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Worker Representation in Australia: Moving Towards Overseas Models?

Anthony Forsyth

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Worker Representation in Australia: Moving Towards Overseas Models?

Dr Anthony Forsyth, Senior Lecturer in Workplace Law and Director, Corporate Law and Accountability Research Group, Department of Business Law and Taxation, Faculty of Business and Economics, Monash University, Australia; email: Anthony.Forsyth@buseco.monash.edu.au

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Abstract

This paper examines how far, and in what ways, overseas systems of worker representation are influencing the Australian debate. After briefly exploring the diminution of legal support for worker representation over the last 15 years, the paper contains a detailed analysis and comparison of recent policy proposals put forward by the Australian Council of Trade Unions and the Federal Labor Opposition. The ACTU policy draws heavily on the United States, Canadian and United Kingdom collective bargaining and union recognition systems, along with North American and (particularly) New Zealand concepts of ‘good faith bargaining’. Key aspects of these overseas systems are highlighted in the paper. In contrast, the ALP industrial relations policy is a substantially diluted version of the ACTU blueprint, involving only minimal ‘borrowing’ from overseas worker representation laws. Importantly, stronger supports for collective bargaining – such as the NZ mechanism for arbitration of bargaining impasses – have been omitted from Labor’s policy. If implemented, this would see the emergence in Australia of a blend of several overseas worker representation models, resulting in some improvement to the current legal framework’s subversion of collective bargaining – but not to the extent desired by the ACTU.

1. Introduction

The legal arrangements for worker representation in Australia are currently in a state of flux. The traditional model, based on Australia’s unique system of compulsory conciliation and arbitration with strong representation rights for trade unions, was all but done away with by the Howard Coalition (conservative) Government’s 2005 ‘Work Choices’

* Thanks to Carolyn Sutherland and Professor Ron McCallum for their comments on a draft of this paper.

legislation.¹ And with a Federal election due to be held by the end of 2007, the Labor Opposition recently adopted a new industrial relations policy² that would consign the once-impregnable Australian Industrial Relations Commission ('AIRC') to the dustbin of history. In its place, Labor would establish a body known as Fair Work Australia ('FWA'). FWA would combine the advisory, dispute resolution, minimum-wage setting, enforcement and judicial functions of several Federal Government bodies into one central agency.³ One of FWA's main roles would be to oversee the new good faith bargaining ('GFB') framework outlined in Labor's policy, which is premised on the notion of collective bargaining rights flowing from a union's capacity to demonstrate 'majority support' among the workforce.⁴

The articulation of such a policy position by Labor follows a period of serious reflection, on the part of the Australian union movement, as to the kind of labour laws needed to strengthen worker representation rights in the post-Work Choices era. Led by the Australian Council of Trade Unions ('ACTU'), this process has involved consideration of the legal processes found in a number of other major industrialised economies. In April-May 2006, the ACTU sent a delegation to examine the union recognition and collective bargaining systems operating in New Zealand, Canada, the United States, and the United Kingdom. The ACTU had also commissioned research on these overseas jurisdictions, along with those of Italy, Germany and Sweden.⁵ This examination of foreign models for ordering bargaining and representation rights influenced the final shape of the collective bargaining policy ultimately adopted by the ACTU in September-October 2006.⁶

The main aim of this paper is to consider how far, and in what ways, overseas systems of worker representation are influencing the Australian debate. The next section of the paper briefly examines how Australian law historically bolstered worker representation, and the ways in which that support has been diminished in the last 15 years, especially by the Work Choices Act. This is followed (in section 3) by a detailed outline of the ACTU and ALP policy proposals. In section 4, the ACTU policy is subjected to closer examination,

¹ *Workplace Relations Legislation Amendment (Work Choices) Act 2005* (Cth) ('Work Choices Act'), amending the *Workplace Relations Act 1996* (Cth) ('WR Act') with effect from 27 March 2006; references to the WR Act in this paper are to that legislation, as amended by the Work Choices Act.

² Australian Labor Party ('ALP'), *Forward with Fairness: Labor's plan for fairer and more productive Australian Workplaces*, April 2007 ('Forward with Fairness').

³ Forward with Fairness, pp 17-18; see also ALP, 'Federal Labor's New Independent Industrial Umpire: Fair Work Australia', *Media Statement*, 26 April 2007.

⁴ Forward with Fairness, pp 13-16.

