Workplace and Corporate Law Research Group

RESEARCH REPORT

Legal Origins and the Evolution of Australian Labour Law, 1970-2010

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LEGAL ORIGINS AND THE EVOLUTION OF LABOUR LAW IN AUSTRALIA, 1970-2010

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Introduction

This paper reports on recent research by the authors on the evolution of Australian labour law using a numerical, or 'leximetric', approach, which allows for a quantitative measurement of law, legal evolution and comparative legal studies.[1] The leximetric approach has been particularly influential in recent debates in the law and economics literature, where it has been used to explore the development of legal rules and the effects of different 'styles' of regulation on a range of economic outcomes.[2]

In carrying out this work we have drawn from a 2007 study by Deakin, Lele and Siems,[3] and in particular we have adopted the coding framework used by those authors in their Longitudinal Labour Regulation Index, which formed the basis for the data set used in the coding and comparison of labour law developments across a number of countries.[4]

In taking this approach, we seek to do three things. First, we aim to demonstrate a useful method for examining the evolution of Australian labour law in a systematic manner that employs objective criteria against which legal changes can be measured. Second, we use the data to test whether the protective strength of Australian labour law has, over time, converged with that of other countries. Third, we use the data to assess the extent to which the Australian case conforms to the predictions of legal origins theory.

The outcome, as will be clear from the following text, is that we are able numerically to chart the evolution of Australian labour law across the 1970-2010 period[5] and, at the same time, to

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1 P. Lele and M. Siems, 'Shareholder Protection: A Leximetric Approach' (2007) 7 *Journal of Corporate Law Studies* 17; M. Siems 'Shareholder Protection Around the World ("Leximetric II")' (2008) 33 *Delaware Journal of Corporate Law* 111; M. Siems, 'Legal Origins: Reconciling Law & Finance and Comparative Law' (2007) 52 *McGill Law Review* 55; M. Siems, 'Numerical Comparative Law: Do we Need Statistical Evidence in Law in Order to Reduce Complexity?' (2005) 13 *Cardozo Journal of International and Comparative Law* 521.

2 For a review of the literature see R. La Porta, F. Lopez-de-Silanes and A. Shleifer, 'The Economic Consequences of Legal Origins' (2008) 46 *Journal of Economic Literature* 285.

3 S. Deakin, P. Lele and M. Siems, 'The Evolution of Labour Law: Calibrating and Comparing Regulatory Regimes' (2007) 146 *International Labour Review* 133.

4 Full details of their project and the data sets are available for downloading at: <http://www.cbr.cam.ac.uk/research/programme2/project2-20.htm>. Last accessed 28 July 2009.

5 Note that we scored Australian labour law out to 2010 so as to allow for the impact of changes being

compare these developments with the findings given for the five countries examined by Deakin et al. (France, Germany, India, the UK and the USA). As part of this process we are able to provide an initial examination of the degree to which Australian labour law conforms with 'legal origins' theory about national regulatory styles in economic ordering,[6] and to contribute to domestic debates concerning the importance of specific shifts in public policy in changing the trajectory of the evolution of Australian labour law. Finally, while we do not pursue this question in this paper, we suggest that the study may allow for a more systematic investigation of the consequences of labour law reforms for a range of economic and social outcomes.[7]

Legal Origins Theory

In their 2007 article Deakin, Lele and Siems traced the emergence of legal origins theory back to the quantitative work of Rafael La Porta and his colleagues on corporate law in the mid-to-late 1990s.[8] According to those authors, national 'regulatory styles' in economic ordering are principally influenced by the 'legal origins'[9] of a particular country: that is, whether they belong either to the 'common law' legal family or to one or other variant of the 'civil law' legal family. The theory suggests that different legal systems use contrasting 'regulatory styles' in dealing with market failures and, accordingly, that a country's legal origins influences the long run performance of its national economy. For the purposes of the legal origins hypothesis, there are four important legal families, long described by comparative lawyers.[10] These are: common law systems, originating in England; civil law systems, derived from France; civil law systems derived from Germany; and socialist legal systems. In much of the empirical work and secondary literature (as here), this categorisation is simplified into two groupings, those of civil law, and those of common law legal origins. Almost all countries outside Europe have legal systems that are 'transplants': that is, they are, by reason of conquest or adoption, based on European models.

For legal origins theory, a legal tradition represents an informational technology designed to solve social problems. While adopters may change and adapt a legal tradition to suit local circumstances and cultural values, the underlying style of regulation associated with the

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introduced in the *Fair Work Act 2009* (Cth.).

6 For some preliminary qualitative discussion on these matters see M. Jones and R. Mitchell, 'Legal Origin, Legal Families and the Regulation of Labour in Australia' in S. Marshall, R. Mitchell and I. Ramsay (eds.), *Varieties of Capitalism, Corporate Governance and Employees*, Melbourne University Press, Melbourne 2008, p. 60; S. Marshall, R. Mitchell and A. O'Donnell, 'Corporate Governance and Labour Law: Situating Australia's Regulatory Style' (2009) 47 *Asia Pacific Journal of Human Resources* 150.

7 For an example of this approach, see S. Deakin and P. Sarkar, 'Assessing the Long-Run Economic Impact of Labour Law Systems: A Theoretical Appraisal and Analysis of New Time Series Data' (2008) 39 *Industrial Relations Journal* 453.

8 See, for example, R. La Porta, F. Lopez-de-Silanes, A. Shleifer, and R. Vishny, 'Legal Determinants of External Finance.' (1997) 52 *Journal of Finance* 1131; R. La Porta, F. Lopez-de-Silanes, A. Shleifer and R. Vishny, 'Law and Finance' (1998) 106 *The Journal of Political Economy* 1113; R. La Porta, F. Lopez-de-Silanes and A. Shleifer 'Corporate Ownership Around the World' (1999) 54 *The Journal of Finance* 471.

9 See generally E. Glaeser and A. Shleifer, 'Legal Origins' (2002) 117 *Quarterly Journal of Economics* 1193; R. La Porta, F. Lopez-de-Silanes and A. Shleifer, 'The Economic Consequences of Legal Origin' (2007)

10 K Zweigert and H. Kötz, *Introduction to Comparative Law*, (3rd ed trans T. Weir), Oxford University Press, Oxford, 1998.

originating country persists over time. Thus, legal transplantation represents a 'kind of involuntary information transmission', [11] which tends to 'lock-in' a style of regulation, a certain 'path dependency', and a degree of 'complementarity' between legal and economic institutions, thereby ensuring that the different 'types' of systems remain distinct.[12]

The 'legal families' categorisation has been deployed by legal origins scholars to explain key differences in a broad range of legal and economic institutions between countries.[13] These studies purport to show that common law countries are more 'liberal' in their regulation, relying more on markets and contracts, whilst civil law countries are more extensively and more restrictively regulated by state intervention.[14] Importantly for policy purposes, the work of La Porta et al. led them to certain conclusions about the relative merits of the 'common law' and 'civil law' styles of regulation. They concluded that on the one hand countries with a common law legal system produced rules and regulations that provided better protection of property rights and contract enforcement, and were thus relatively more responsive to market conditions, while on the other hand civil law countries were associated with more interventionist forms of regulation which tended to impact adversely on the business enterprise and markets, thus leading to higher unemployment, lower productivity and lower economic growth.[15] In short countries of common law origin, across a range of factors, were more likely to produce efficient rules for establishing and regulating markets than countries of civil law origin. This argument also found its way into the World Bank's policy recommendations for economic reforms in developing and transition countries.[16]

Not surprisingly, legal origins – and what it implies for international and national government policy – has been extremely controversial, and has given rise over the past decade to a vigorous and extensive debate about the veracity of its hypotheses and the validity of its methodologies across several legal fields.[17] This paper is intended to contribute to this discussion from an Australian perspective.

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[11] See La Porta, et al., above n. 2.

[12] See Deakin, Lele and Siems, above n. 3, at pp. 134-135.

[13] See, for example, Glaeser and Shleifer, above n. 8; S. Djankov, E.Glaeser, R. La Porta, F. Lopez-de-Silanes and A. Shleifer, 'The New Comparative Economics' (2003) 31 *Journal of Comparative Economics* 595; and La Porta, et al, above n. 2.

[14] La Porta et al, above n. 8.

[15] *Ibid*.

[16] This has been the subject of debate in its own right: J. Berg and S. Cazes, 'Policymaking Gone Awry: The Labour Market Regulations of the Doing Business Indicators' (2008) 29 *Comparative Labor Law and Policy Journal* 349; S. Voigt, 'Are International Merchants Stupid? Their Choice of Law Sheds Doubt on the Legal Origins Theory' (2008) 5 *Journal of Empirical Legal Studies* 1.

[17] See particularly A. Musacchio, 'Do Legal Origins Have Persistent Effects Over Time? A Look at Law and Finance Around the World' Working Paper No. 08-030, Harvard Business School, Harvard University, 2008; M. Amin and P. Ranjan, 'When Does Legal Origin Matter?' Working Paper No. 080912, Department of Economics, University of California-Irvine 2008; D. Klerman and P. Mahoney, 'Legal Origins?' (2007) 35 *Journal of Comparative Economics* 278; J. Armour, S. Deakin, P.Lele and M. Siems, 'How Do Legal Rules Evolve? Evidence from a Cross-Country Comparison', Working Paper No. 382, Centre for Business Research, University of Cambridge, 2009; M. Roe, 'Legal Origins, Politics, and Modern Stock Markets' (2006) 120 *Harvard Law Review* 462; D. Acemoglu, S. Johnson and J. Robinson, 'The Colonial Origins of Comparative Development: An Empirical Investigation' (2001) 91 *The American Economic Review* 1369.

Legal Origins and Labour Law

As noted earlier, most of the work on which legal origins theory was founded was in relation to corporate law, finance, shareholder rights and creditor protection. Attention was only directed to labour law by the original group of researchers in 2004.[18] In a study of the labour market laws of 85 countries, Botero et al. examined 65 variables under three broad categories: (i) employment laws; (ii) collective relations laws; and (iii) social security laws. In assessing the importance of legal origins in explaining cross-national differences in regulatory style, the Botero et al. study also tests for 'political' and 'efficiency' explanations. In reaching conclusions based on their data, Botero et al. found that of the three possible explanations for a particular national style in the regulation of labour, legal origins outranked both 'politics' and 'efficiency'. Although there were some differences in the strength of this conclusion between the three sets of regulations examined, according to the authors there was little room for doubt: 'In short, legal traditions are a strikingly important determinant of various aspects of statutory worker protection'.[19] 'The results are consistent with the view that legal origins shape regulatory styles, and that such dependence has adverse consequences for at least some measures of efficiency'.[20]

Since the publication of the Botero et al. article there have been several further pieces of work published on the general issue of labour law and legal origins,[21] and others which deal with labour law and legal origins as part of more general discussions including corporate governance and economic regulation.[22] We do not intend to survey this work here, given our more limited focus. It is necessary to note, though, that much of this published work contains methodological and other criticisms of legal origins theory in general, and in the context of labour law in particular, and also with responses to those critiques. We deal with this issue in a little more detail in a following section of the paper (Methodology and Methodological Problems).

Legal origins theory is essentially a narrative about the transplantation of laws and 'styles' of regulation. In its most simplified form it identifies two fundamental original legal styles

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[18] J. Botero, S. Djankov, R. La Porta, F. Lopez-de-Silanes and A. Shleifer, 'The Regulation of Labor' (2004) 119 *The Quarterly Journal of Economics* 1339.

[19] *Id.* at p. 1365.

[20] *Id.* at p. 1378. The Botero et al. article also compares common law and civil law styles for economic efficiency outcomes, and finds the common law style superior. Although this is an important aspect of the debate over 'legal origins' we have not incorporated a discussion of this point in this paper..

[21] They include D. Pozen, 'The Regulation of Labor and the Relevance of Legal Origin' (2007) 27 *Comparative Labor Law and Policy Journal* 43; S. Djankov and R. Ramalho 'Employment Laws in Developing Countries' (2009) 37 *Journal of Comparative Economics* 3; S. Deakin and P. Sarkar, 'Assessing the Long-Run Economic Impact of Labour Law Systems: A Theoretical Reappraisal and Analysis of New Time Series Data (2009) 39 *Industrial Relations Journal* 453.

[22] Including B. Ahlering and S. Deakin, 'Labour Regulation, Corporate Governance, and Legal Origin: A Case of Institutional Complementarity?' (2007) 4 *Law and Society Review* 865; J. Armour, S. Deakin, P. Lele and M. Siems, 'How do Legal Rules Evolve? ...' above. n. 16; S. Deakin, 'Legal Origin, Juridical Form and Industrialisation in Historical Perspective: The Case of the Employment Contract and the Joint Stock Company' (2009) 7 *Socio-Economic Review* 35; M. Siems, 'Shareholder, Creditor and Worker Protection: Time Series Evidence about the Differences between French, German, Indian, UK and US Law', Working Paper No. 381, Centre for Business Research, University of Cambridge, 2009.

(common law and civil law) and the spread of these legal and institutional traditions across most of the world through the process of colonisation. Through this process most countries have received their legal systems 'exogenously', rather than their being self-developed.[23]

Australia is, of course, a separate country, but one settled through British colonisation. Assuming a legal origins effect to have force, it would follow that Australian labour law would resemble the regulatory 'style' of other common law originating countries such as the United Kingdom, the United States, New Zealand, a number of Asian countries, including India, and so on. It would also follow that there would be a certain 'path dependency' in the evolution of Australian labour law fixed by certain 'ground rules'[24] and 'institutions'[25] and that any development in the regulatory regime would be basically in accord with comparable systems.

So far there has been virtually no explicit attention given to Australian labour law in this debate. However, there have been one or two published pieces which raise questions about the applicability of these types of arguments in relation to Australian regulatory 'style' generally,[26] and some recent qualitative analyses which question the categorisation of Australian labour law in particular, at least historically, within the 'common law' family of countries.[27] These are touched upon in the following section.

Accounting for Legal Origins Effects

In an equivalent section of their 2007 paper, Deakin, Lele and Siems discuss the theoretical framework which has been advanced for why and how a country's legal origins produces differing outcomes in terms of its regulatory style. The authors note two important arguments. One is based on the view that because the common law is essentially a product of judicial decision making, it is inherently more able to adapt incrementally to fit changing economic circumstances and requirements than the more 'rigid' civil law system which requires legislative change (the 'adaptability channel'). The second explanation (the 'political channel') argues that the judicial independence which characterises the common law system,

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[23] Botero et al. at pp. 1344-1345

[24] This term is taken from K. Pistor, 'Legal Ground Rules in Coordinated and Liberal Market Economies' in K. Hopt, E. Wymeersch, H. Kanda and H. Baum (eds.), *Corporate Governance in Context: Corporations, States and Markets in Europe, Japan and the United States*, Oxford University Press, Oxford, 2006.

[25] By 'institutions' we mean 'a set of rules, formal or informal that actors generally follow...and organisations as durable entities with formally recognised members, whose rules also contribute to the institutions of the political economy', see P. Hall and D. Soskice (eds.), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*, Oxford University Press, Oxford, 2001 at p. 9.

[26] One example is A. Dignam and M. Galanis, 'Australia Inside Out: The Corporate Governance System of the Australian Listed Market' (2004) 28 *Melbourne University Law Review* 623.

