* T.G. Parsons, *Alfred Deakin and the Victorian Factory Act of 1885: A Note*, 14 J. INDUS. REL. 206 (1972).
16. For details, see NEIL GUNNINGHAM, SAFEGUARDING THE WORKER: JOB HAZARDS AND THE ROLE OF THE LAW 65–71 (1984).

several States of the United States.[17] In the mid-1890, a series of labor disputes broke out in Australia, especially in the shipping and sheep sheering industries, which crossed over the colonial boundaries. In brief, the employers asserted their rights of freedom of contract to employ whomsoever they wished, whereas the trade unions stated that they would not work with non-unionists. By the middle of that decade, however, the trade unions had been defeated and the employees returned to work on the terms of the employers.

A number of far-sighted politicians were of the view that the processes of conciliation and arbitration that were being discussed throughout the common law nations could be used to prevent the future outbreak of industrial disputation. In 1894, the New Zealand Parliament passed the first compulsory conciliation and arbitration statute.[18] Shortly afterwards several Australian parliaments (the colonies became States in 1901 when Australia became a federal nation), enacted similar statutes,[19] and in 1904 the Parliament of Australia passed the Commonwealth Conciliation and Arbitration Act of 1904.[20] Thus began one hundred years of compulsory conciliation and arbitration, Australian-style.

In the 1890s, at the time of the labor disruptions, Australian politicians were meeting to draft a federal constitution for Australia. In 1898, its framers decided to give the Australian Parliament power to enact labor laws based on compulsory conciliation and arbitration. Section 51(xxxv) of the Australian Constitution, which became known as the labor power, provided that the Parliament could make laws with respect to "Conciliation and Arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state." It was the labor power that enabled the Australian Parliament to enact federal labor laws that had as their centerpiece, first a labor court and later an industrial relations commission, which possessed compulsory powers to conciliate, and failing conciliation to

17. For an account of the position in Canada and the United States, see Richard Mitchell, *Solving the Great Social Problem of the Age: A Comparison of the Development of State Systems of Conciliation and Arbitration in Australia and Canada*, *in* CANADIAN AND AUSTRALIAN LABOR HISTORY: TOWARDS A COMPARATIVE PERSPECTIVE 47 (Greg Kealey & Greg Patmore eds., 1990).

18. Industrial Conciliation and Arbitration Act 1894 (NZ).

19. *See*, *e.g.*, Industrial Arbitration Act 1901 (NSW). The best account of the development of Australian conciliation and arbitration is THE ORIGINS AND EFFECTS OF STATE COMPULSORY ARBITRATION 1890–1914 (Stuart MacIntyre & Richard Mitchell eds., 1989). For a briefer account by a United States academic, see Leroy Merrifield, *The Origin of Australian Labor Conciliation and Arbitration*, *in* INTERNATIONAL COLLECTION OF ESSAYS: IN MEMORIAN, SIR OTTO KAHN-FREUND 173 (F. Gamillscheg et al. eds., 1980).

20. Commonwealth Conciliation and Arbitration Act 1904 (Cth).

engage in binding interest arbitration on an industry basis. The placing of the labor power into the Australian Constitution was a triumph for working people. It guaranteed that an independent body would determine wages and terms and conditions of employment for employees, and that the body would be independent of government, of capital, and of trade unions. It amounted to the birthright of Australian industrial citizens.[21]

What set Australian and New Zealand arbitral laws apart from laws in other similar nations was their compulsion. For example, in 1907 the Parliament of Canada enacted the Industrial Disputes Investigation Act[22] that only utilized compulsory conciliation as the primary means of settling labor disputes. While Australia cannot claim compulsory conciliation and arbitration as a homegrown idea, its use of compulsory arbitration by independent labor courts and industrial relations commissions did establish a vigorous labor relations mechanism that was far stronger than its New Zealand counterpart and which lasted throughout the twentieth century.