⁵ Anthony Forsyth, Peter Gahan, Marco Michelotti, Andreas Pekarek and Renee Saibi, *Collective Bargaining and Union Recognition Rights: Policy Issues for Australia*, Research Report for the Australian Institute of Employment Rights, April 2006 ('AIER Report').

⁶ ACTU, *A fair go at work: Collective Bargaining for Australian Workers*, September 2006 ('A fair go at work'); ACTU, *Industrial Relations Legislation Policy*, ACTU Congress, October 2006, pp 16-26.

highlighting the extent and manner of its reliance upon overseas models of union recognition and collective bargaining; and focusing on the legal arrangements operating in the US, Canada, the UK and NZ. This discussion paves the way for an assessment of the extent to which the ALP policy, in turn, draws upon these overseas industrial relations systems (section 5). It is concluded that while borrowing elements of UK and North American labour law, certain features of the NZ system which might provide stronger support for collective bargaining have been omitted from Labor's policy, thus detracting (to some degree) from suggestions that the ALP is simply proposing to hand back power to the unions. Finally (in section 6), some observations are made about the future prospects for worker representation under Australian law.

2. Worker Representation: from Compulsory Arbitration (1904) to the Work Choices Act (2005)

Australian labour law traditionally provided extensive support to worker representation through the conciliation and arbitration system, and the central role accorded to unions within that system. In addition to coverage and organisational rights, unions obtained *de facto* recognition from employers through the capacity to notify disputes to the AIRC (and its predecessors). This triggered compulsory dispute resolution processes, usually leading to the determination of a binding 'award' that comprehensively regulated terms and conditions of employment.⁷ The legal and institutional support provided to unions contributed greatly to their growth and organisational security over the course of the twentieth century – such that by 1953, trade union membership had reached 63 per cent of the total labour force, and remained around 50 per cent until the early 1980s.⁸

Since then, however, the level of trade union membership in Australia has steadily fallen. The latest figures indicate that, in 2006, union members made up 20.3 per cent of the workforce – 42.6 per cent in the public sector, and just 15.2 per cent in the private sector.⁹ Factors contributing to the decline in union membership over the last 25 years include the massive reduction in highly-unionised manufacturing employment, arising from the economic reform process; the growth of casual, part-time and 'contract' labour arrangements; and (from the early 1990s) the increasing adoption of aggressive

⁷ See Andrew Frazer, 'Trade Unions under Compulsory Arbitration and Enterprise Bargaining', in Paul Ronfeldt and Ron McCallum (eds), *Enterprise Bargaining, Trade Unions and the Law*, The Federation Press, Sydney, 1995, p 52.

⁸ Michael Crosby, *Power at Work: Rebuilding the Australian Union Movement*, The Federation Press, Sydney, 2005, pp 42-43.

⁹ Australian Bureau of Statistics ('ABS'), *Employee Earnings, Benefits and Trade Union Membership – Australia*, Cat. No. 6310.0, August 2006.

'individualisation' and 'de-unionisation' strategies by employers.¹⁰ In addition, the legal rights of unions were significantly wound back as part of the 'de-collectivist' labour laws introduced by Federal and State conservative governments during the 1990s. This included the Federal Coalition Government's first round of workplace reform legislation in 1996, which enshrined the principle of 'voluntary unionism', restricted union recruitment and strike activity, and facilitated both union and non-union enterprise bargaining¹¹ along with individual employer-employee agreements known as 'AWAs'.¹²

The 2005 Work Choices Act took this process of marginalising unions¹³ and undermining collective bargaining considerably further. In particular, it abolished the century-old framework of dispute notification and conciliation/arbitration of industrial disputes by the AIRC;¹⁴ repealed the no disadvantage test,¹⁵ and allowed workplace agreements to totally and permanently displace the operation of awards (so that award protections such as penalty rates and shift loadings can be ousted by an agreement, without financial compensation to employees).¹⁶ The Work Choices Act also provided for AWAs to override collective agreements (so that an employer can offer and enter into individual agreements with employees, even when a collective agreement is in force).¹⁷

¹⁰ See further David Peetz, *Unions in a Contrary World: The Future of the Australian Trade Union Movement*, Cambridge University Press, Cambridge, 1998; Stephen Deery and Richard Mitchell (eds), *Employment Relations: Individualisation and Union Exclusion – An International Study*, The Federation Press, Sydney, 1999; Crosby, 2005.