[27] See the references in n. 5 above.

makes that system less susceptible to regulatory capture through legislation, and more protective of individual property rights against state power than civil law systems.[28]

Essentially these are arguments which assume that any legal origins effect occurs as a consequence of instrumental response to efficiency demands. The arguments are, however, criticised by Deakin, Lele and Siems as overstating, or misstating, the role of legal origins in legal evolution, rather than negating it completely. The authors accept that there are 'significant differences in regulatory style between the common law and civil law', [29] and that these may 'hamper the flow of ideas from one system to another' and, conversely, 'facilitate the exchange of legal models *within* the main legal families'.[30] 'To that extent, a legal origin effect could be expected to arise from the division of systems into different legal families'.[31]

The authors stress, however, that the strength of a legal origins effect 'would differ from one context to another', that it cannot be assumed *a priori*, and thus, that it is a matter for empirical analysis.[32] Important issues to be taken into account include the extent to which foreign legal rules may be adapted to local economic, cultural and political conditions (endogenisation), the strength of 'opposing tendencies for the convergence of legal rules' deriving from various harmonising and transnationalising influences, and particularly the timing and nature of legal innovations in relation to the process of industrialisation. Rather than a strong 'functionalist' legal origins effect, the force of legal origin depends on 'context': a 'weak' legal origins effect.[33]

Deakin, Lele and Siems illustrate the importance of the timing of industrialisation by reference to the evolution of British labour law. When the process of industrialisation commenced in Britain, the old forms of labour regulation based on master and servant laws and feudal obligations of service were still extant, whereas in Europe the codified private law of contract was already in place at the time of major scale industrialisation.[34] In Britain the old forms of regulation persisted into the late nineteenth century, continuing the tradition of strong managerial prerogative through ownership, and employment as service, enforced through criminal sanctions. In regulating labour markets it was these ideas, in the form of

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[28] See Deakin, Lele and Siems, above n. 3 at pp. 136 ff. The authorities cited in support include T. Beck, A. Demigurc-Kunt and R. Levine, *Law and Firms' Access to Finance*, Working Paper No. 10687, National Bureau of Economic Research, Cambridge Ma 2004; T. Beck, A. Demigurc-Kunt and R. Levine, 'Law and Finance: Why Does Legal Origin Matter?' (2003) 31 *Journal of Comparative Economics* 653; and T. Beck, A. Demigurc-Kunt and R. Levine, 'Law, Endowments and Finance' (2003) 70 *Journal of Financial Economics* 137. These arguments are also addressed in Glaeser and Shleifer, above n. 8 and Djankov et al. , above n. 12.

[29] See Deakin, Lele and Siems, above n. 3, at p. 137.

[30] *Ibid*. The emphasis is in the original.

[31] *Ibid.*

[32] Deakin, Lele and Siems, above n. 3, at pp. 137-141.

[33] *Ibid.*

[34] See further, S. Deakin, 'Timing is Everything: Industrialization, Legal Origin and the Evolution of the Contract of Employment in Britain and Continental Europe' in B. Bercusson and C. Estland (eds.), *Regulating Labour in the Wake of Globalisation: New Challenges, New Institutions*, Hart, Oxford, 2008, p. 67.

different variants of master and servant legislation, that were passed on to the British colonies rather than the idea of the 'efficiency' of free contracting between the autonomous parties to industrial relationships.[35] The contract of employment as it is now understood in the common law world did not emerge in Britain until the 1920s-1930s.[36]

In the context of these arguments, Australian labour law offers some interesting similar and contrasting perspectives. As was the case in Britain, Australian legislators also adopted master and servant forms of labour market regulation, limiting worker mobility and punishing misconduct with penal sanctions. Many of these types of provisions remained on the statute books well into the twentieth century.[37] It has been argued that the continued relevance of master and servant concepts had a similar effect in forestalling the clear emergence of a form of labour market regulation based on the independent contract of employment as it did in Britain.[38] In this respect the evolution of Australian labour law fits with what legal origins theory would suggest should be the case: the carrying over of certain legal institutions as a result of historical influence.[39]

But importantly Australian labour law (along with that of New Zealand) also began to diverge around the turn of the twentieth century. Between 1890 and about 1915, governments in these countries introduced systems for the compulsory arbitration of industrial disputes as the main form of labour market regulation.[40] This system was introduced principally to stabilise industrial relations at a crucial period of economic development in the colonies – the emergence of manufacturing industries and the need for protective tariffs to sustain them against foreign competition.[41] To a substantial degree these arbitration models regulated wages and conditions out of market competition for much of the twentieth century, effectively prohibiting the hire of labour under free contract in exchange for industry protection.

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35 D. Hay and P. Craven (eds.), *Masters, Servants and Magistrates in Britain and the Empire, 1562 – 1955*, University of North Carolina Press, Chapel Hill N.C., 2004.

36 S. Deakin, 'The Evolution of the Contract of Employment, 1900-1950' in N. Whiteside and R. Salais (eds.), *Governance, Industry and Labour Markets in Britain and France*, Routledge, London, 1998, p. 212. See further, S. Deakin, 'Legal Origin, Juridical Form...' above n. 21.

37 See generally A. Merritt, 'The Historical Role of Law in the Regulation of Employment – Abstentionist or Interventionist?' (1982) 1 *Australian Journal of Law and* Society 56; M. Quinlan, 'Pre-Arbitral Labour Legislation in Australia and its Implications for the Introduction of Compulsory Arbitration' in S. Macintyre and R. Mitchell (eds.), *Foundations of Arbitration*, Oxford University Press, Oxford, 1989, p. 25; and M. Quinlan, 'Australia, 1788- 1902: A Workingman's Paradise?' in D. Hay and P. Craven, above n. 35, p.219.

38 J. Howe and R. Mitchell, 'The Evolution of the Contract of Employment in Australia: A Discussion' (1999) 12 *Australian Journal of Labour Law* 113.

39 There are other examples of course: see P. Gahan, 'Dead Letters? An Examination of Union Registration under Australian Colonial Trade Union Acts 1876-1900' (2000) 13 *Australian Journal of Labour Law* 50.

40 See Macintyre and Mitchell (eds.), above n. 36; J. Holt, *Compulsory Arbitration in New Zealand: The First Forty Years*, Auckland University Press, Auckland, 1986; J. Holt, 'The Political Origins of Compulsory Arbitration in New Zealand' (1975) 9 *New Zealand Journal of History* 99; R. 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 G. Kealey and G. Patmore (eds.), *Canadian and Australian Labour History: Towards a Comparative Perspective*, Australian Society for the Study of Labour History, Sydney, 1990, p. 47.

41 For general reference on these issues see the works cited in n. 39 above. See also N. Woods, *Industrial Conciliation and Arbitration in New Zealand*, Government Printer, Wellington, 1963, chaps. 1-2.

Whilst this system of labour law may have had some antecedents in various British, Canadian and European ideas[42] in essence it was a path-breaking legal innovation. Whilst it appears to have had some influence in countries such as India, Malaysia and Singapore, it was subsequently adopted in only one or two countries and diverged in fundamental respects from the systems of the other major common law jurisdictions.[43] On its face, then, the emergence of the compulsory arbitration system seems to confront legal origins theory with a puzzle. Notwithstanding its common law inheritance, by about 1920 the Australian labour law system had few important legal/institutional antecedents adopted from its country of legal origin, apart from various private law principles which were incorporated into the developing contract of employment. In various respects its elements seem, in retrospect, to have placed it closer to the supposed character of the civil law system than to the common law system; greater government intervention through legislation, less reliance on freedom of contract, and more centralised state control over the economy, including pay and working conditions.[44] No British-style collective bargaining system evolved, nor, after 1900, were the major legal underpinnings of that system copied.

Yet that may not be a conclusive argument about legal origins and Australian compulsory arbitration. It has also been argued that despite the *appearance* of these forms of regulation,[45] ultimately the 'regulatory style' inherent in Australian labour law 'ground rules' is closer to the common law model insofar as it largely protects 'managerial prerogatives', eschews worker participation in management, and is comparatively less 'universal' in the application of labour standards.[46]

On the basis of this evidence it remains an open question, then, of whether, and if so to what extent, Australian labour law fits with legal origins theory: that is to say whether the system is path dependent, insofar as it adheres to certain fundamental 'ground rules' of the common law 'regulatory style', or whether it is an illustrative case of what Deakin et al. have identified as 'historical contingency', or 'context', determining exceptionalism. We return to these matters in the concluding section of this paper.

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[42] See, for example, R. Mitchell, 'State Systems of Conciliation and Arbitration: The Legal Origins of the Australasian Model' in Macintyre and Mitchell (eds.), above n.37, at p.74; C. Fisher, *The English Origins of Australian Federal Arbitration: To 1824*, Australian National University, Research School of Social Sciences, 1986.

[43] The early labour laws of Malaysia and Singapore, reshaped in the 1960s, did draw to a degree upon several concepts and institutions inherent in the Australian model, see S. Deery and R. Mitchell, *Labour Law and Industrial Relations in Asia*, Longman Cheshire, Melbourne, 1993, ch. 1

[44] See, for example, R. Mitchell and P. Scherer, 'Australia: The Search for Fair Employment Contracts through Tribunals' in J. Hartog and J. Theeuwes (eds.), *Labour Market Contracts and Institutions: A Cross-National Comparison*, North-Holland, Amsterdam, 1993, p.77; Jones and Mitchell, above n. 5.

[45] For a valuable discussion of form and content in the comparison of British and Australian labour law see K. Ewing, 'Australian and British Labour Law: Differences of Form or Substance?' (1998) 11 *Australian Journal of Labour Law* 44. Some other authors have tended to treat Australian compulsory arbitration as a variant of a collective bargaining system: see H. Clegg, *Trade Unionism under Collective Bargaining*, Blackwell, Oxford, 1976.

[46] See Jones and Mitchell, above n. 5.

Methodology and Methodological Problems

We have already briefly outlined the general approach in this research project. The general leximetric methodology employed by Deakin, Lele and Siems. is derived from that used by Botero and colleagues, but developed further by the authors in their 2007 article. In this section we examine the various problems associated with this methodology, and our own approach to it.

It was noted earlier that Botero et al. attempt to quantify labour market regulation in 85 countries by creating indices of the stringency of regulation relating to employment (such as dismissal), collective labour relations (such as union recognition and legal requirements to bargain in good faith), and social security (such as access to unemployment or sickness and health benefits). For each of these three broad areas, the authors examined formal statutory legal rules as they applied to a standardised male worker and a standardised employer.[47] The coding method used in the study assigned a numerical value to each legal rule, with a lower value of 0, indicating no protection, and the highest score of 1, indicating maximum protection, for employees.

Several scholars have pointed to various difficulties with the coding method adopted in the Botero et al. research.[48] Among the important problems with the coding methodology identified by Deakin, Lele and Siems are the following: (i) particular mechanisms used to protect employees are diverse across systems making relative weighting difficult; (ii) many mandatory rules are not applied in particular industries and regions (especially in developing countries); (iii) the use of binary variables makes it difficult to capture gradations in the effect of legal rules; (iv) the growing importance of default rules and other 'reflexive' norms; and (v) the importance of non-legal norms.[49]

However, the main problem identified by the authors with the Botero et al. index is that it is specific to a particular point of time (in this case the late 1990s), and, consequently, that it cannot create a picture of a trend or propensity of the law to move over time. This makes aspects of the 'legal origins' argument, particularly in relation to the timing of legal innovations, and their relationship with economic developments, difficult to explore.

Partly in response to these problems, Deakin, Lele and Siems adopted a somewhat different approach from that taken in the Botero et al. study. The authors discarded some of the

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[47] See Botero et al., above n. 18, at p. 1353: A 'standardised' male worker is assumed to be a non-managerial employee who has been working in the same firm for twenty years, has two children, a wife who is not in paid employment, lives in the country's most populous city, is a law abiding citizen and is of the same ethnicity and religion as the majority of his country's population, and is not a member of a union. A 'standardised' employer is one in the manufacturing sector, based in the country's most populous city, is a wholly owned domestic firm, employs 250 workers, and provides employees with no more than their legal entitlements.

[48] See, for example, Pozen, above n. 21, Berg and Cazes, above n. 16; Ahlering and Deakin, above n. 22; and Deakin, Lele and Siems, above n. 3.

[49] Deakin, Lele and Siems, above n. 3 at pp. 141-142.

variables used in the Botero et al. index, [50] and adopted a 'longitudinal' index charting labour law regulation from 1970 to 2005, thus allowing for investigation of legal development over time rather than at a fixed historical point. In compiling their index the authors also accounted for the role of self-regulating mechanisms (such as collective agreements), and the extent to which laws were mandatory or capable of modification by the parties (default rules). Unlike the Botero et al. study, Deakin, Lele and Siems also cite specific sources for each of their variables.[51]

The Longitudinal Labour Regulation Index models the influence of labour law on the economic relations within the enterprise – that is to say, the extent to which the law protects employees against employers, redistributes resources from employers (or shareholders) to employees, and at the same time redresses imperfections which reduce economic efficiency.[52] In taking this approach, Deakin, Lele and Siems seek to address the central concern of traditional labour law scholarship – how best to redress the imbalance of power between employees and employers – but also to consider the extent to which the strength of labour law may also contribute to the efficient functioning of the enterprise. [53]

The index covers five areas of labour law which are as follows: (i) the regulation of forms of labour contracting other than the standard employment relationship; (ii) the regulation of working time; (iii) the regulation of dismissals; (iv) the regulation of employee representation and participation at the workplace; and (v) the regulation of industrial action. These are divided into various sub-categories, making a total of 40 variables in all.[54]

Although we have reservations with some aspects of the variables selected and the scoring method used by Deakin, Lele and Siems, we have largely adopted their approach for the purposes of the present research. As noted earlier, our purpose in this paper is to investigate in a preliminary way certain propositions about the evolution of Australian labour law according to legal origins theory, and how that trajectory compares with those of some other

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50 The index of labour market regulation developed by Botero et al includes measures of social security. Neither these measures, nor any equivalent measures of social security provisions, are included in the index constructed by Deakin, Lele and Siems.

51 See Deakin, Lele and Siems, above n. 3 at p. 44 and fn. 9 on that page.

52 Deakin et al at 143. It is worth noting here that the differences between the two indices developed by Botero et. al. and Deakin, Lele and Siems outlined earlier, also extends to the question of the theoretical purpose of coding labour law. For Botero et al, the primary concern is to develop a measure to capture the extent to which labour laws inhibit the functioning of a competitive labour market and influence the costs of employing labour. In contrast, Deakin, Lele and Siems highlight the traditional labour law conception of the primary purpose of labour law as protecting employees.

53 Botero et al 2004 at pp. 1340-1

54 The variables and descriptors for coding are set out in the Appendix attached to this paper. Complete details of the Australian data, including variable descriptions, sources and values assigned to each variable are found on the 'Legal Origins and the Evolution of Australian Labour Law' website at [tbc]. In constructing the index for Australia, we have added 2 additional variables to account for the distinction in Australian labour law between part-time and casual employees. This had no impact on the final measures and so a 40 variable index is reported here.

countries. There will be scope for a fuller treatment of various methodological issues as the current project progresses.[55]

The Evolution of Australian Labour Law: A Leximetric Analysis

Our purpose in this section of the paper is to report on our findings concerning the evolution of Australian labour law over the past four decades using the five sets of variables noted above. This will enable us to develop in the following section of the paper a comparative analysis with the results recorded in the Deakin, Lele and Siems study for the UK, USA, India, Germany and France. Although the relationship between the legal system and economic outcomes is a critical issue in legal origins research, it is important to note that we are not attempting to say anything here about this specific relationship, nor anything about the interaction in general between the law and socio-economic and political contexts. Nor are we able at this stage to address the 'legal origin' issue more broadly by reference to other indicators covering shareholder and creditor protection.[56] The findings here are limited to those drawn from our labour regulation index alone.