Conciliation and arbitration remained at the center of Australian labor law until the State and federal parliaments, to varying degrees, began to partially deregulate labor law in the early 1990s.[23] Compulsory arbitration flourished Down Under, I suggest, owing to its egalitarianism and fairness (which were hallmarks of the Australian character) to our relatively secure economy, and no doubt to Australia's geographic isolation from the industrialized northern hemisphere nations.[24]

As most arbitrated awards specified terms and conditions of employment on an industry basis, they lacked the necessary detail to govern all aspects of the employment relationship. While they specified wage rates, hours of work, et cetera, other matters such as employee obedience, good faith and fidelity, and termination of employment were governed by the individual contract of employment.

21. Ron McCallum, *Industrial Citizenship*, *in* LABOR MARKET DEREGULATION: REWRITING THE RULES 15 (Joe Isaac & Russell Lansbury eds., 2005).

22. Industrial Disputes Investigation Act 1907 Statutes of Canada, 1907, c.20. For an account of this statute and of the politics behind it, see PAUL CRAVEN, AN IMPARTIAL UMPIRE: INDUSTRIAL RELATIONS AND THE CANADIAN STATE 1900–1911, 279–317 (1980).

23. For details, see THE AUSTRALASIAN LABOR LAW REFORMS: AUSTRALIA AND NEW ZEALAND AT THE END OF THE TWENTIETH CENTURY (Dennis Nolan ed., 1998); EMPLOYMENT RELATIONS, INDIVIDUALIZATION AND UNION EXCLUSION: AN INTERNATIONAL STUDY (Stephen Deery & Richard Mitchell eds., 1999).

24. For a thoughtful analysis of Australian compulsory conciliation and arbitration, see the papers collected in THE NEW PROVINCE FOR LAW AND ORDER: 100 YEARS OF AUSTRALIAN INDUSTRIAL CONCILIATION AND ARBITRATION (Joe Isaac & Stuard MacIntyre eds., 2004); see also Justice Michael Kirby, *Industrial Conciliation and Arbitration in Australia—A Centenary Reflection*, 17 AUSTL. J. LAB. L. 229 (2004).

In a nutshell, the common law contract of employment remained at the center of Australian labor law, with conciliation and arbitration supplying general employment conditions such as wages and hours of work.[25]

III. CONVERGENCES IN THE TWENTIETH CENTURY

Although compulsory conciliation and arbitration held sway throughout most of the twentieth century, Australia's labor laws were strongly influenced by external legal developments. These external forces did lead to a higher level of convergence between Australian employment law and the laws of the other common law developed nations than otherwise might have been the case. It is not possible in a paper of this size to cover everything in detail; however, I shall make brief remarks on discrimination in employment, occupational health and safety, unfair dismissal legislation, and collective bargaining.

In 1964, the United States Congress passed its Civil Rights Act,[26] Title VII of which outlawed racial and sexual discrimination in employment. The new laws proscribing this type of discriminatory conduct resounded around the world in large part because they were consonant with the growing movements against racial and sexual discrimination. These new anti-discrimination measures were relatively speedily transplanted into other common law industrialized nations. In the late 1960s and in the 1970s Britain enacted racial and sex discrimination statutes.[27] At the same time, Canada outlawed such forms of discrimination in its human rights statutes. South Australia first outlawed racial discrimination in 1966,[28] and in 1975 it passed its Sex Discrimination Act.[29] Victoria and New South Wales enacted similar measures[30] as did the other states. In 1975, the Australian Parliament banned racial discrimination;[31] in 1984 it outlawed discrimination on the grounds of sex, marital status, and pregnancy;[32]

25. The contract of employment has always played a pivotal role in Australian labor law. *See* BREEN CREIGHTON & ANDREW STEWART, LABOR LAW 271–312, 352–72 (4th ed, 2005); see also JOELLEN RILEY, EMPLOYEE PROTECTION AT COMMON LAW (2005).

26. Civil Rights Act 1964 42 U.S. C. 2000e et seq. For comment on the employment aspects of this statute see generally SAMUEL ESTREICHER & MICHAEL HARPER, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION AND EMPLOYMENT LAW (2000).

27. For comment, see Laurence Lustgarten, *The New Meaning of Discrimination* PL 178 (1978).

28. Prohibition of Discrimination Act 1966 (SA).

29. Sex Discrimination Act 1975 (SA).

30. Anti-Discrimination Act 1977 (NSW); and Equal Opportunity Act 1977 (Vic); and see now Equal Opportunity Act 1995 (Vic).