¹¹ Enterprise-level bargaining had in fact been introduced by the former Labor Government in the early 1990s, as a measure to increase workplace productivity and efficiency, but with important safeguards for employees; these included AIRC scrutiny of enterprise agreements to ensure (among other things) that there was no overall disadvantage to workers compared to relevant award conditions (the 'no disadvantage test'); see Ron McCallum 'Enhancing Federal Enterprise Bargaining: The Industrial Relations Reform Act' (1993) 6 *Australian Journal of Labour Law* 63.

¹² That is, 'Australian Workplace Agreements'; see Ron McCallum, 'Australian Workplace Agreements – An Analysis' (1997) 10 *Australian Journal of Labour Law* 50.

¹³ See Anthony Forsyth and Carolyn Sutherland, 'From 'Uncharted Seas' to 'Stormy Waters': How Will Trade Unions Fare under the Work Choices Legislation?' (2006) 16 *The Economic and Labour Relations Review* 215.

¹⁴ See Anthony Forsyth, 'Arbitration Extinguished: The Impact of the Work Choices Legislation on the Australian Industrial Relations Commission' (2006) 32 *Australian Bulletin of Labour* 27.

¹⁵ See note 11 above.

¹⁶ At least, that was the case under the original amendments introduced by the Work Choices Act. However, the Government moved to introduce a new 'fairness test' (similar in some respects to the former no disadvantage test) to apply to most AWAs and all collective agreements lodged on or after 7 May 2007; see the *Workplace Relations Amendment (A Stronger Safety Net) Act 2007*, which was passed by the Federal Parliament on 20 June 2007.

¹⁷ See Anthony Forsyth and Carolyn Sutherland, 'Collective Labour Relations under Siege: The Work Choices Legislation and Collective Bargaining' (2006) 19 *Australian Journal of Labour Law* 183; and Joel Fetter, 'Work Choices and Australian Workplace Agreements' (2006) 19 *Australian Journal of Labour Law* 210.

Importantly, under Australian Federal law, employers are free to ignore the preference of employees to engage in collective bargaining, and can refuse to recognise a union seeking to negotiate a collective agreement on behalf of employees – leading McCallum to describe the Australian system as one of ‘voluntary collective bargaining’.¹⁸ While the WR Act enables employees, unions and employers to take ‘protected’ industrial action in support of claims made in the process of negotiating collective agreements,¹⁹ there are no legal obligations on parties to bargain in good faith. The AIRC’s powers to make orders ensuring parties adhered to GFB processes, introduced by Labor in 1993, were repealed by the Coalition Government in 1996.²⁰

Despite the Government’s efforts to promote individual and non-union agreements over the last eleven years, statistics on agreement coverage indicate that collective bargaining remains an influential mechanism for regulating the employment conditions of Australian workers. As at May 2006,²¹ collective agreements registered under Federal or State law covered 38.1 per cent of the Australian workforce (35.3 per cent were union agreements). A further 3.0 per cent of employees were covered by unregistered collective agreements. Combined with the 19.0 per cent of employees covered solely by awards,²² this puts the overall coverage of collectively-determined employment conditions in Australia at just over 60 per cent of the workforce.²³ Registered individual agreements covered just 3.1 per cent of the workforce.²⁴ The bulk of these (2.9 per cent) were AWAs, although the use of these statutory individual agreements has increased considerably since the Work Choices Act

¹⁸ This has in fact been the case since the Coalition Government’s initial legislative reforms in 1996, and there have been many instances in recent years of employers adopting ‘hard-line’ positions of refusing to negotiate with unions, while workers are ‘locked out’ for extensive periods. In one case involving aircraft maintenance employees at Boeing, the workers spent almost 12 months on a picket line asserting the right to have their union negotiate a collective agreement on their behalf, with the AIRC powerless to intervene; see *Boeing Australia Ltd v Australian Workers’ Union* (2006) 148 IR 466. See further Ron McCallum, ‘Trade Union Recognition and Australia’s Neo-Liberal Voluntary Bargaining Laws’ (2002) 57 *Relations Industrielles* 225.

¹⁹ Although the right to take protected action is now subject to significant restrictions and procedural hurdles; see Shae McCrystal, ‘Smothering the Right to Strike: Work Choices and Industrial Action’ (2006) 19 *Australian Journal of Labour Law* 198.

²⁰ See McCallum 2002; Forsyth 2006, p 29; see further notes 68 and 129-130 below.

²¹ See David Peetz, *Assessing the Impact of ‘Work Choices’ – One Year On*, Report to Department of Innovation, Industry and Regional Development, Victoria, 19 March 2007, p 8, drawing on ABS and Federal Department of Workplace Relations data.

