

Enterprise Bargaining, Managerial Prerogative and the Protection of Workers' Rights: An Argument on the Role of Law and Regulatory Strategy in Australia under the Workplace Relations Act 1996 (Cth)

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*Shelley Marshall and Richard Mitchell*

**Abstract:** Since the beginning of the 1990s successive Australian national governments (from both right and left of the political spectrum) have overseen a shift in the regulation of employment relations from one based on centralised arbitrated awards to one of enterprise bargaining. The ostensible purpose of this policy was to facilitate the development of workplace-focused systems of regulation which were sensitive to the need for flexible production and employment systems in the context of the global economy. The evidence suggest that whilst many of the objectives of the enterprise bargaining project have been attained (particularly the goal of greater flexibility in employment systems), the law has been less effective in protecting the interests of workers, particularly their power to influence decision-making at the place of work. The major impact of enterprise bargaining upon the workplace, the paper proposes, has been the restoration of managerial prerogative which previously had been mediated through arbitration or the power of trade unions. Finally, the paper draws conclusions on the changing role of the institutions which regulate Australian industrial relations. Historically, Australian industrial tribunals have combined the features of judicial bodies and regulatory agencies. The paper concludes that a shift is occurring in Australian labour law from a mixture of self-regulation and centralised 'command and control', to 'enforced self-regulation', thus signalling a systemic and profound reorientation in regulatory policy and technique in Australian labour market regulation.

When Labour Relations Deregulation is not an Option: The Alternative Logic of Building Service Employers in Quebec

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*Patrice Jalette*

**Abstract:** It is generally considered that globalisation is creating pressures on employers toward a deregulation of labour relations. This paper explores how institutional advantages resulting from a labour relations policy may have benefits for employers that outweigh their costs. To that end, the author examines the building services sector in Quebec which is covered by the decree system, a working conditions extension mechanism unique in North America. The comparative institutional advantages of the decree system help employers to secure greater labour market stability and low-inflation wage settlements which accounts for the relatively good economic performance of the sector.

## An analysis of Changing Industrial Relations in China

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*Jie Shen*

**Abstract:** This paper explores changing industrial relations in China by reviewing the existing literature and analysing a recent industrial relations survey conducted by the Shanghai Municipal Trade Union Council. During the transition from a planned economy to a quasi-market one, a harmonic relationship has been replaced by widespread labour disputes between enterprise management and workers. The growing violations of workers' rights are mainly due to diversity of ownership, a lack of regulations for human resources management, extended management power over employment relations, inadequate social security, surplus labour supply and weak unions. In order to achieve social stability the Chinese government is keen to establish a system of protection of workers' rights. The current system is centred on labour arbitration that is accompanied by tripartite negotiation, collective (regional) agreements and labour courts. Unions play no more than a role of mediation, organising meetings in tripartite negotiation. Consequently, local labour bureaux or (government) industry bureaux have a strong tendency to interfere in and influence industrial relations. 'Rival' regional unions or workers' congresses set up by the union council to represent workers in their regions are emerging. However, they have not yet played an active role in solving labour disputes. Strengthening labour arbitration is the key to developing labour dispute management strategies in China given that independent unions are not possible in the near future.

## Stroking the Nettle: New Zealand Legislators and the Issues of Redundancy

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*Alan Geare, Fiona Edgar*

**Abstract:** As a consequence of recession and also of major restructuring of the economy, New Zealand has experienced considerable redundancies over the last 20 years. During this time, successive legislators have been reluctant to pass specific redundancy legislation guaranteeing compensation to workers being made redundant. Legislation does, however, give any dismissed worker the right to take a personal grievance. The failure of legislators to make crystal clear what is the situation with redundancy has allowed, if not encouraged, a considerable degree of judicial activism on the part of the Courts, thereby creating a high level of uncertainty as to the outcome of any redundancy situation.

## The Legal Position of Employees' in Cross-Border Transfers of Undertakings in the EU: A Question of Jurisdiction and Choice of Law

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*Jonas Malmberg*

**Abstract:** The EC Transfer of Undertakings Directive (2001/23/EC) aims to protect the position of employees in the case of a transfer of undertaking. This paper discusses the way in which the Directive is to be applied to cross-border transfers of undertakings. The analysis indicates that, in principle, the Directive is applicable to such transfers. Since the Directive must be implemented under national law, this involves different national rules for transfers of undertakings, even if they are harmonised to some extent. As a result, one key issue concerns which country's law is to apply and which country's courts have jurisdiction to hear disputes arising from cross-border transfers.

## Fundamental Social Rights in Pre- and Post-Constitutional Terms

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*Frank Hendrickx*

**Abstract:** Fundamental social rights have come a long way in the history of the European Union. Until recently, with the currently contested EU Constitutional Treaty, the Union showed a willingness to adopt a binding instrument containing fundamental social rights. This article argues that the newly pledged fundamental rights would have a considerable impact on both EU as well as Member State policies. The paper also outlines the development of fundamental social rights in the European Union and shows a lack of a clear and uniform approach to the fundamental rights debate in Europe. It is argued that a more general “constitutionally coloured” fundamental rights pathway must be distinguished from the social policy track, but that the two approaches have merged over the years, finding a synthesis in the Charter on Fundamental Rights incorporated into the Constitutional Treaty. The focus is therefore on a pre-constitutional and a post-constitutional understanding of fundamental social rights.