31. Racial Discrimination Act 1975 (Cth).

32. Sex Discrimination Act 1984 (Cth).

in 1992 it enacted legislation prohibiting disability discrimination;[33] and finally in 2004 age discrimination was outlawed.[34] The various State and federal industrial relations statutes were also amended to proscribe discrimination in employment on the grounds of gender, pregnancy, race and disability.

As it did in its colonial era, in the field of occupational health and safety law, Australia continued to borrow heavily from Great Britain. In 1972, the Robens Committee handed down its report into occupational health and safety law.[35] Robens recognized that the factory legislation only covered approximately 50% of the workforce, and that there were no general laws covering workplace safety for offices, schools, hospitals, et cetera. So, in 1974, the British Parliament enacted the Health and Safety at Work Etc Act,[36] which required all employers, contractors, and controllers of places of work to ensure, so far as was reasonably practicable, that all employees and other persons at places of work were safe and without risks to health. Any transgressions made employers, contractors, and controllers liable to criminal penalties. The Robens report had enormous influence throughout the industrialized market economy countries of the Commonwealth and of Europe. Australia, Canada, and New Zealand enacted Robens legislation in a similar form to the British 1974 health and safety at work statute.[37] Although there were some earlier measures, New South Wales was the first Australian State to fully adopt this British approach in 1983,[38] and by the end of the 1990s, the other States and Territories had enacted similar legislation. [39]

Throughout most of the twentieth century, the State labor courts and industrial relations commissions had ordered employers to reinstate dismissed employees in order to settle collective labor disputes. In other words, where the termination of an employee led to

33. Disability Discrimination Act 1992 (Cth).

34. Age Discrimination Act 2004 (Cth); and for a detailed discussion of federal discrimination law, see HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, FEDERAL DISCRIMINATION LAW (2005).

35. LORD ROBENS, REPORT OF THE COMMITTEE ON SAFETY AND HEALTH AT WORK 1970–1972 (1972).

36. Health and Safety at Work Etc Act 1974 (UK).

37. Health and Safety at Work Etc Act 1974 (UK).

38. Occupational Health and Safety Act 1983 (NSW), and see now Occupational Health and Safety Act 2000 (NSW).

39. *See*, *e.g.*, Occupational Health and Safety Act 1985 (Vic), and see now Occupational Health and Safety Act 2004 (Vic). For a thoughtful historical discussion, see Neil Gunningham, *From Compliance to Best Practice in OHS: The Roles of Specification, Performance and Systems-Based Standards*, 9 AUSTL. J. LAB. L. 221 (1996) and for an examination of the operation of these laws, see Richard Johnstone, *Paradigm Crossed? The Statutory Occupational Health and Safety Obligations of the Business Undertaking*, 12 AUSTL. J. LAB. L. 73 (1999).

a collective difference between the relevant trade union and the employer, as a means of settling this dispute the State labor court or commission would order the employer to reinstate the employee. However, no individual right to seek redress for harsh, unfair, or unreasonable dismissals existed. In Britain and in Europe in the late 1960s and 1970s, individual unfair termination regimes were constructed. Again it was South Australia that took the lead in this area of employment law. In 1972 it first established an individual unfair termination remedy,[40] and gradually the other States enacted broadly similar measures. However, it was not until the Australian Parliament passed the Industrial Relations Reform Act of 1993 that employees under federal labor law were given this form of remedy.[41]

Finally, it is timely to write a few words on collective bargaining. When conciliation and arbitration were operating in Australia, from time to time (especially in periods of labor shortages) industry bargaining did occur between trade unions and employer associations. However, in the late 1980s when the first winds of economic globalization were beginning to sweep across Australia, it became clear that our nation could no longer set wages on an industry or occupational basis. Professor John Niland's 1989 report for the New South Wales government[42] and the influential 1989 report of the Business Council of Australia[43] both recommended that Australia adopt collective bargaining, which became known as enterprise bargaining, for the determination of wages and terms and conditions of employment at the level of the employing enterprise. It does appear that especially the Niland report and to a lesser extent the Business Council of Australia report, had in mind Australia adopting a plant level collective bargaining mechanism somewhat akin to the United States' collective bargaining regime. In 1993, the federal government established a collective bargaining regime,[44] and several States set up their own mechanisms. As I have pointed out elsewhere,[45] the federal enterprise bargaining regime failed to include many of the safeguards to trade unions and to employees that are to