Alternative Employment Contracts

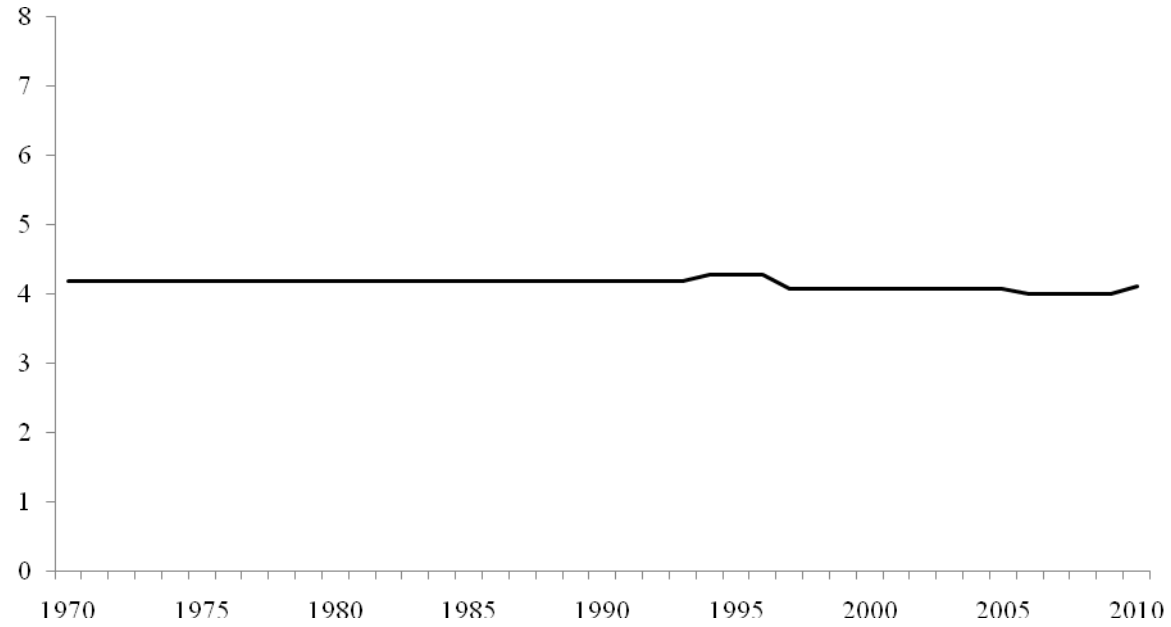
The first sub-index included in the Longitudinal Labour Regulation Index measures the extent to which the law imposes differential costs or restrictions on employers utilising alternatives to the standard employment contract. Figure 1 indicates a highly stable, but only moderate protection for the standard employment contract over nearly four decades since 1970. This reflects a fair degree of freedom for the parties to decide on the legal form of their own relationship, and a degree of balance between a strong protection through the award system and other laws for part-time workers, and at the same time a somewhat mixed regulatory approach to casual and fixed-term contracts, and agency workers. To give one example, casual workers generally have been entitled to close to equal treatment with full

[55] One difficulty we had with the approach to coding taken by Deakin, Lele and Siems needs to be highlighted. Their index contains three items measuring the extent to which a country's constitution protects the right to form a trade union, the right to engage in collective bargaining or make collective agreements, and the right to take industrial action. The Deakin, Lele and Siems index codes for 'constitutional equivalents' of these rights where there is no written constitution. Thus for the UK, despite the absence of any constitutional right to form a union or engage in collective bargaining, these variables are given a moderate score for some years. However, because the US has a written constitution, the legal equivalents to these rights (in the form of legislation) are completely discounted. For these variables then, the UK is given a higher score despite the fact that the regulation in both countries is equally amenable to statutory amendment. In Australia the absence of a constitutional right to form a union or to engage in collective bargaining undoubtedly has been counterbalanced by the traditional strength of the arbitration system in protecting organisational security. Nonetheless, for the sake of direct comparison we have adhered to the coding framework used by Deakin, Lele and Siems, and scored Australia on the same basis as those authors scored the US law, despite the fact that in our opinion this radically understates the strength of Australian law in protecting trade unions and collective bargaining..

[56] See the corresponding discussion in Deakin, Lele and Siems at pp. 145-147.

time workers in many respects, but this has been balanced out by the fact that they have been relatively less protected against unfair dismissal. An examination of the detailed Australian Index on the project website[57] indicates many similar disparities in levels of protection within the five core variables used.

Figure 1. Alternative Employment Contracts (8 variables)



Some small improvement for non-standard workers is seen in a very slight upward movement in the indicator corresponding with the Labor government's unfair dismissal laws of 1993, but following this we see a slight downward trend with the introduction of the Liberal/National Party government's *Workplace Relations Act 1996*, and again with its *Work Choices* legislation in 2005. These latter changes reflect a limiting of award regulation in respect of non-standard employment in particular. A further slight upward movement is detected following the new workplace laws of the recently elected Labor Party government,[58] but as noted these are very slight, and overwhelmingly the most notable feature of the trend in regulation in this variable is its stability over the period in question.

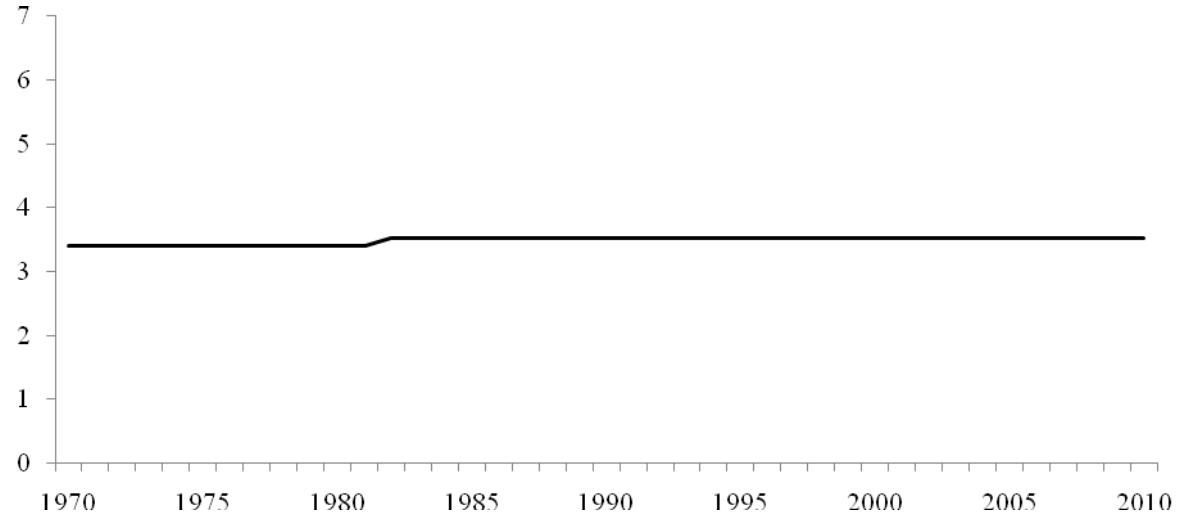
[57] See above n. 53.

[58] *The Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Cth.) and *The Fair Work Act 2009* (Cth.).

The Regulation of Working Time

Figure 2 also displays a highly stable and moderate level of protective regulation in relation to working time. Again, this reflects a balancing effect of some reasonable strong protections (both in terms of substance and effective coverage of the regulation) for matters such as annual leave entitlements, public holidays and overtime premiums, and a relatively low level of regulation associated with the volume of hours worked. The indicator does show a very slight upward trend in the early 1980s, plateauing out thereafter. This is largely explained by the more or less uniform reduction in working hours from 40 to 38 introduced by award at that time.

Figure 2. The Regulation of Working Time (7 variables)



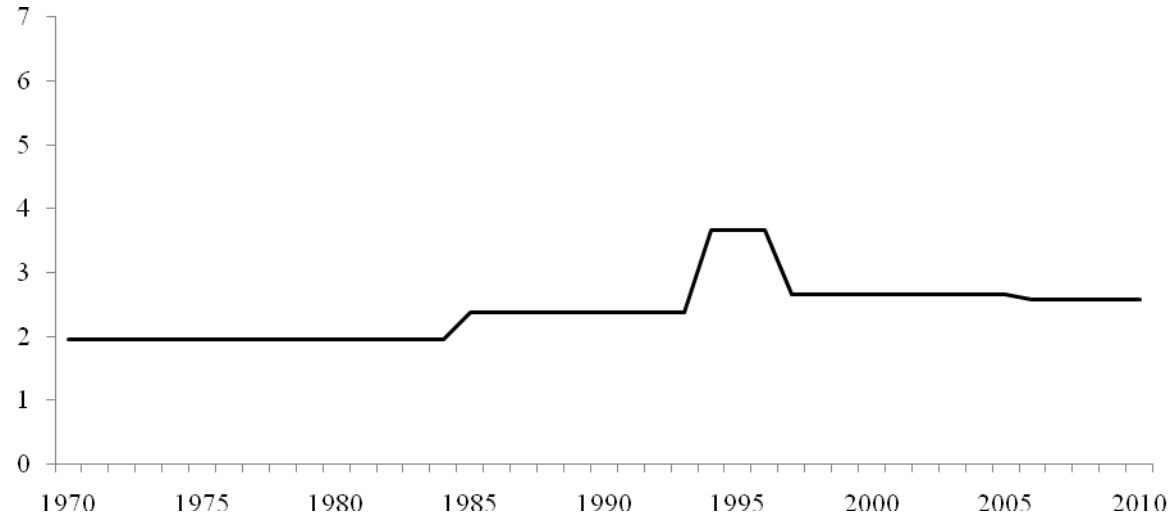
The Regulation of Dismissal

Figure 3 indicates a greater degree of variation over the period in the regulation of dismissal. The less than moderate protection extended to employees in dismissal cases prior to the 1990s reflects both the weakness of the award system in relation to this issue, and the very uneven development of specific unfair dismissal legislation in the various Australian States. The evident incline in the level of protection in the mid-1980s reflects the somewhat improved award position arising from the *Termination, Change and Redundancy Decision*[59] in the Federal Industrial Tribunal at that point of time. There is a further appreciable upward trend in the regulation of dismissal in 1993, due to the Labor government's legislation of that year which effected a more uniform scheme of procedural and substantive safeguards. However, as the figure shows, this raised the level of protection against dismissal only to a moderate position as measured by the index. This reflects the relatively low standards

[59] *Termination, Change and Redundancy Case*, (1984) 8 *Industrial Reports* 34; (1984) 9 *Industrial Reports* 115.

required to be met in relation to such matters as mandated notice periods, formal notification of dismissal and selection for redundancy.

Figure 3. The Regulation of Dismissal (7 variables)



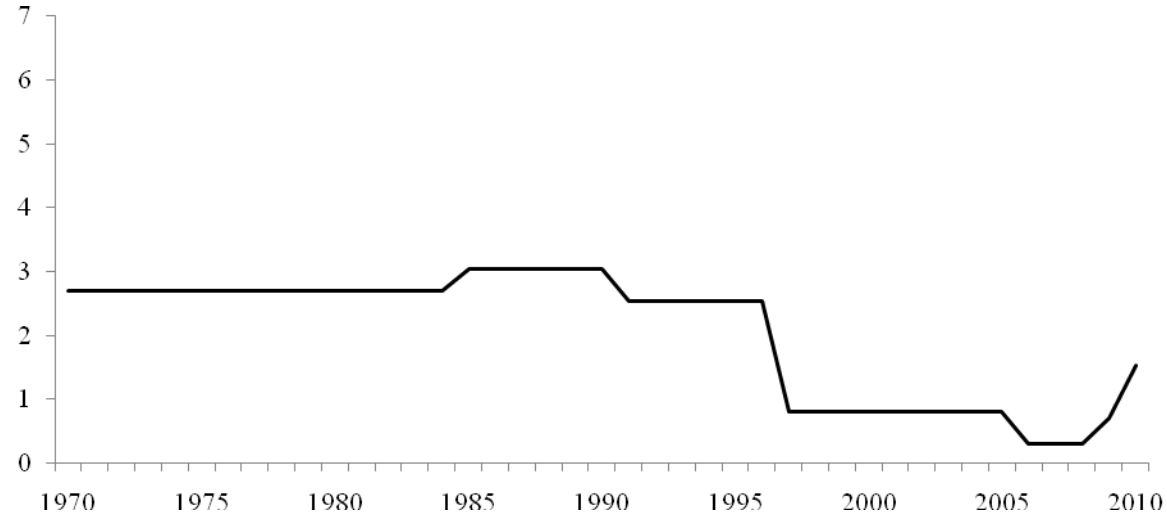
The downward trend in the level of dismissal protection corresponds with the Liberal/National Party government's *Workplace Relations Act 1996* (Cth.). This legislation effectively reduced the legal requirements for substantive and procedural legitimacy in dismissal cases. Since 1996, according to our data the trend has been relatively stable, but at a less than moderate level of protection. Of course, there have been very significant changes in specific aspects of unfair dismissal law since 1996, most prominently the very extensive exclusions operating during the currency of the *Work Choices* legislation. However, as these exclusions affected only one of the seven variables, their *aggregate* effect is not pronounced. This illustrates an endemic characteristic of an index number that assumes that constituent variables have even effect. We will investigate possible distortions that this gives rise to in subsequent work.

Employee Representation

Figure 4 reports on the sub-index dealing with the protection of employee representation rights. These indicia cover core elements of collective labour regulation, including both union recognition and bargaining rights, among other sub-variables. The indicator in the Figure shows a stable, but less than moderate level of protection in this variable between 1970 and the mid-1980s, and a slight incline in the level of protection from around 1985 as unions obtained greater 'voice' in decision making following the *Termination, Change and*

Redundancy Decision in 1984.[60] A roughly corresponding decline in protection is evident in the early 1990s as the general regulatory trend against the closed shop began to take effect. The figure then discloses a precipitous decline in the level of protection for employee representation due to the introduction of the *Workplace Relations Act 1996* (Cth.), which introduced general laws freedom of (non-)association, removed or curtailed other important union rights, and excluded some employee representation rights from awards. This is followed by a further weakening of protections for employee representation with the government's *Work Choices* legislation of 2005, which imposed yet further restrictions on trade union organisational rights.

Figure 4. Employee Representation (7 variables)



As the indicator shows, these sets of provisions had the effect of reducing the level of protection in this variable to an extremely low level (i.e. to less than 0.5 on a scale of 0-7). Since 2007, the figure shows a sharp incline in the level of protection for employee representation with the election of a Labor government and the introduction of legislation that has provided some renewed organisational rights to unions, although it has not restored those rights to pre-1996 levels.[61]

[60] *Ibid*.

[61] For preliminary discussion see C. Sutherland, 'Making the "BOOT" Fit: Reforms to Agreement-Making from Work Choices to Fair Work'; A. Forsyth, ' "Exit Stage Left" Now "Centre Stage": Collective Bargaining under Work Choices and Fair Work': S. McCrystal, 'A New Consensus: The Coalition, The ALP and the Regulation of Industrial Action'; and C. Fenwick and J. Howe, 'Union Security after Work Choices': all in A. Forsyth and A. Stewart (eds.), *Fair Work: The New Workplace Laws and the Work Choices Legacy*, Federation Press, Sydney, 2009, at pp. 99, 120, 141 and 164 respectively.

Whilst these are notable outcomes of the project, for reasons which we have adverted to earlier[62] they are influenced considerably by the particular coding method we have adopted here, following Deakin, Lele and Siems, and there are reasons to suggest that they may not, speaking comparatively, entirely accurately reflect the historical position of Australian labour law, or perhaps its present position. For example, were we to take a somewhat different approach to Deakin, Lele and Siems in respect of the recognition of 'functional equivalents' to constitutional provisions, Australia historically (and thus from the commencement of the period under review here) would have measured far higher on the 0-7 scale applicable for this variable, and thus the severe declines noted in the mid-1990s and the mid-2000s would have started from a much higher base. It follows either that the level of protection in this variable might not have been recorded as having declined to the very low base indicated in the period 2005-2007 (where it reached a point more or less commensurate with US labour law in this area), or the severity of the decline would have been much greater than indicated in the figure.

Industrial Action

Figure 5, dealing with industrial action, shows a stable but very low level of protection in Australian labour law until 1993, which accords with the fact that virtually all strikes and lockouts in Australia historically were unlawful in one way or another. The sharp incline in the level of protection for industrial action shown in the figure reflects the impact of the Labor government's 1993 amendments to the *Industrial Relations Act 1987* (Cth.) which extended certain rights and protections to unions, employers and employees undertaking industrial action for bargaining purposes.[63]

The Liberal/National Party government's *Workplace Relations Act 1996* (Cth.) maintained a general 'right' to industrial action, but imposed certain limitations which are reflected in the slight drop in the level of protection shown in the figure at this time. Thereafter, the trend has been fairly steady, although with a slight further downturn corresponding with the *Work Choices* legislation in 2005. As indicated, the level of protection is less than moderate on the 0-7 scale used for this variable.

[62] See above n. 55.

[63] Again, we note that this score would be higher if we had adopted a different approach from Deakin, Lele and Siems on the 'constitutional equivalent' issue: see n. 55.