²² Many of the employees covered by (union or non-union) registered collective agreements are also covered by awards, with the award providing the ‘safety net’ or minimum floor for bargaining.

²³ Although note Peetz’s observation (2007, at p 11) that, since the commencement of the Work Choices Act, more employees are moving onto AWAs (see also notes 24-25 below), and fewer onto union collective agreements.

²⁴ Approximately one-third of Australian employees (31.7 per cent) had their working conditions regulated by unregistered individual contracts, known also as ‘common law’ contracts or agreements; the ALP policy commitment to abolish AWAs (see notes 26-31 below) would see common law agreements take the place of AWAs.

came into effect – they are now estimated to cover somewhere between 3.7 and 8.4 per cent of the workforce.²⁵

3. The ACTU and ALP Policies

The release of Labor's industrial relations policy at its National Conference in late April 2007 sparked a vehement debate in the Australian media (which, apart from anything else, highlighted the extent to which workplace reform will be a central issue in the upcoming Federal election campaign). Much attention, and a considerable degree of vitriol from the Government and employer bodies, focused upon the ALP's proposal to abolish AWAs.²⁶ This stems from a long-standing opposition on Labor's part to any form of statutory recognition for individualised bargaining, which it regards as inherently unfair and (especially as formulated under Work Choices) slanted in favour of employers.²⁷ Complaints from the business community, and employers in the booming resources sector in particular,²⁸ led to significant pressure on the ALP to reverse its position on the removal of AWAs or come up with some form of special arrangements for the mining industry.²⁹ While remaining committed to its policy position that employers can obtain the flexibility they desire through common law employment contracts rather than AWAs,³⁰ the ALP has indicated that existing AWAs may be able to continue in operation for their full five-year term after the election of a Labor Government.³¹

Government representatives, employer organisations and media commentators also zeroed in on Labor's collective bargaining proposals, claiming (according to one typical example) that they simply amounted to a charter for 'union power' under the guise of

²⁵ Cf Peetz 2007, p 10; and Peter McIlwain (Employment Advocate), in evidence to the Senate Standing Committee on Employment, Workplace Relations and Education, Budget Estimates, *Hansard*, Monday 28 May 2007, p 24.

²⁶ See Forward with Fairness, pp 3, 13.

²⁷ See Forward with Fairness, pp 4-5, including discussion of data on agreement outcomes (showing the removal of 'protected award conditions' in many instances) since the Work Choices Act came into effect.

²⁸ An industry body claims that around 80 per cent of the mining sector's 700,000 employees are engaged on AWAs: see John Kerin, 'Rudd firm on AWAs', *The Australian Financial Review*, 4 April 2007. Employers in the retail and hospitality industries have also asserted the importance of individual agreements (primarily because they enable the removal of 'penalty rates' for night and weekend work): see for example John Hart, 'AWAs a must for small service businesses', *The Australian Financial Review*, 3 May 2007. Note also 'Qantas pushes Labor to keep AWAs, as pilots push for new company-wide arrangements', *Workplace Express*, 18 May 2007.

²⁹ See for example 'ALP fails to resolve AWA transition with AMMA', *Workplace Express*, 2 May 2007; 'Mining industry debate: productivity, ideology', *ABC Online*, 2 May 2007, available at: <http://www.abc.net.au/pm/>; 'Mining body suggests IR compromise', *ABC Online*, 3 May 2007, available at: <http://www.abc.net.au/news/>.

³⁰ See for example George Megalogenis, 'Rudd flags deal for miners', *The Australian*, 17 May 2007; and note 24 above.

³¹ With the possibility of an 'opt-out' arrangement for employees who do not wish to remain on an AWA: see 'AWAs can run their full term, says Gillard', *Workplace Express*, 17 May 2007; Steve Lewis and Matthew Franklin, 'Labor's contract escape clause', *The Australian*, 18 May 2007.

restoring 'balance' to the workplace relations system.³² To examine the validity of these claims, and the overseas origins of both the ACTU and Labor policies, it is first necessary to outline each in some detail.