40. Industrial Conciliation and Arbitration Act 1972 (SA) section 15(1)(e).

41. Industrial Relations Reform Act 1993 (Cth).

42. I JOHN NILAND, TRANSFORMING INDUSTRIAL RELATIONS IN NEW SOUTH WALES: A GREEN PAPER (1989).

43. *Business Council of Australia, Enterprise-based Bargaining Units: A Better Way of Working*, I REPORT TO THE BUSINESS COUNCIL OF AUSTRALIA BY THE INDUSTRIAL RELATIONS STUDY COMMISSION (1989).

44. Industrial Relations Reform Act 1993 (Cth); and for comments, see ENTERPRISE BARGAINING, TRADE UNIONS AND THE LAW (Paul Ronfeldt & Ron McCallum eds., 1995).

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

be found in the United States laws. For example, since the 1993 changes, no trade union recognition mechanism exists requiring employers to recognize, for the purposes of collective bargaining, a trade union that has the support of a majority of the employees in the enterprise. Instead, our laws leave it for employers to decide whether or not to choose to engage in collective bargaining.

IV. LABOR LAW CHANGES IN THE TWENTY-FIRST CENTURY

In late 2005, the Australian Parliament passed legislation that, for all practical purposes, abolished Australia's century-long federal conciliation and arbitration system. These new laws, which are known colloquially as the Work Choices laws,[46] have established a type of deregulated labor law regime that focuses upon the individual employee and employer relationship. Conciliation and arbitration has been replaced by a mechanism that promotes statutory agreements between employers and individual employees. This type of individual agreement-making is the government's preferred method of labor relations regulation. Where employers agree to engage in collective bargaining, either with trade unions or directly with their employees, the new laws enable collective bargaining to take place, although the capacity for trade unions to take legal strike action is greatly curtailed. For example, trade unions engaging in collective bargaining at the enterprise level are required to hold secret strike ballots that must be in favor of strike action before they may engage in lawful strike activity.[47] Interestingly, this secret strike ballot mechanism has been borrowed from the English labor laws that were first enacted in the 1980s by the government of Prime Minister Margaret Thatcher.[48] These Work Choices laws became fully operational in March 2006.

Except for transitional purposes, in enacting these new laws, the Parliament has not relied on the labor power that centers upon conciliation and arbitration tribunals and trade unions. Instead, the primary constitutional power upon which the Parliament has relied is the corporations power. Section 51(xx) of the Australian Constitution enables Parliament to make laws with respect to "Foreign corporations, and trading or financial corporations formed within the

46. The Workplace Relations (Work Choices) Amendment Act 2005 (Cth), which significantly amended and renumbered the Workplace Relations Act 1996 (Cth), has established the new Work Choices laws.

47. Workplace Relations Act 1996 (Cth) ss 449–493.

48. For details of the British laws, see SIMON DEAKIN & GILLIAN MORRIS, LABOR LAW 921–35 (3rd ed., 2001).

limits of the Commonwealth." Together with ancillary powers,[49] this new Work Choices scheme covers approximately four out of every five Australian employees.

Much has already been written on the new Work Choices laws.[50] Briefly put, the powers of industrial relations tribunals and trade unions have been curtailed in favor of employer managerial power. The setting of terms and conditions of employment is to be either by statutory individual agreements between employers and employees, or through the conclusion of collective agreements. Such agreements may be made either with trade unions or directly with the employees of the enterprise.[51] All workplace agreements, either individual agreements or collective agreements, must comply with the new Fair Pay and Conditions Standard.[52] Briefly put, this Standard (which is complex in its legislative form), comprises a minimum wage that will be set by a new authority titled the Australian Fair Pay Commission.[53] The Standard also includes four weeks of annual leave (two weeks of which may be sacrificed in return for increased remuneration), ten days of personal carer's/sick leave, two days of compassionate leave, thirty-eight ordinary hours of work per week averaged over twelve months, and twelve months unpaid parental leave, that is unpaid leave given to a parent (usually the mother) on the birth or adoption of a child. The unfair dismissal laws have been truncated so that now it is only employees whose employers employ more than one hundred persons who will be able to seek a remedy for unfair termination.[54] Of course, employees who have been dismissed unlawfully, that is on impermissible grounds of sex, race, disability, et cetera, will still be able to seek redress. Collective agreements will no longer be certified by the Australian Industrial Relations Commission whereby their terms were analyzed against the backdrop of underlying award terms