Figure 5. Industrial Action (9 variables)

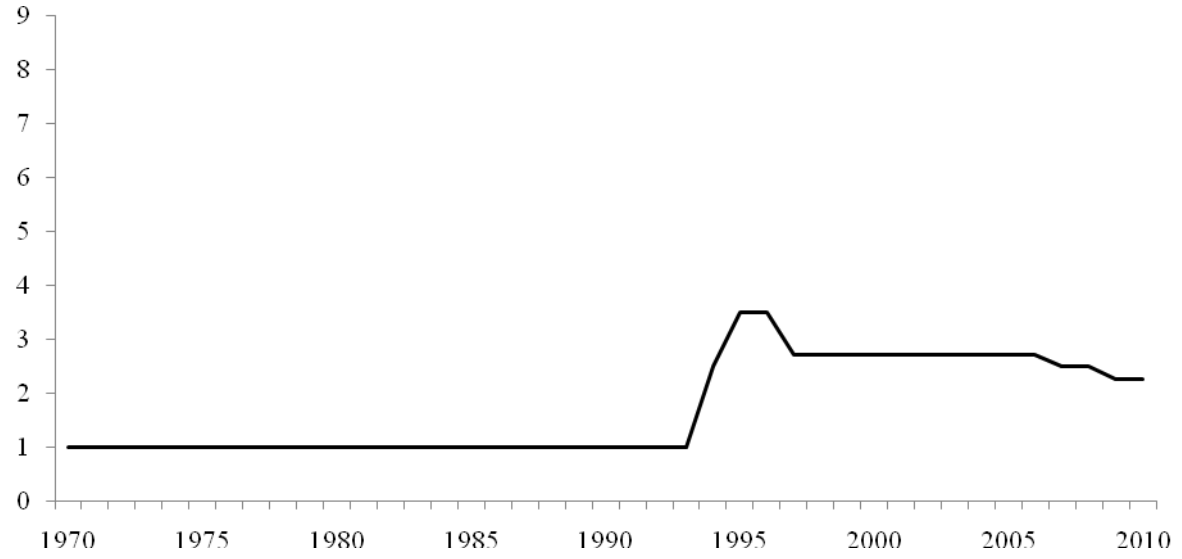
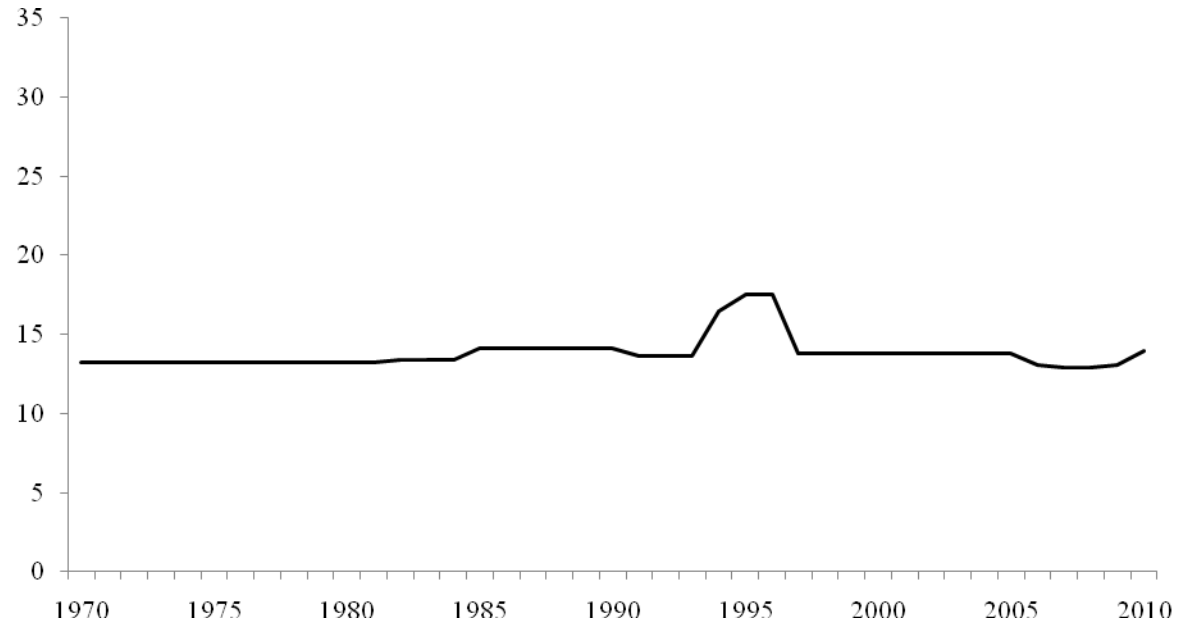


Figure 6. Labour Market Regulation - Aggregate Index (40 variables)



The Aggregate Index

Among Australian labour lawyers it would be relatively uncontroversial to suggest that the recent period of Australian labour law history has been one of unprecedented change in the lengthy duration of the Australian system. It would also be safe to say that most commentators would mark the period since about 1993 as one of exceptional and systemic

reform, designed, more or less, to alter the character of the Australian labour law model. The government's *Work Choices* legislation of 2005 has been described by one Australian expert as 'the greatest single change in Australian federal labour law since the introduction of compulsory conciliation and arbitration.[64] Others have described these changes in terms of 'transformation' and 'revolution'.[65] Yet, as Figure 6 demonstrates, when our data for the five sets of variables are consolidated into an aggregate measure, notwithstanding the clear rise and fall in the levels of protection spanning the period 1993-1997, the slight downturn in 2005 after the Work Choices legislation, and the upturn again following the Labor government's new policies following its election to office in 2007, the overwhelming impression is one of overall stability in the evolution of Australian labour law at quite moderate levels of protection. In other words, and allowing for some possible understatement in the *level* of protection,[66]the present state of Australian labour law appears in a quantitative sense to be little different in levels of protective content from where it was positioned at the commencement of the measured period, and apart from one confined period relatively stable in its trajectory. One obvious question arising from this picture concerns the validity of the assumptions about the relative strength of Australian labour law viewed historically.[67] A second question is what the data says about the Australian system's convergence on a model of labour law in accordance with the 'legal origins' hypothesis.[68] These issues are pursued in the next section of the paper.

The Evolution of Australian Labour Law, Legal Origins and Convergence

The Evolution of Australian Labour Law Compared (5 Sets of Variables)

We commence this section of the paper with a brief account of the evolution of Australian labour law when compared with the development of labour law in the five countries examined in the Deakin, Lele and Siems study. For this purpose we have reproduced Figures 4-8 (inclusive) from the Deakin, Lele and Siems study, and incorporated the Australian indicator into those figures, enabling us to view the trajectory of Australian legal development across the 5 sets of variables alongside those of the UK, the US, India, France and Germany.

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64 C.Fenwick, 'How Low can you Go? Minimum Working Conditions under Australia's New Labour Laws' (2006) 16 *Economic and Labour Relations Review* 85 at p.86.

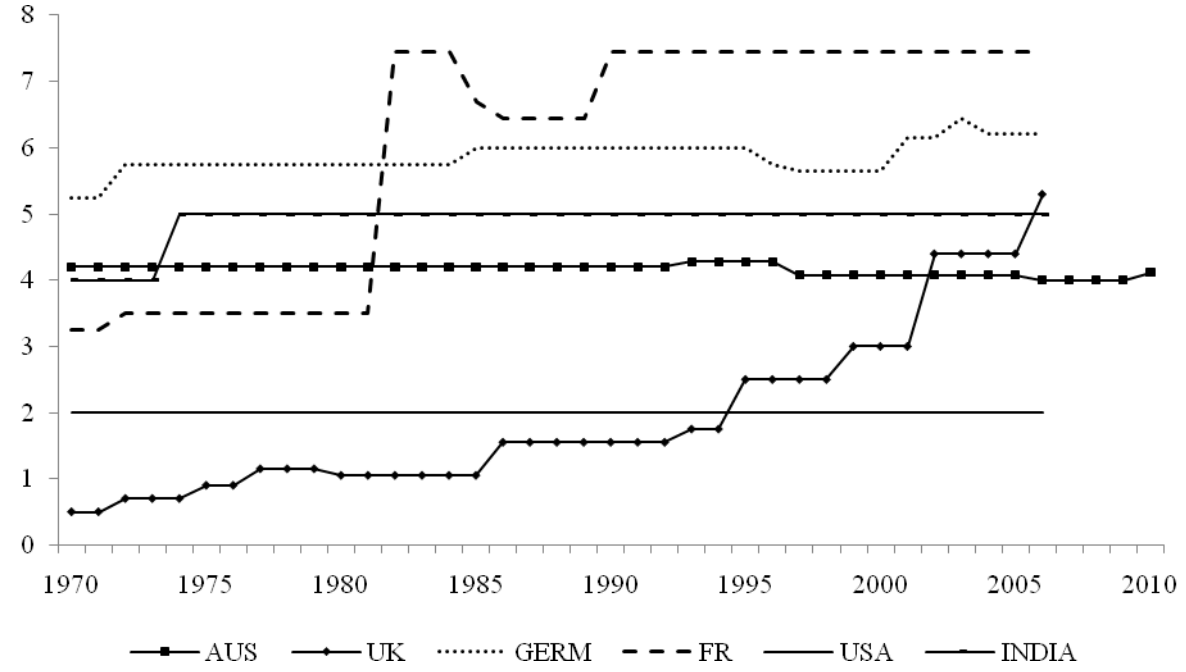
65 See A. Stewart and A. Forsyth, 'The Journey from Work Choices to Fair Work' in A. Forsyth and A. Stewart (eds), above n. 61, 1 at p. 1.

66 See n. 55 above.

67 See Jones and Mitchell, above n. 5.

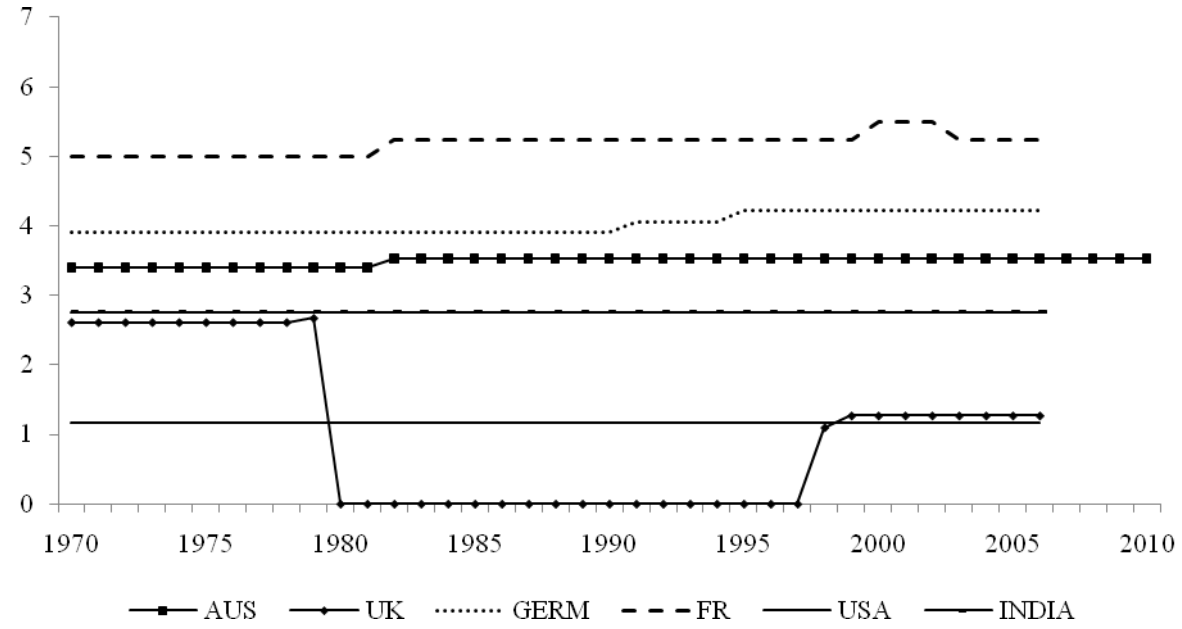
68 Various authors have predicted or identified a shift in Australian labour law towards a so-called 'Anglo-American' model: see L. Bennett, 'The American Model of Labour Law in Australia' (1992) 5 *Australian Journal of Labour Law* 135; and R. McCallum, 'Plunder Downunder: Transplanting the Anglo-American Labor Law Model to Australia' (2005) 26 *Comparative Labor Law and Policy Journal* 381.

Figure 7. Alternative Employment Contracts (8 variables), International Comparisons



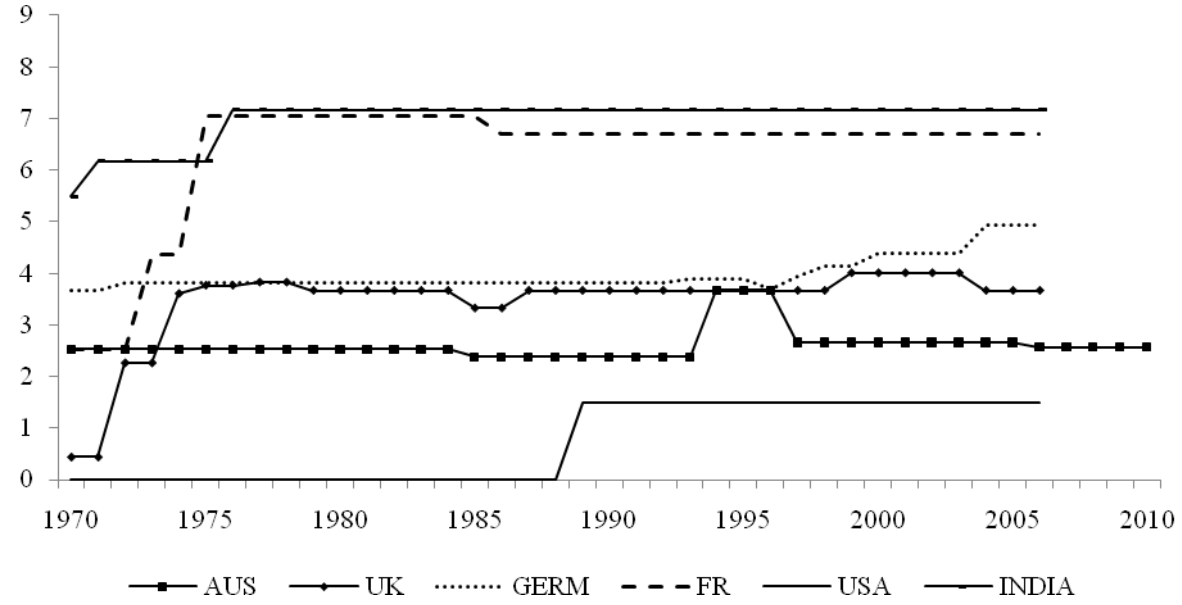
Taking first the trend in regulation protecting the standard employment contract (or the cost effectiveness to employers of utilising alternative employment contracts) we see that the Australian position has been broadly consistent over the 40-year period and measures about 4 on an 8-point scale. The current position is generally comparable with the position of two other common law-origin countries (the UK and India), although in the UK the long term trend to this position has been from a very low base (less than 1 in 1970) and in the case of India is slightly higher (5), having increased in levels of protection since the early 1970s. The third common law-origin country in the Deakin, Lele and Siems sample, the US, appears at a far lower level on the scale, whilst the two civil law-based countries, Germany and France, both have stronger protection in this category. These results do not appear to indicate a trend to a convergence on a highly-liberalised market model in the common law countries, as both the UK and India have moved to a more protective position on this issue, consistent with the Australian position, and thus have diverged considerably from the US position. However, it remains the case that in this sample group, including Australia, all common law-origin countries are at lower levels of protection than their civil law counterparts.

Figure 8. The Regulation of Working Time (7 variables), International Comparisons



In the regulation of working time category, the Australian position has remained steady at about 3.5 on the 7-point scale, and is thus broadly comparable with the Indian position. The trend in the US has remained at a constant low level of protection (about 1). Over the time period examined, the UK level collapsed in about 1980 (following the election of the Thatcher-led Conservative government) from one roughly equivalent to the position in India and Australia, virtually to 0, and then recovering after 1997 (with the election of the Blair-led Labor government) to a level roughly equivalent to that prevailing in the US. None of these indicators show what could be regarded in this category as a convergence by the common law-origin countries upon a broadly similar level of protection. But again, we do find a division of common law- and civil law-based countries into higher/lower levels of protection, though the Australian level of protection in this area is not very different from that of Germany

Figure 9. The Regulation of Dismissal (9 variables), International Comparisons



In the regulation of dismissal category, Australian labour law appears at a fairly low level (about 2.5 on a scale of 7), having risen to, and then declined from, a score of almost 4 between 1993 and 1996. The causes of this rise and fall were explained in the previous section of this paper. At its current level, of the six countries under examination in this variable Australia ranks only ahead of the US, which is scored at about 1.5 on the scale. The UK's position shows a rapid incline from a low base corresponding with the introduction of its unfair dismissal laws in the early 1970s, to a moderate level of about 4, from where its trend has remained fairly steady. The level of protection in Germany has remained fairly constant, showing a slow incline from about 4 to about 5 over the 1970-2005 period measured in the Deakin, Lele and Siems study. Both India and France show relatively strong levels of protection in relation to dismissals. The introduction of unfair dismissal laws in India in the 1970s saw a rapid rise in the level of protection from a score of about 2.5 to a current level of 7. France has had a relatively stable level of protection, which remains at about 6 on the scale. On these measures, whilst there has been a general upward movement in the level of legal support for employment protection in most of these countries since the 1970s, there is no revealed convergence in the common law group upon a common law-based standard. In this category of protection India appears as the most protective of all countries in the sample. It remains the case, however, that the US, Australia and the UK all appear with lower levels of protection than the two civil law based countries.