ACTU: A fair go at work

The ACTU's 2006 policy document mounted the case for establishing a legislative collective bargaining framework, based on GFB obligations of the parties and a 'safety net' of decent minimum standards in awards, as 'the primary mechanism to improve wages and conditions of employment.'³³ The ACTU argued that:

'Good faith collective bargaining balances flexibility with fairness. It is the means to ensure that workers can contribute to the creation of productive and profitable enterprises and fairly share in the gains that are generated by their efforts. Collective bargaining gives workers a say and a fair go at work.'³⁴

Under the ACTU's proposed GFB system, unions, workers and employers would all have the right to initiate the process for negotiating a workplace agreement, which could take the form of a union or non-union (but not an *individual*) agreement.³⁵ Bargaining by a union would be based on the support of the employees in the workplace.³⁶ The system would be two-pronged: first, employers and unions could 'voluntarily' enter into negotiations, with the legislation premised on 'the assumption that parties will collectively bargain in good faith'; however, secondly, if a party was not engaging in collective bargaining, another party could apply to the AIRC for orders to facilitate GFB.³⁷ The AIRC's powers in this area would be subject to clear legislative guidance, along the following lines:³⁸

- GFB 'does not require a bargaining party to agree on any matter for inclusion in an agreement or require a party to enter into, or prevent a party from entering into, an

³² Paul Kelly, 'For Labor, balance is code for union power', *The Australian*, 2 May 2007; see also 'Labor IR plan puts unions back in business, says Hockey', *Workplace Express*, 30 April 2007; Brad Norington, 'Union deals to be 'forced' on bosses', *The Australian*, 30 April 2007; Paul Gollan, 'Just a few unionists will rule the roost', *The Australian Financial Review*, 2 May 2007; John Breusch and David Crowe, 'Pollster warns Rudd on union factor', *The Australian Financial Review*, 3 May 2007; Janet Albrechtsen, 'Labor scheme to sell out workers to unions', *The Australian*, 8 May 2007; Brad Norington, 'Firms fear the return of unions', *The Australian*, 30 May 2007.

³³ A fair go at work, pp 6-9.

³⁴ A fair go at work, p 6; see also p 62.

³⁵ A fair go at work, p 13; at p 8, the policy states: 'There should be no statutory individual contracts, and existing legislation that provides for AWAs should be repealed ...'.

³⁶ A fair go at work, p 13.

³⁷ A fair go at work, p 14; see also pp 70-72.

³⁸ A fair go at work, pp 15-16.

agreement'. Significantly, however, the ACTU policy also states that the onus should be on a party that refuses to engage in collective bargaining to demonstrate why the AIRC should *not* make a GFB order, and: '[o]pposition to the making of a collective agreement should not be considered a valid reason.'³⁹

- Neither 'pattern bargaining', nor taking protected industrial action, would constitute a breach of good faith.⁴⁰
- In deciding whether to make any GFB orders, the AIRC would consider the parties' conduct in the negotiations including whether they have: agreed to meet at reasonable times and attended such meetings; refused or failed to negotiate with another party, or with a union that is entitled to represent employees; complied with agreed negotiating procedures; capriciously added or withdrawn items for negotiation; provided relevant information and documents; engaged in conduct designed to undermine the bargaining rights of another party; and respected the bargaining process.
- The AIRC would also have regard to the views of the bargaining parties, and (if it is contested) the level of support among the employees for collective bargaining.

To address the situation whereby employers are able to unilaterally determine the form of bargaining despite the wishes of the workforce, the AIRC would be expressly required to make GFB orders where a majority of employees support collective bargaining.⁴¹ In these circumstances, AIRC orders to facilitate GFB would be 'mandatory', although they still 'would not require a party to make admissions or concessions on the matters proposed to be in the agreement'.⁴² The AIRC would have discretion over how to ascertain whether majority employee support existed in the workplace in question. For example, it could consider evidence from employees or their representatives (such as an employee petition, or the outcome of a workplace vote or mass meeting), the result of a union-run ballot, or the level of union membership; or as a 'last resort', the AIRC could order a secret ballot of the employees in which 'majority support should consist of a simple majority of those who cast a vote'.⁴³

³⁹ A fair go at work, p 17; see further notes 109-112 and 122 below.

⁴⁰ See further notes 47-50 and 65-66 below.

⁴¹ A fair go at work, pp 17-18; see also pp 88-90.

⁴² A fair go at work, p 18.