49. For a discussion of the Australian heads of constitutional power which has been written for an international readership, see Ron McCallum, *Plunder Downunder: Transplanting the Anglo-American Labor Law Model to Australia*, 26 COMP. LAB. L. & POL'Y J. 381 (2005), see also Ron McCallum, *Justice at Work, Industrial Citizenship and the Corporatisation of Australian Labor Law*, 48 J. INDUS. REL. 131 (2006).

50. For the most detailed account, see JOELLEN RILEY & KATHRYN PETERSON, WORK CHOICES: A GUIDE TO THE 2005 CHANGES (2006); see also *CCH, Understanding Work Choices: A Practical Guide to the New Workplace Relations System* (2006); JAMES MACKEN, MACKEN ON WORK CHOICES (2006); Andrew Stewart, *The Work Choices Legislation: An Overview*, BREEN CREIGHTON & ANDREW STEWART, LABOR LAW (supp., 4th ed. 2005), *available at* http://www.federationpress.com.au/pdf/workchoiceslegislation300306.pdf (last visited May 3, 2006).

51. Workplace Relations Act 1996 (Cth) ss 321–418.

52. Workplace Relations Act 1996 (Cth) ss 171–320.

53. Workplace Relations Act 1996 (Cth) ss 19–45.

54. Workplace Relations Act 1996 (Cth) 635–687.

and conditions of employment. Instead, collective and individual agreements are now lodged with the Office of the Employment Advocate for approval. These new Work Choices laws, I suggest, have borrowed heavily from the individualistic ideas that underpin British and, to a lesser extent, United States labor laws. [55]

V. NEO-LIBERAL IDEOLOGY AND ECONOMIC RATIONALISM IN THE TWENTY-FIRST CENTURY

Given Australia's long-standing habit of borrowing labor laws from other common law nations, it is hardly surprising that after almost two decades of knocking on the parliamentary doors, Australia has sought to amend its labor laws in line with the more market-oriented labor laws of Great Britain and the United States. Neo-liberal ideology and the forces of economic globalization are in their ascendancy. It is these ideas, coupled with the operations of the labor laws of Britain and the United States, which have been powerful factors in Australia enacting its Work Choices regime.

It can be seen that for most of its history of more than two hundred years, Australian labor law has borrowed from other legal systems. Throughout its colonial period, there was a strong convergence between the labor laws of England and those of its Australian colonies. At the beginning of the twentieth century, Australia (together with New Zealand) did establish its own unique form of compulsory conciliation and arbitration. At that time, these ideas were not new, for conciliation and arbitration was perceived throughout the common law world as one means of resolving labor disputation. Australia's indigenous form of conciliation and arbitration did set market wage rates and work rules on an industry basis throughout the nation, however, influences from other foreign laws were significant. As I have shown above, Australia did adopt modern discrimination laws along the lines of those enacted in the United States, Great Britain, and Canada. Similarly, Australia largely copied England's approach to occupational health and safety regulation of the last quarter of the twentieth century. Australia's unfair termination laws, as they existed before the new Work Choices laws, borrowed from overseas examples. When Australia established its enterprise-focused regimes of collective bargaining, it was influenced by United States practice, even though it failed to enact the

55. For a useful economic analysis see 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).

protections that are bestowed upon United States trade unions. Finally, the Work Choices laws have been greatly influenced by neo-classical economic and neo-liberal ideas that have been in the ascendancy, especially among those market economy countries whose legal systems are grounded in the common law. It will be interesting to see whether, in the coming years, Australia continues along this path of convergence, or whether it seeks to revive some of the egalitarian ideas that underpinned its conciliation and arbitration mechanisms.