Figure 10. Employee Representation (7 variables), International Comparisons

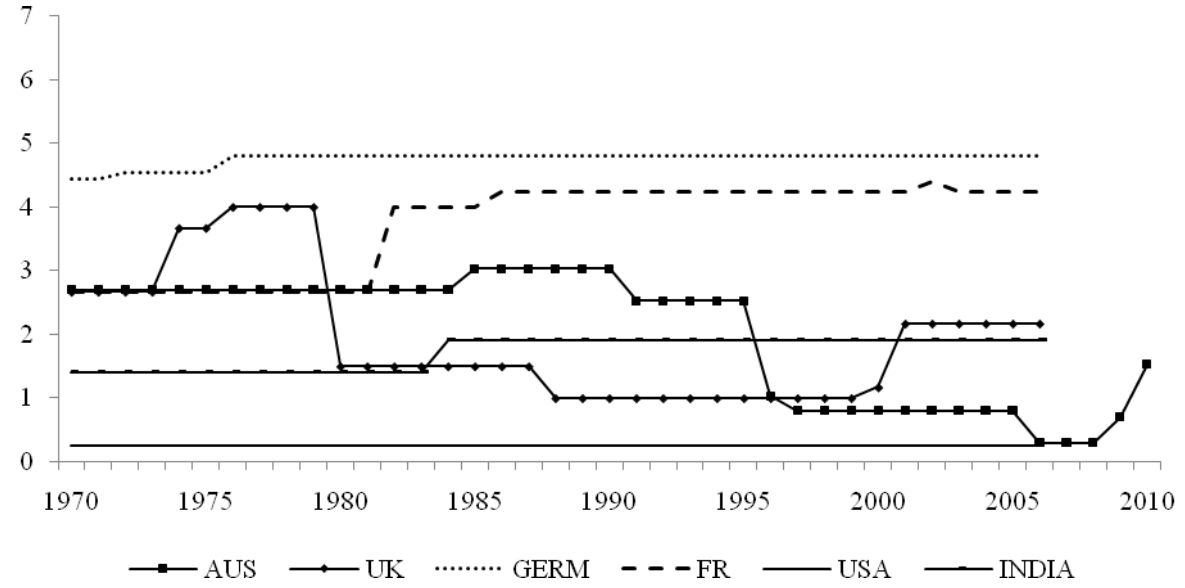
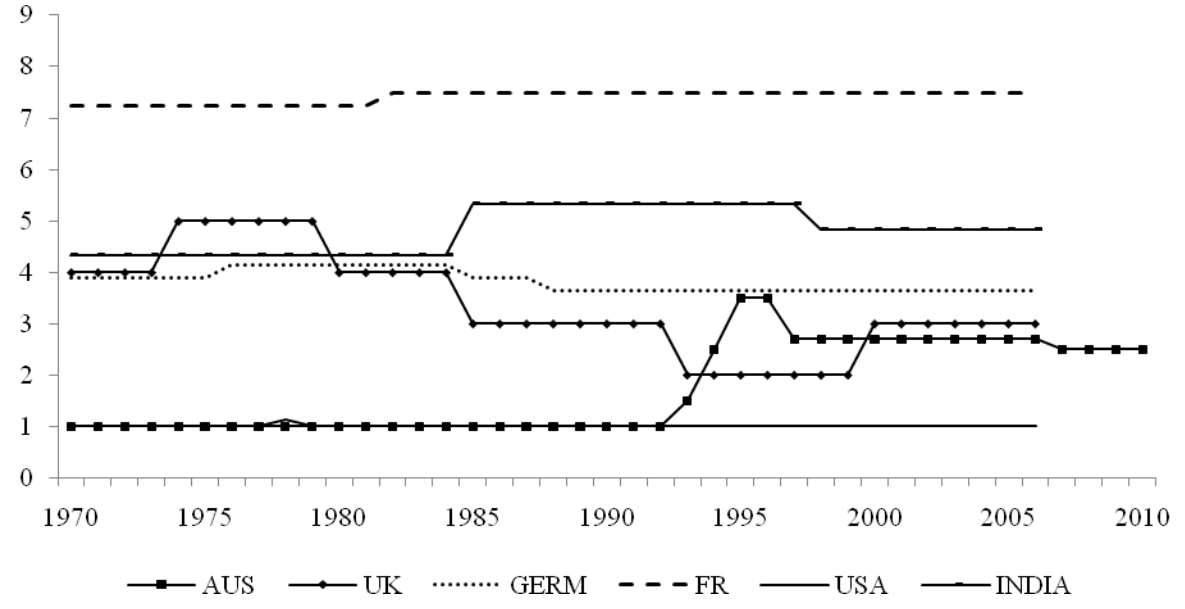


Figure 11. Industrial Action (9 variables), International Comparisons



The data on employee representation shows a less diverse pattern of development. Here the US scores at slightly above 0. The UK and India are currently scored at about 2. In the case of the UK, this represents a drop from a much stronger position in the mid-1970s (of about 4), marking the onset of a long period of political opposition to trade unions and a decline in the level of legal support for their organisation and activities. Australia has something of a comparable history, showing a decline from a moderate level of protection in the mid-1980s,

to a very low position (about 0.5) in the mid-2000s. The level of protection in Australian labour law for this category has since risen to a level similar to that of the UK and India. In this category all four common law-origin countries show protective standards well below those of the civil law-based countries, and at the same time they appear within a relatively confined band of legal quality (0-2). Accordingly there may be seen to be something of a convergence upon a common law-based model in this category. Once again, however, we must highlight our concern that the coding scheme does not reflect the true strength of Australian protection for employee.[69] Had it done so, the Australian may well (at least for the pre-1996 period) have been closer to those of the civil law-based countries.

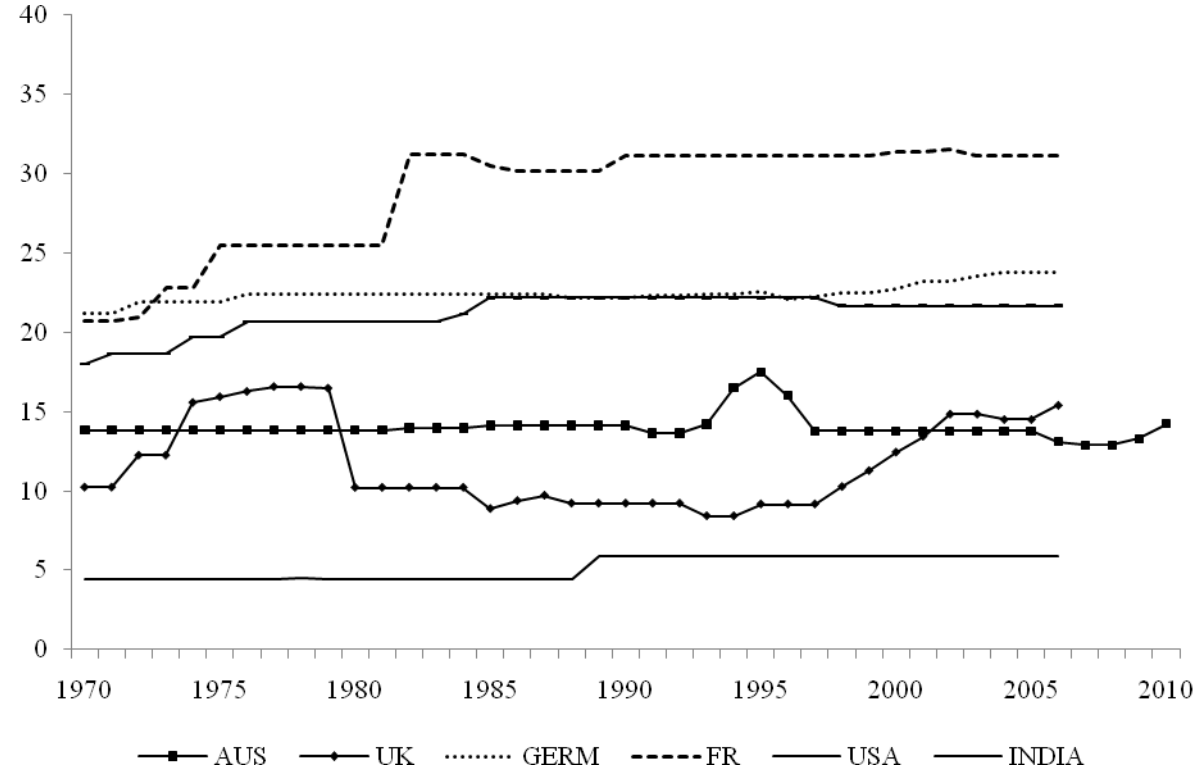
The data for the industrial action variable once again shows a mixed set of outcomes. The Australian position is scored at about 2.5, which is between the US position (1) and the UK position (about 3). The US position has been constant over the entire period, whereas the UK position has seen a decline from a high of more than 5, to a decline of about 2, before recovering to its present level following the legislation of the Blair Labour government after 1997. The Australian trend, as we noted earlier, saw a rise in the level of protection to a high of about 3.5 in the mid-1990s, from where it declined (under the Liberal/National Party government) to about its present level. If this represents something of a 'legal origins' convergence among common law countries, once again India does not fit the pattern. Its level of protection is about 5, higher than Germany (4), though far lower than that of France (more than 7).

The Evolution of Australian Labour Law Compared (Aggregate Data: 40 Variables)

What does this tell us about the trajectory of Australian labour law in an aggregate sense when compared with the trends in the UK, US, India, France and Germany? In Figure 12 we have inserted an indicator marking the Australian trajectory into the equivalent figure constructed for the other countries in the Deakin, Lele and Siems article.[70] As the figure shows, there is a divide between the levels of protection in the two civil law-based countries, and those of common law origin. As Deakin, Lele and Siems note in their article '[o]n the face of it, this analysis supports the legal origin claim for labour law',[71] and our data indicates that Australia fits neatly into this pattern, with an aggregate level of protection approximately that of the UK, ranking at a less than moderate score of about 15 on the 40 point scale, but well ahead of the US (about 6), and below India (about 21-22).

[69] See above n. 55.
[70] See Figure 1 in Deakin, Lele and Siems, above n. 3 at p. 146.
[71] *Ibid*, at p. 145.

Figure 12. Aggregate Labour Regulation (40 variables), International Comparisons



But does the long-term trend of labour law since 1970 support the legal origins claim concerning the path dependency of laws and institutions? Of the four common law-origin countries in the present sample, three (India, the US and Australia) show relatively little change over the time period in their aggregate labour law scores, although the Australian indicator does show a short period of quite acute incline and decline in the level of protection over a short period (1993-1997). The figure shows that US labour law has hardly changed at all since its system was put in place, whilst the Indian system, particularly through change in the unfair dismissal and industrial action categories, has shown a steady propensity to increase in strength. The UK by comparison has shown a tendency for its labour law to rise and fall, to an appreciable degree, in the levels of protection across all five categories of sub-variables in the index. However, this appears to be explainable principally by political effects (i.e. changes of government), and the impact of transnational harmonisation through the directives of the European Union rather than a discernible legal origins effect.[72]

As Deakin, Lele and Siems point out, it is difficult to identify a shared common law origin effect in the development of labour laws in the UK, the US and India.[73] Since its inception in 1947, Indian labour law has largely repudiated the 'voluntarist' system of the UK in favour of more state interventionist regulation, which, in terms of protective strength, as the earlier

[72] See Deakin, Lele and Siems, at pp.145, 154, 155.
[73] See the discussion in Deakin, Lele and Siems, at pp. 149-151.

discussion and analysis shows has placed it much closer to the civil law family than it is to the other common law origin countries (see Figure 7). Similarly, there are important divergences between the US and the UK in terms of the strength of labour law. As Figure 7 shows, US labour law has remained largely unprotective of employees and unions when compared with the other common law countries. By comparison, UK labour law, most noticeably in relation to the collective variables (employee representation and industrial action)[74] came from a radically different position, or diverged sharply away from the US position in other respects (e.g. regulation of dismissal). There may be some argument that UK labour law, particularly over the period from 1980 to 1996 had moved much closer to the US position (see Figure 7), but as noted above there are political explanations for these developments, and for the subsequent movement away from the trend in US labour law. On this analysis, 'legal origin' does not appear to offer a strong explanation for the long-term trends in either system.

There are useful parallels, we feel, to be found in an examination of the development of Australian labour law. Whilst Australia has, from time to time, borrowed US labour law concepts,[75] particularly in relation to the regulation of collective labour relations, there is no obvious strong common law origins effect at work across the two countries – particularly if we look at trends over time. Australia's system has relied, historically, on relatively high levels of state intervention and, as Figure 7 shows, Australian labour law has remained on a course quite distinct from that of the US. There is, moreover, no indication of the type of decline in Australian labour law as occurred in UK labour law, bringing it closer to the US levels of protection between about 1980 and the mid-1990s. Rather, apart from a short period of volatility in the mid-1990s, Australian labour law held its course in levels of protection, more or less tracking in parallel fashion the much lower levels of protection in the US.

There are some slight parallels with UK labour law, but these are, again, not indicative particularly of a strong common law origin effect. The election of a conservative-style Liberal/National Party government in the mid-1990s saw a sharp decline in levels of labour law protection, as occurred in the UK with the election of the Thatcher Conservative government in 1979, and a corresponding improvement in levels of protection with the election of a Labour-based government in 2007, which also mirrored the UK position following the election there of the Blair Labour government. For much of the past 40 years, Australian labour law has run a course parallel with the Indian position, but at appreciably lower levels of protection. Thus whilst there arguably has been some relationship between trends in labour law in the UK and Australia, there appears to have been no impact upon each other of the systems in India and Australia, and the US and Australia, in aggregate terms.

When we look more closely at the sets of sub-variables, we find that in relation to industrial action, for example, the laws of the UK and India diverged in the early-to-mid 1980s, and then converged more closely in the late 1990s. Australian labour law on industrial action

[74] Again we need to urge caution on this point, as it is possible that the condition of US labour law is also understated for the same reasons as Australia might be understated (see n. 55 above).

[75] As has the UK: see Deakin, Lele and Siems, above n. 3 at p. 151.

strengthens considerably at the time when the same dimension of labour law is in decline in the UK, moving more closely to the levels of protection in the Indian system by 1993, and thereafter declines to a level more approximate to the law of the UK in this category. By way of contrast, the US labour law over this period has barely changed. As we noted earlier, the trends in relation to the Employee Representation sub-variable are much less diverse with India, the UK, the US and Australia reaching roughly similar levels of protection over the past several years. But again, if we take the regulation of dismissal variable we find considerable divergence in levels of protection between India and the other common law origin countries, and in a time of relative stability in the dismissal laws of the US, India and the UK, Australian law saw a sharp incline and decline in levels of protection. As noted by Deakin, Lele and Siems most of these developments, showing substantial inclines or declines in levels of labour law protection, have been prompted mainly by political change. In this process there are some cross-influences through legislative borrowing, mainly in the areas of trade union recognition, good faith bargaining, strikes and unfair dismissal, but the degree and levels of divergence over time between countries within the same legal family seems to imply that historical, political and economic contingency (context) provides a safer way of understanding the development of labour law and its relationship with economic development in a country than an assumed *a priori* link with its legal origins.

Testing for Convergence in Labour Market Regulation

A major debate within the social sciences has been the extent to which public policy and regulatory arrangements in different countries have, over time, converged.[76] A key concern in this debate has been the extent to which labour standards and labour law have converged across national settings.[77] These debates have been most vigorous in the industrial relations and political science literature. However, the question of convergence between legal systems has also been a recent concern within comparative legal studies.[78]

While the precise meaning of the term convergence in this context is somewhat ambiguous, it has been asserted that a process of convergence may reflect a number of forces.[79] Perhaps the most prominent view has been that economic forces of globalisation and competition have made it increasingly difficult for national governments to maintain distinctive systems of labour market regulation. From this perspective, it is generally argued that competition among countries to attract direct foreign investment is associated with a 'race to the bottom'

[76] Debates over convergence are typically traced to the work of Clark Kerr and his colleagues; see C. Kerr, J. Dunlop, F. Harbison and C. Myers, *Industrialism and Industrial Man*, Harvard University Press, Cambridge, Mass., 1960.

[77] For a review of this literature see D. Drezner, 'Globalization and Policy Convergence' (2001) 3 *International Studies Review* 53.

[78] See, for example, G. Ponzetto and P. Fernandez, (2008) 'Case Law versus Statute Law: An Evolutionary Comparison' (2008) 37 *Journal of Legal Studies* 379.

[79] D. Drezner, 'Globalization, Harmonization and Competition: The Different Pathways to Policy Convergence' (2005) 12 *Journal of European Public Policy* 841.

– a tendency to reduce the protective strength of labour law to a common low standard.[80] While there is substantial case study evidence of multinational corporations shifting production and jobs to low-cost countries,[81] the evidence of a 'race to the bottom' effect on labour standards is at best mixed.[82] Legal scholars have suggested globalisation may nonetheless induce a level of convergence in legal systems towards a single model through the influence of international institutions (such as the World Bank) or via the influence of major economic powers. These influences may arise due to the perceived potential economic benefits associated with transnational harmonisation of legal rules, or as a direct consequence of the diffusion of more efficient rule making procedures among countries with diverse legal systems. Researchers using this argument suggest that globalisation is associated with a process of convergence towards a particular regulatory type, notably some variation of a common law model, which provides greater flexibility and a reduction in employment security.[83]

While these arguments have been used to support the proposition that convergence is towards a *single* model, other scholars have hypothesised that convergence may involve a 'bipolar convergence' around two competing styles.[84] This may occur, for example, where rivalry between economic powers, 'combined with increasing returns to scale of regulatory harmonization', leads countries 'to attract as many allies as possible'.[85] In the context of legal origins theory, this argument has been associated with the view that colonisation resulted in the transplant of legal systems from Europe to other countries, which were subsequently 'locked-in' and have remained divergent.[86]

A third possible variation would suggest that there may be a degree of convergence between countries of different legal origins and legal cultures, without specifying the model to which those countries are converging. This type of argument would tend to indicate that other factors, such as economic and/or political unification, will ultimately be more powerful than legal origins in driving convergence. Significantly, this process would potentially result in the creation of 'hybrid' legal systems which do not necessarily conform to the predictions of legal origins theory.[87]

It is not our purpose here to test these competing explanations for convergence. Nonetheless, our data allow us to assess whether the predictions suggested by these different approaches is evident among the sample of countries included in our study.

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80 J. Braithwaite and P. Drahos , *Global Business Regulation*, Cambridge University Press, New York, 2000.

81 A. Tonelson, *The Race to the Bottom*, Westview Press, Boulder, Colorado, 2000.

82 Organisation for Economic Co-operation and Development, *Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade*, OECD, Paris, 1996; and C. van Beers (1998) 'Labour Standards and Trade Flows of OECD Countries' (1998) 21 *The World Economy* 57.

83 R. Kelemen and E. Sibbitt, 'The Globalization of American Law' (2004) 58 *International Organization* 103.

84 See D. Drezner, above n. 79.

85 *Ibid* at p. 856

86 See Glaeser and Shleifer, above n. 8.

87 For example, Deakin, Lele and Siems suggest that, notwithstanding their different legal origins, the degree of convergence observed in the UK towards France and German, reflects its openness to EU influences; see Deakin, Lele and Siems pp. 152-153. See further M. Siems, 'The End of Comparative Law' (2007) 2 *The Journal of Comparative Law* 133.

Convergence Among Countries

Figure 13 reports changes in the coefficient of variance in the aggregate scores for the Labour Market Regulation Index as a way of measuring the extent of convergence or divergence in the protective strength of labour law.[88] It reports the coefficient of variance for all six countries, irrespective of legal origin, and also for common and civil law countries, separately. The coefficient of variance for all countries indicates the degree of convergence *between* countries irrespective of legal origins (i.e., between origins convergence), while the coefficient of variance calculated for common and civil law countries indicates the degree of convergence between countries *within* a legal origin (within origins convergence).

The inclusion of the Australian indicator in the dataset used in the Deakin, Lele and Siems study has little effect on the overall degree of convergence or divergence reported by those authors. As the coefficient of variance for all countries indicates, the period until the early- to mid-1980s was associated with a degree of divergence in labour market regulation among all countries included in this study. The data reported in Figure 13 indicate that the period of growing divergence is largely the consequence of a growing divergence in the degree of protection provided to employees within the civil law group of countries. After the mid-1980s, however, a slow but progressive trend of convergence is evident. It should be noted that the degree of divergence among countries remained higher than at any time prior to 1982. We would interpret the evidence presented in Figure 13 as indicating at best weak support for a prediction of convergence towards a single model of labour market regulation.

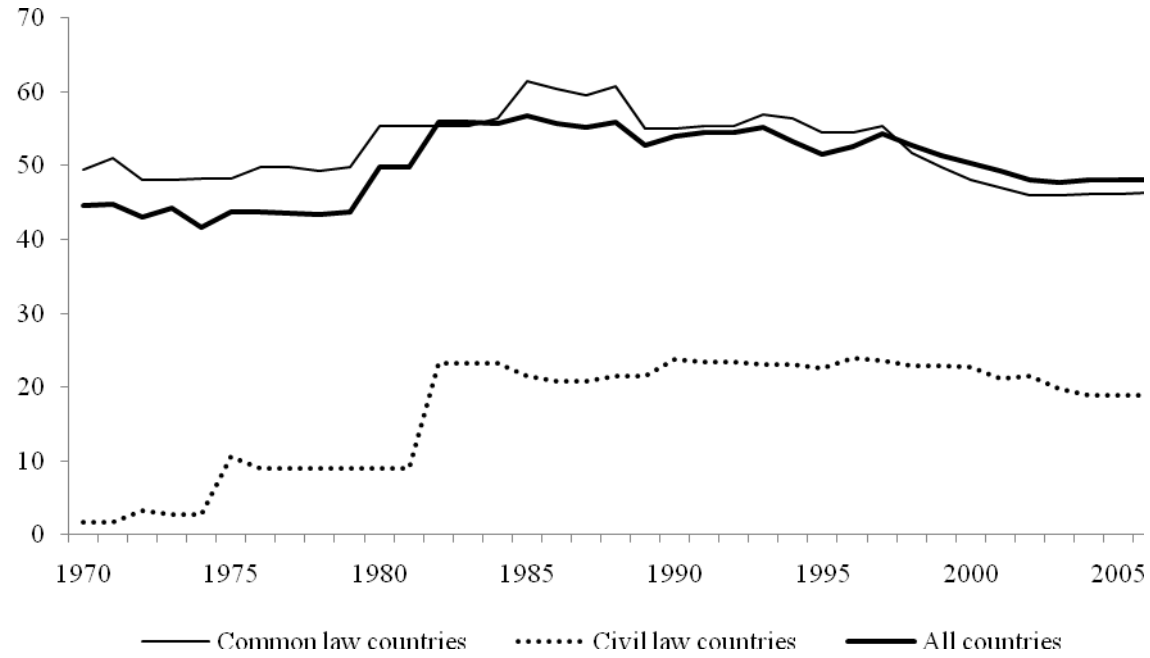
We explore this proposition further by examining the extent to which the protective strength of aggregate labour market regulation in individual countries diverges from the average for the group as a whole. Figure 14 charts the difference between a country's individual score on the Labour Market Regulation Index and the mean score for all countries.[89] If a prediction of convergence towards a single (unspecified) model were correct, we would expect that over time the difference between individual country scores and the mean for all countries' differences would become increasing smaller (i.e. they would converge towards zero). Overall, this figure reveals persistent differences between countries. With the exception of India, the data also show clear differences between civil and common law countries, with common law countries generally having a weaker level of protection for workers. In this context, India has a significantly stronger level of protection than other common law

[88] The coefficient of variance is calculated as the ratio of the standard deviation to the mean. A higher value indicates a greater degree of dispersion in observed values across all cases, while a lower value indicates that observed values are less dispersed. Deakin, Lele and Siems interpret this coefficient as an indicator of 'functional convergence'. By this they mean the extent to which the *overall* level of protection afforded to workers is similar across countries.

[89] A value of zero would imply no divergence between a country's labour market regulation and average strength of labour market regulation for the group as a whole. The further the score for an individual country deviates from zero, the greater is the divergence between the protective strength of that country's labour market regulation and the average level of protection of the group.

countries for the entire period. Overall then, the data provide little evidence of convergence on a single model of labour market regulation.

Figure 13. Functional Convergence in Labour Market Regulation among Civil and Common Law Countries.



Legal Origins and Bipolar Convergence

Figures 13 and 14 also allow us to provide some assessment of whether there has been a bipolar convergence around competing models. Here, we would anticipate that legal origins would provide the foci for bipolar convergence, through the processes hypothesised by legal origin theory. If convergence around legal origins were evident, we would expect that, over time, the coefficient of variance for each group would decrease.

Figure 13 show that for both common law and civil law groups, the period from 1970 through to the early-1990s was a period of divergence within each group, rather than convergence. This trend is particularly evident for the two civil law countries included in our sample between 1980 and 1985.[90] The pattern for common law countries, including Australia, is far less pronounced. While starting from a high level of divergence (reflected in the higher value

[90] Considerable care should be taken in interpreting this trend, given the small number of countries for which we have data. Our group of countries includes only two civil law countries, but four common law countries. The sharp increase in the coefficient of variance for civil law countries is largely attributable to the strengthening of the law in France protecting workers employed under alternate employment contracting arrangements.

for the coefficient of variance), the growth in divergence over the period to the mid-1980s was less than that among civil law countries. Unlike the civil law group of countries, however, the period of convergence from the 1980s was associated with an overall higher degree of convergence than during the 1970s. On the basis of this evidence, there appears to be a weak 'within legal origin' convergence effect from the mid-1990s among the common law group of countries.

Figure 14. Mean Differences in Labour Market Regulation from Other Countries' Laws.

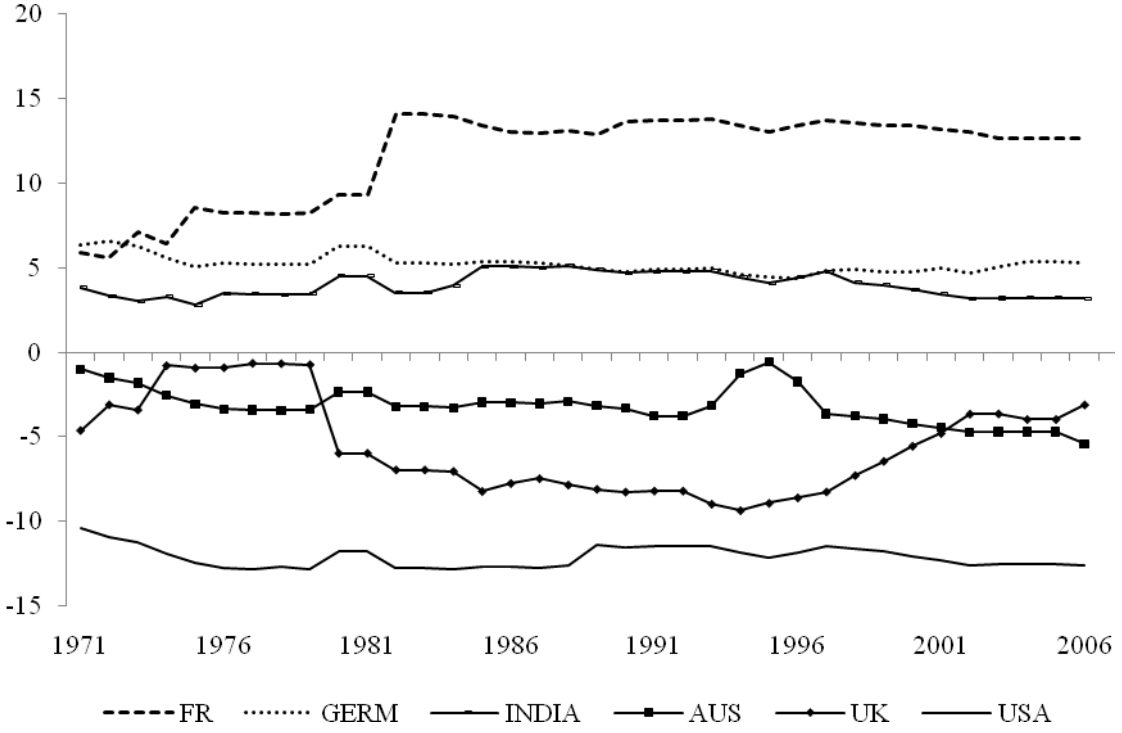


Figure 14 also allows us to test the prediction of bipolar convergence. Here the evidence provides very little support for this prediction. This data reveals that both France and the United States diverge from the mean score by the largest degree for most of the period. After 1981, the data show a degree of persistent difference and divergence for these two countries. Moreover, the differences between France and Germany remain relatively constant over most of the period, indicating little convergence between them. Although the pattern is slightly different for common law countries, the data indicate no strong evidence for within type convergence. For example, the large differences in protective strength between India and the US remain relatively constant through the period. In the case of Australia and the UK, however, the period after 2000 indicates a degree of convergence in the protective strengths of labour law in those two countries. Again, the data provide very little support for the proposition of bipolar convergence around legal origin type.

Australian Labour Law and Convergence

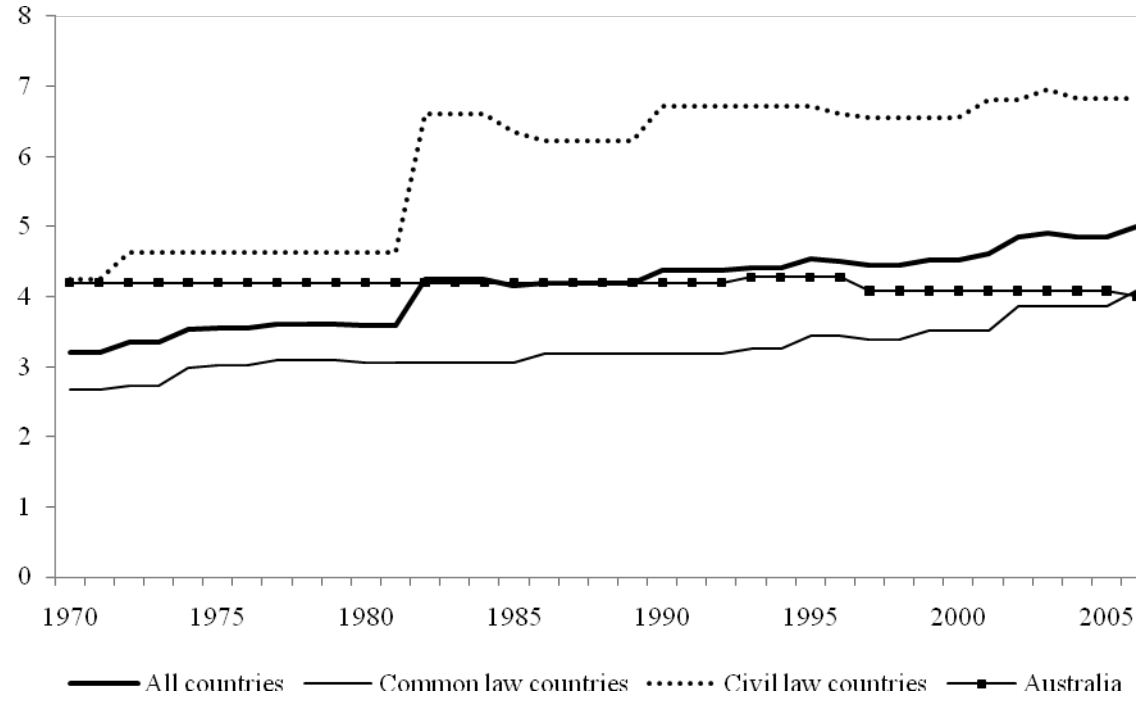
To what extent has Australian labour law converged or diverged from the average protective strength of labour law in other countries? The data reported in Figure 14 suggest that during the 1970s Australian labour law diverged from the average level of protection to a significant degree by virtue of the fact that over this period Australian labour law remained fairly stable while the degree of protection was changing significantly in other countries. Towards the mid-1990s, however, it had begun to converge with the average level for all countries. Then, following the reforms introduced by the Liberal/National Party government in 1996, a distinct period of divergence from the average is once again evident. The figure also shows that for most of the period covered in this work, Australian labour market regulation has been more protective than either the UK or the US, although since the early 2000s labour law in the UK has become more protective than that of Australia. Although we don't have comparable data for the period after 2006 (the year in which the Deakin, Lele and Siems data concludes), we would expect that the protective strength of Australian labour law has begun to once again converge with the average level of protection for all countries.

Convergence at the Sub-indice Level

Although a useful indicator of the overall level of protection provided to workers, the aggregate Labour Market Regulation Index obscures shifting patterns in different areas of labour market regulation. Figures 15-19 report our findings for each of the five sub-indices, comparing the average score of all countries, and of civil and common law countries as separate groups. The figures also include each sub-indice score for Australia to allow for comparisons to be drawn.

Figure 15 reports the score for the alternative employment contracts sub-index. It shows that, on average, the level of protection provided to workers employed under alternative employment contracts over the period 1970-2006 increased in both civil and common law countries, although this trend was particularly strong in the two civil law countries examined. As a consequence, the relative strength of laws diverged between common and civil law countries, particularly after 1980. In Australia, the data confirm a different pattern to the general trend towards increasingly levels of protection. Over much of the period, the strength of the regulation in this area remained largely unchanged and, against the general trend, weakened slightly after 1996. Among common law countries, the average level of protection provided to workers under alternative employment contracts improved over the entire period, and by 2006 had converged with the Australian position.

Figure 15. Alternative Employment Contracts



Different patterns from those identified in the alternative employment contracts data is found for working time regulation (Figure 16) and the regulation of dismissal (Figure 17). In the case of working time, the relative stability of regulation in Australia is also largely evident in other countries. This is reflected in the fact that a significant difference in the level of protection provided to workers in this area is evident between common and civil law countries, with the level of protection appreciably higher in France and Germany. Of interest is the significant divergence in the strength of regulation of working time between Australia and other common law countries, which have traditionally afforded workers significantly lower level of protection. The data suggest that in this area of labour market regulation, the strength of regulation in Australia was considerably higher than the average, and significantly higher than other common law countries. By 2006, the index value for Australia was only marginally closer to the average for common law countries than it was to civil law countries

While the data show consistent and significant differences between common and civil law countries in terms of the strength of law regulating dismissal, it also reveals Australia to be an anomaly. Despite the short period of improvement brought about by the 1992 reforms, which bought Australian law closer to the average position in common law countries, Australian dismissal regulation continued to be significantly weaker than the average for common law countries generally, where the levels of protection in India and the UK are generally higher.

Figure 16. Working Time

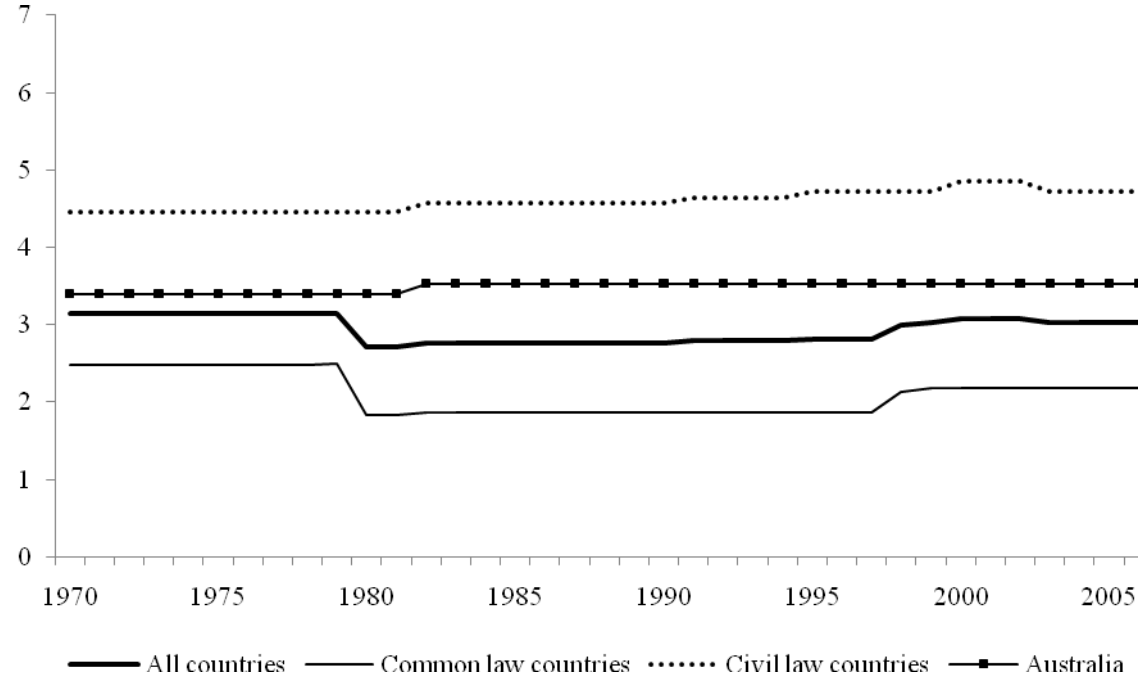
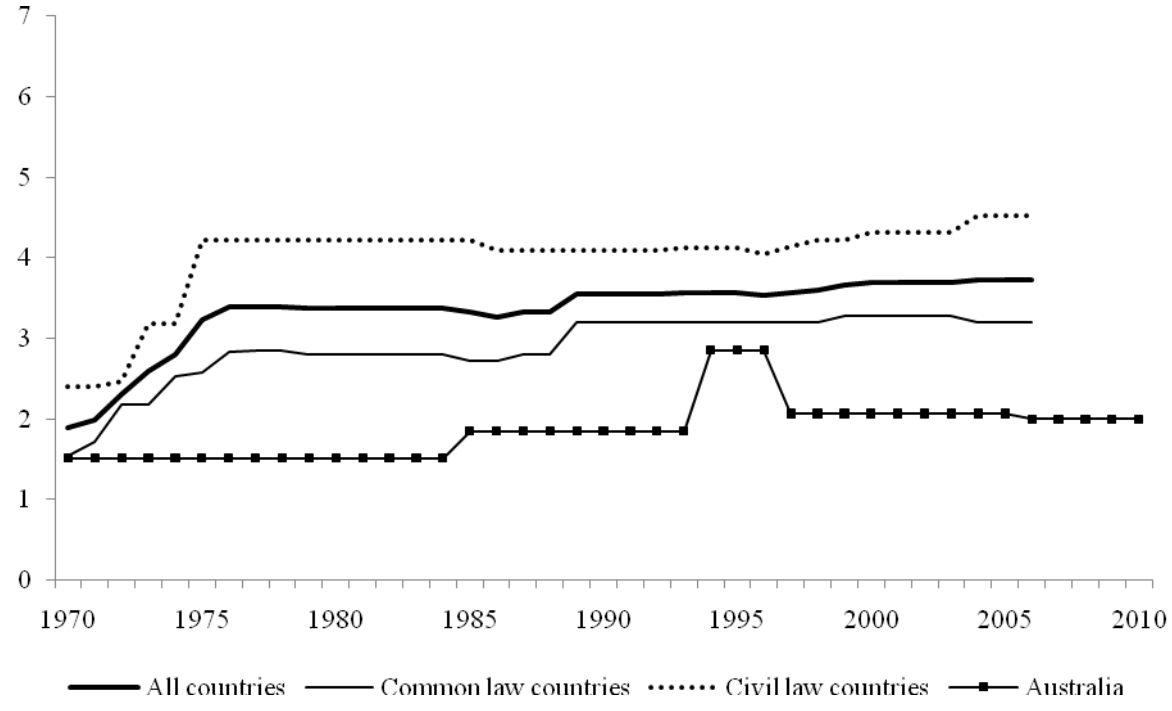


Figure 17. The Regulation of Dismissal



In contrast with the trends described for the first three sub-indices, Figures 18 and 19 indicate that the strength of regulation in Australia dealing with employee representation and industrial action substantially converged with the average level of protection afforded to workers in other common law countries. In the case of employee representation, the level of protection afforded to Australian workers was significantly higher than the level of protection provided on average to workers in other common law countries, until a sharp diminution of rights associated with the *Workplace Relations Act* in 1996 and then the *Work Choices* [91] reforms in 2005.[92] However, the creation of bargaining rights as part of the *Fair Work* reforms would imply a higher level of protection of employee representation rights than in other common law countries.

Figure 18. Employee Representation

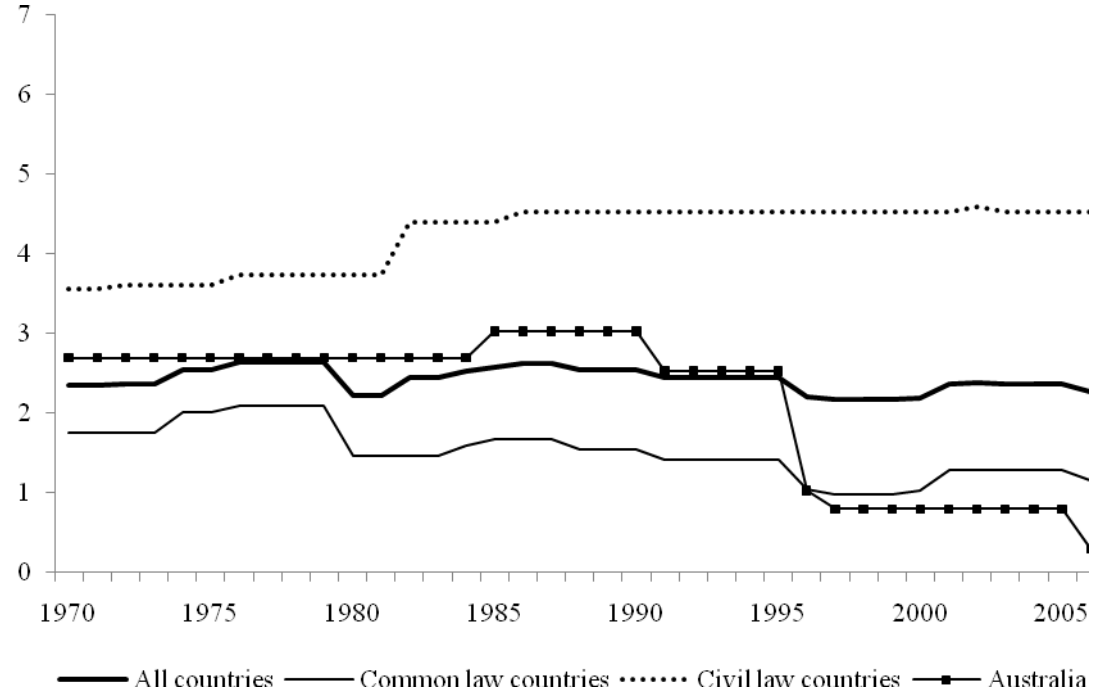


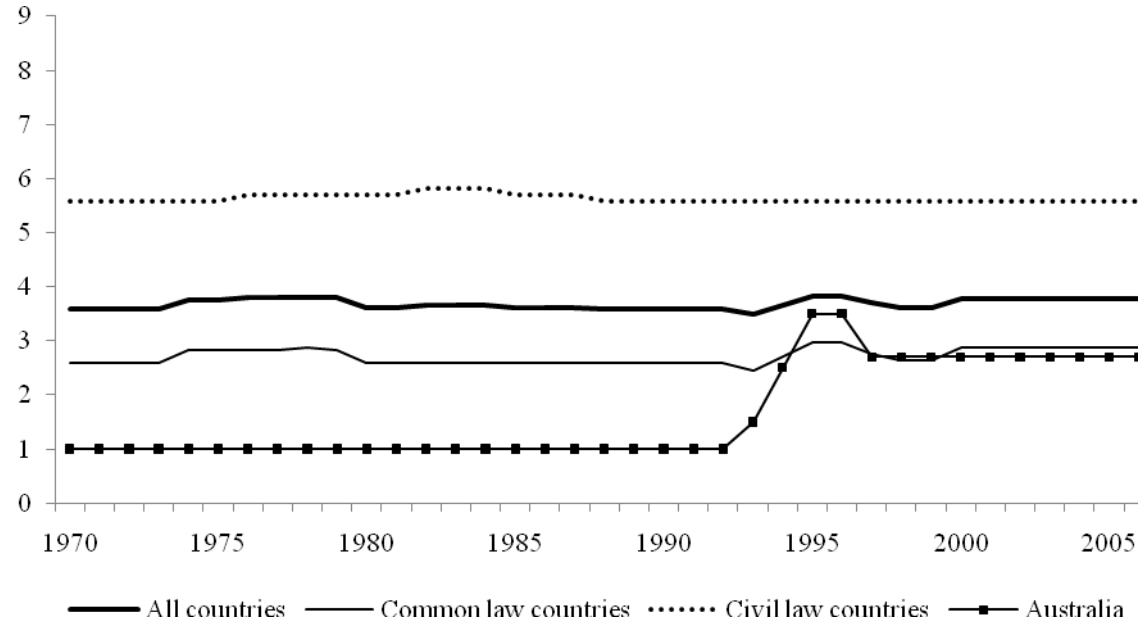
Figure 19 indicates that the level of protection provided to workers engaging in industrial action remained relatively stable in most systems over the period, but was the subject of

[91] See above n. 58.

[92] As the Deakin, Lele and Siems data discontinues in 2006, no direct comparison with Australian developments is possible after this date. However, the value of this sub-index for Australia increased substantially to a level above the 2006 common law country average following the *Fair Work* reforms, which included significant improvements in bargaining rights: see above n. 61. As no major amendments to the laws have been implemented in any of countries examined, we would be confident that the Australian score would exceed the common law average after 2009. We would again emphasise the potential impact of the coding framework adopted by Deakin, Lele and Siems on this sub-index for Australia which arguably should be scored higher to reflect the true strength of its regulation in this area.

considerable regulatory change in the Australian context. As we have noted above, for much of the twentieth century there was, as a matter of law (as opposed to practice) no right to strike in Australia, and consequently, prior to the 1990s Australia remained significantly lower than in any other country included in this study. The effects of the changes introduced in Australia were associated with a strengthening of legal protection for industrial action until the *Workplace Relations Act* reforms in 1996. The net effect of these reforms was a degree of convergence with other common law countries.

Figure 19. Industrial Action



Conclusion

Without further empirical examination of Australian labour law and other related fields it is difficult for us to conclude with any certainty about the importance of legal origins theory and its relationship with economic development. As noted in our introduction this is a preliminary study with limited objectives. We cannot reach any final conclusions, nor do we have data which would enable us to link legal and regulatory 'style' with economic development and the efficiency of markets.

There are, however, a number of hypothetical arguments which might be advanced about Australian labour law in the context of legal origins theory and the debate over convergence/divergence in labour law, and our data does enable us to take this Australian discussion further.

First, a 'strong' form of legal origins theory would predict that Australian labour law

(through some form of inherent common law characteristic) would resemble, in terms of its regulatory style (i.e. a more liberal, less employee-protective form of labour market regulation) the labour law systems of other common law countries, and contrast more strongly in terms of its regulatory style (i.e. a more restrictive, more employee-friendly form of labour market regulation) with the systems of civil law countries. It would also predict that this regulatory style would hold fast notwithstanding important changes of an economic, social and political nature.

The general Australian evidence on this is very mixed. Clearly Australian labour law inherited many features of the British common law system during its colonial period and beyond, and it has also in more recent years borrowed legal developments from both the UK and the US in pursuing labour law reform.[93] However, there is evidence based upon some measures [94] which suggests that through its adoption of the compulsory arbitration system at the turn of the twentieth century Australia deviated away from the common law systems and adopted laws which brought it closer to the civil law family style of labour market regulation (in terms of the level of regulatory intervention and protections extended to workers). [95]And, again, there are arguments to suggest that such a characterisation is overstated.[96] Essentially, then, this comes down to a matter of interpretation. But we suggest that at the very least it makes it extremely difficult to sustain an argument for the 'strong' predictive quality of 'legal origins' theory suggested by some of its advocates. In other words, the Australian evidence supports an argument that the timing of stages of economic development, perhaps the type of labour market and industry structure, and changes in the political environment, may be more important for explaining the direction of legal evolution than legal origins.

Secondly, a 'weak' form of legal origins argument would predict that Australia would *tend* to a regulatory style similar to that of other common law countries, but also that this would not be time invariant nor resistant to change in all contexts. In other words 'within family' deviations might occur, and perhaps 'cross family' convergences might occur, according to specific historical, political and economic conditions. Belonging to the same legal origins group may facilitate legal borrowing, but this is not decisive, as the history of Australian labour law shows. Thus whilst 'legal origins' clearly has some consequences, its effects, in this field, are not overriding, and the path of legal evolution depends, perhaps more importantly, on political economy factors rather than on legal heritage.

On our data there is evidence of a 'weak' legal origins effect in the Australian case. Overall there is a discernible divide between the common law origin countries and the civil law origin

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93 See R. McCallum, 'Convergences and/or Divergences of Labor Law Systems: The View from Australia' (2007) 28 *Comparative Law and Policy Journal* 455.

94 See the references in n. 5 above.

95 This would not be to argue that the Australasian developments in compulsory arbitration in the late-nineteenth and early-twentieth centuries were *derived from* civil law systems. In fact the system was relatively novel, although there were antecedents of such developments in many different legal systems (common law and civil law). However, the most immediate direct models from which compulsory arbitration idea was taken were probably Canadian models of the 1880s and 1890s: see Macintyre and Mitchell, and Mitchell, above n. 39.

96 See the references in n. 5 above.

countries in levels of labour protection, and, as we have seen, Australia fits quite comfortably within this analysis.[97] But as we have noted also, Australian labour law has deviated markedly, in certain respects, from the labour law systems of other common law origin countries, at certain economic and historical junctures.

A third hypothesis might be that whatever the past influence of legal origins might have been on the evolution of Australian labour law, the system's recent history shows a convergence upon a single model of very low level labour protection in what is a 'race to the bottom' induced by global economic competition. It is possible to find some arguments to this effect in the Australian literature on labour market regulation.[98] However, the evidence from our data does not suggest any such evolution in Australian labour law over the past four decades. The data shown in the Aggregate Index for Australian labour law (Figure 6) indicates that apart from a short period in the mid-1990s (when it rose then declined rather sharply) the protective quality of Australian labour law has remained fairly constant since 1970 at least. If there was a tendency in Australian labour law to converge upon a model with much lower levels of protection we might expect to see a shift towards the US model. Whilst, ostensibly, there are individual examples of Australian labour law borrowings of US labour law concepts[99] the comparative data shows a line of roughly parallel development rather than convergence between Australia and the US (see Figure 12). Whether there are closer, or converging, relationships between Australia and its immediate economic competitors in the Asia/Pacific region is a question requiring further research work.

A fourth possible hypothetical scenario is one which would see Australian labour law as converging on a single common model of regulation by virtue of the influence of policies being recommended by leading international institutions (such as the World Bank), or because of arguments about economic efficiency. Again the tenor of this argument would see any such convergence as essentially one upon a less regulated (common law) style rather than a more regulated (civil law) style because of the general assumptions made in this literature about the greater efficiency of the common law model(s).

Quite aside from whatever influence other regulatory institutions might have had in the debate on the reform of Australian labour law it is clear that its recent evolution, since the mid-1980s at least, has been strongly influenced by certain ideas about economic efficiency, productivity and so on.[100] But be that as it may, the data produced in this Report contain no evidence that the Australian labour law system is converging upon a single model, nor that those of the other countries examined here are doing so. This is, admittedly, only a small sample, but our data on the tendencies of Australian labour law to converge towards a common system shows an inconsistent pattern. What is evident is that there are periods of both convergence and divergence, which are associated with cycles of political orientation and government types (i.e., those with a propensity to favour of labour or capital) across

[97] See the discussion above at pp. 24-25. It should also be noted that the apparent divide evident in the data shown here also lends credibility to the Varieties of Capitalism discourse: see P. Hall and D. Soskice (eds.), above n. 24, and H. Gospel and A. Pendleton (eds.), *Corporate Governance and Labour Management: An International Comparison*, Oxford University Press, Oxford, 2005.

countries. There is no obvious evolution towards a common labour law system by reference to an ideal type embodying the perceived most efficient regulation of labour markets.

Fifth, if there is no convergence by Australia on a model common to all other countries, we might still predict that Australia is likely to be converging on one of two *competing* styles of regulation, and we would expect this to be a convergence upon the common law style. Some authors have argued that the Australian labour law model has drawn closer to those of the other members of the common law legal family, and there is some qualitative evidence supporting this view.[101] As noted in our earlier discussion, our data does provide support for an argument that there has been something of a 'within legal origin' convergence among the common law group since the mid-1990s, though this is a weak rather than strong evolutionary trend.

Sixth, we can make some tentative arguments about whether the evolution of Australia's labour law system has converged towards what we have called a 'hybrid' variation. Here it is instructive to compare developments in Australia and the UK, where the aggregate level of protection has, since 2000, converged (Figure 12). In explaining the strengthening of UK labour law, Deakin, Lele and Siems point to the influence of EU Directives relating to the regulation of alternative employment contracts (Figure 7) and employee representation (Figure 10). Obviously these are not influences in the Australian situation. Nonetheless, the *Fair Work* reforms have been associated with a restoration of some power to the federal tribunal (in the form of Fair Work Australia), and the introduction of new rights of union recognition and good faith bargaining, which are more like the provisions now in UK labour law than US labour law.

Finally two further observations should be made. *Within* the common law family of countries, the gaps in levels of protection between various countries in some cases, both in an aggregate sense (Figure 12) and in the content of some of the sub-variables, are larger than the gaps in levels of protection between some of the common law origin countries and their civil law counterparts. In some instances one of the common law origin countries ranks more highly

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98 For example, K. van Barneveld, 'Australian Workplace Agreements and Work Choices' (2006) 16 *Economic and Labour Relations Review* 165; P. Sheldon and A. Junor, 'Australian HRM and the *Workplace Relations Amendment(Work Choices) Act 2005*' (2006) 44 *Asia Pacific Journal of Human Resources* 153; S. Cowling and W. Mitchell, 'Taking the Low Road: Minimum Wage Determination Under Work Choices' (2007) 49 *Journal of Industrial Relations* 741; B. Pocock and J. Elton, 'The Impact of "Work Choices" on Women in Low Paid Employment in Australia: A Qualitative Analysis' (2008) 50 *Journal of Industrial Relations* 475.

99 See the works cited in nn. 68 and 93 above.

100 On the immediate period from the mid-1990s to 2007 or so see generally, C. Arup, A. Forsyth, P. Gahan, M. Michelotti, R. Mitchell, C. Sutherland and D. Taft, *The Impact of Employment Legislation Under the Coalition Government: A Review of the Research Literature 1997-2008*, Research Report, Workplace and Corporate Law Research Group, and Australian Centre for Research in Employment and Work, Monash University, 2009. For the earlier period (post-1980s) see R. Blandy, 'Deregulating the Labour Market' (1986) 5 *Economic Papers* 1; R. Blandy and J. Sloan, *The Dynamic Effects of Labour Market Regulation*, ACC/Westpac Economic Discussion Papers, No. 3; R. Mitchell, 'Labour Law Under Labor: The Industrial Relations Bill 1988 and Labour Market Reform' (1988) 1 *Labour and Industry* 486; and R. Mitchell and M. Rimmer, 'Labor Law, De-Regulation and Flexibility in Australian Industrial Relations' (1990) 12 *Comparative Labor Law Journal* 1.

101 See, for example, Marshall, Mitchell and O'Donnell, above n. 5; McCallum, above n. 91.

than one or more of the civil law countries for example. Clearly this must throw further doubt on the whole idea of legal origins organised along the common law/civil law fault line, and suggests that there may be other important factors at play. As we have noted earlier in this paper, historically Australian labour law, in its core systemic elements, arguably owed little to the UK and other common law systems, but at the same time it is not unlike them in terms of its protective sense. If we assume the relative levels of protection to be accurately reflected in the data, perhaps greater empirical examination of multiple systems over time may uncover factors unrelated to their legal origins which explain why common law and civil law countries tend to regulate differently. We suggest that there is much interesting work to be done, particularly in our region with its diverse indigenous and colonial backgrounds.

The findings also, we think, raise some interesting questions about Australian labour law specifically. First, the apparent relative stability of our labour law system as indicated in Figures 6 and 12 is perhaps something of a surprise, given developments over the past two decades. Apart from one short period of volatility, Australian labour law has shown remarkable stability over the period examined, particularly when compared with the UK, but also when compared with the labour laws of France and India. Second the findings raise serious questions about the supposed strength of Australian labour law. Simply put, the Australian system on the aggregate data (Figure 12) is situated in the same half of the figure as the UK system, which generally has been perceived as comparatively much less protective of labour's interests. On that data, Australian labour law does not rank with France and Germany as a civil law origin equivalent, contrary to what has sometimes been suggested,[102] but instead appears as a middling ranked common law type demonstrating only moderate protections to labour and its institutions. However, it is important to note that the substance of these two points is affected in each case by the coding conventions adopted in compiling the Deakin, Lele and Siems index, and about which we have expressed some reservations.[103]

[102] See the discussion in Jones and Mitchell, above n. 5.
[103] See above n. 55.

APPENDIX

The Longitudinal Labour Regulation Index – Description of Variables

Here we provide a brief overview of the Longitudinal Labour Regulation Index developed by Deakin, Lele and Siems. A more comprehensive description can be found at: <http://www.cbr.cam.ac.uk/research/ programme2/project2-20.htm>.

The Longitudinal Labour Regulation Index is an additive index comprised of 40 variables. Like the Botero et al. Labor Market Regulation Index, each variable is assigned a value in the range of 0 (no protection) to 1 (strong protection), indicating the relative strength of the protection the law affords to employees. As we have outlined in the body of the paper, the Longitudinal Labour Regulation Index consists of five sub-indices covering different elements of labour law. With the exception of social security law, these five indicia can be mapped directly against measures included in the Botero et al data. Each of the five sub-indices is calculated as the sum of the score given to each of the individual variables that make up each sub-index; the aggregate index is the sum of all variables. The table below provides a brief summary of the 40 variables included in the original coding framework developed by Deakin, Lele and Siems, and the two additional variables we have included in the sub-index measuring the strength of law protecting workers employed under alternative employment contracts. For the purpose of comparison with the figures and data reported in the Deakin, Lele and Siems study we have normalised the value of this sub-index to take a value in the range of 0 to 8, rather than a range of 0 to 10, which would have resulted from the two additional variables. Similarly, the aggregate index reported in Figures 6 and 7 are normalised to reflect a value in the range of 0 to 40, rather than 0 to 42, in order to allow for direct comparison with the Deakin, Lele and Siems data. The effect of doing so has no material bearing on how the sub-index or the aggregate index should be read.

(A) Alternative Employment Contracts

An index that measures the cost of using alternatives to the 'standard' employment contract is computed as the sum of the following variables:

(1) the extent to which the law as opposed to the contracting parties, determines the legal status of the worker (can take a value of between 0 and 1 reflecting the strength of the law);

(2) the extent to which part-time workers have the right to equal treatment with full-time workers,

(3) the extent to which casual workers have the right to equal treatment with full-time workers (can take a value of between 0 and 1 reflecting the strength of the law);

(4) the extent to which the cost of dismissing a part-time worker is equal in proportionate terms to the cost of dismissing full-time workers (can take a value between 0 and 1 to reflect the strength of the law);

(5) the extent to which the cost of dismissing a part-time worker is equal in proportionate terms to the cost of dismissing full-time workers (can take a value between 0 and 1 to reflect the strength of the law);

(6) the extent to which the law constrains the conclusion of a fixed term contract (can take a value between 0 and 1 to reflect the strength of the law);

(7) the extent to which fixed-term workers have the right to equal treatment with permanent workers (can take a value between 0 and 1 to reflect the strength of the law);

(8) the maximum duration of fixed term contracts (normalised to take a score of between 0 and 1);

(9) the extent to which the law prohibits or restricts agency work (can take a value between 0 and 1 to reflect the strength of the law);

(10) the extent to which agency workers have the right to equal treatment with permanent workers of the user undertaking (can take a value between 0 and 1 to reflect the strength of the law);

(B) Regulation of Working Time

An index that measures the regulation of working time is computed as the sum of the following variables:

(1) the normal length of annual paid leave guaranteed by law or collective agreement (normalised to take a value of between 0 and 1);

(2) the normal number of paid public holidays guaranteed by law or collective agreement (normalised to take a value of between 0 and 1);

(3) the normal premium for overtime working set by law or by collective agreements which are generally applicable (normalised to take a value of between 0 and 1);

(4) the normal premium for weekend working set by law or by collective agreements which are generally applicable (normalised to take a value of between 0 and 1);

(5) the maximum weekly number of overtime hours permitted by law or by collective agreements which are generally applicable (normalised to take a value of between 0 and 1);

(6) the maximum duration of the normal working week exclusive of overtime (normalised to take a value of between 0 and 1);

(7) the maximum number of permitted working hours in a day, taking account of rules governing rest breaks and maximum daily working time limits (normalised to take a value of between 0 and 1).

(C) The Regulation of Dismissal

An index that measures the regulation of dismissal is computed as the sum of the following variables:

(1) the length of notice, in weeks, that has to be given to a worker with 3 years' employment (normalised to take a value of between 0 and 1);

(2) the amount of redundancy compensation payable to a worker made redundant after 3 years of employment, measured in weeks of pay (normalised to take a value of between 0 and 1);

(3) the period of service required before a worker qualifies for general protection against unjust dismissal (normalised to take a value of between 0 and 1);

(4) the extent to which the law imposes procedural constraints on dismissal (can take a value between 0 and 1 to reflect the strength of the law);

(5) the extent to which the law imposes substantive constraints on dismissal (can take a value between 0 and 1 to reflect the strength of the law);

(6) the extent to which the law provides for reinstatement as the normal remedy for unfair dismissal (can take a value between 0 and 1 to reflect the strength of the law);

(7) the extent to which an employer has to obtain the permission of a state body or third body prior to an individual dismissal (can take a value between 0 and 1 to reflect the strength of the law);

(8) the extent to which an employer must follow priority rules based on seniority, marital status, number or dependants, etc., prior to dismissing for redundancy (can take a value between 0 and 1 to reflect the strength of the law);

(9) the extent to which an employer must follow priority rules relating to the re-employment of former workers (can take a value between 0 and 1 to reflect the strength of the law).

(D) Employee Representation

An index that measures the strength of the law providing for employee representation is computed as the sum of the following variables:

(1) the extent to which the right to form trade unions is protected in the country's constitution (can take a value between 0 and 1 to reflect the strength of the law);

(2) the extent to which the constitution protects the right to collective bargaining or the right to enter into collective agreements;

(3) the extent to which the (can take a value between 0 and 1 to reflect the strength of the law);

(4) the extent to which the law provides for the extension of collective agreements to third parties at the national or sectoral level (can take a value between 0 and 1 to reflect the strength of the law);

(5) the extent to which the law permits both pre-entry and post-entry closed shops (can take a value between 0 and 1 to reflect the strength of the law);

(6) a dummy variable which equals one of the law gives unions and/or workers to right to nominate board-level directors in companies of a certain size;

(7) the extent to which the law provides workers with rights to information sharing, consultation or co-determination (can take a value between 0 and 1 to reflect the strength of the law).

(E) Industrial Action

An index that measures the strength of the law protecting the right to take industrial action is computed as the sum of the following variables:

(1) a dummy variable which equals 1 if strikes are not unlawful merely by reason of being unofficial or 'wildcat' strikes;

(2) a dummy variable that equals 1 if strikes over political (i.e. non work-related) issues are permitted;

(3) the extent to which secondary or sympathy strike action is constrained (can take a value between 0 and 1 to reflect the strength of the law);

(4) a dummy variable which equals 1 if lockouts are not permitted;

(5) the extent to which the constitution (or equivalent) protects the right to industrial action (i.e. strike, go-slow or work-to-rule) (can take a value between 0 and 1 to reflect the strength of the law);

(6) a dummy variable that equal 1 if there is no mandatory waiting period or notification requirement before strikes can occur;

(7) a dummy variable which equals 1 if a strike is not unlawful merely because there is a collective agreement in force;

(8) A dummy variable that equals 1 if the law does not mandate conciliation procedures or other alternative-dispute-resolution mechanisms (other than binding arbitration) before the strike;

(9) A dummy variable that equals 1 if the law prohibits employers to fire striking workers or to hire replacement labour to maintain the plant in operation during a non-violent and non-political strike.