⁴³ A fair go at work, p 18; curiously, the policy also states: 'A lack of majority employee support would not of itself be grounds for the [AIRC] to refrain from making any GFB orders. The [AIRC] would still have an

The types of GFB orders that could be granted by the AIRC would include orders to require 'orderly bargaining' (such as meeting schedules, exchange of information and proposals, and time limits for doing so); and respect for the bargaining process and the role of parties' representatives.⁴⁴ The AIRC would also have the power to conduct 'last resort arbitrations' – that is, to terminate the bargaining process and arbitrate an outcome.⁴⁵ Last resort arbitration could occur where there is no reasonable prospect of the parties reaching an agreement, *and* one of the following requirements is satisfied:

- there is a significant risk to the safety, health or welfare of people affected by the bargaining dispute;
- there is a risk of significant damage to the economy or an important part of it; or
- last resort arbitration is 'otherwise in the public interest', taking into account factors including whether any party has engaged in 'bad faith'.⁴⁶

The parties could also *agree* to submit any outstanding matters in their bargaining negotiations to the AIRC for last resort arbitration.

The ACTU's proposed model would be centred (as is the current system operating under Work Choices) on bargaining at the level of a single business or enterprise. However, it would also enable bargaining to occur at different levels.⁴⁷ Unions would be able to pursue common claims and outcomes in collective agreements,⁴⁸ and could enter into 'multi-employer agreements'.⁴⁹ The ACTU also maintains that: '[I]legally protected industrial action is integral to bargaining',⁵⁰ and should be available without any requirement for a secret ballot of employees. Further, industrial action should be permitted 'to promote the social or economic views of workers', and during the life of an agreement 'where the

obligation and the discretion to promote collective agreement making consistent with the Objects of the legislation.'

⁴⁴ A fair go at work, pp 16-17.

⁴⁵ A fair go at work, pp 20-21; see also pp 77-80.

⁴⁶ The full list of factors outlined in A fair go at work (at pp 20-21) is as follows: whether there is any history of bargaining at the workplace, and (if not) the desirability of facilitating future bargaining (see further note 86 below); whether a party has breached GFB orders, all parties were trying to reach agreement, 'a reasonable period of active bargaining has taken place', or 'the [GFB] process has been genuinely exhausted'; the views and interests of the parties and the employees; the relative bargaining strengths of the parties and the needs of the low-paid; and the rights of parties to take protected industrial action without this being contrary to GFB.

⁴⁷ A fair go at work, pp 10-11; see also pp 91-98.

⁴⁸ This process is known in Australia as pattern bargaining, and is constrained by provisions of the WR Act which deprive unions of the capacity to take protected industrial action in support of pattern bargaining claims; see McCrystal 2006, pp 204-205.

⁴⁹ Criteria are set out for the AIRC to determine whether multi-employer bargaining should occur (see A fair go at work, pp 11-12).

⁵⁰ A fair go at work, p 19; see also pp 99-103.

employer proposes significant organisational change'.⁵¹ Employers should not be able to 'undermine' protected industrial action by using replacement labour, and employer lockouts should not be automatically available.

Recognising that freedom of association and collective bargaining are complementary rights, three further measures are proposed by the ACTU to strengthen and protect the right to organise.⁵² First, employer conduct designed to undermine collective bargaining would be prohibited, such as offering inducements to workers or interfering with the relationship between employees and their union. Secondly, the role of union delegates in bargaining would be recognised, through rights of access to and communication with employees, and reasonable time off to perform their duties and to attend relevant training. Thirdly, the AIRC would have powers to remedy employer conduct in cases where these rights are not respected.

Finally, the ACTU maintains that: 'Workers must have a right to be consulted and informed of business decisions that affect them in their work.'⁵³ It argues that this should primarily be addressed through award and agreement provisions, with information and consultation to occur through union-based mechanisms at the enterprise level that have no role in collective bargaining.⁵⁴ The information rights of these bodies would extend to workplace change and restructuring proposals, as well as broader issues of business strategy and financial performance. These proposals are in response to a series of company collapses and restructures since 2000, which highlighted the general absence of legal rights for Australian employees to information or consultation about business restructuring issues.⁵⁵

ALP: Forward with Fairness

The ALP's industrial relations policy also supports legislative enshrinement of the principles of freedom of association and collective bargaining, based on the concept of democracy in the workplace: 'Under Labor, all workers will be free to decide whether or not to join and be represented by a union, or participate in collective activities.'⁵⁶ The role of

⁵¹ All of these proposals would involve overturning current limitations on the right to strike under the WR Act; see McCrystal 2006.

⁵² A fair go at work, pp 22-23; see also pp 72-77.

⁵³ ACTU, *Industrial Relations Legislation Policy*, above note 6, p 15.

⁵⁴ See further Greg Combet, 'Employee Consultation in an Australian Context: The Works Council Debate and Trade Unions' in Paul Gollan and Glenn Patmore (eds), *Partnership at Work: The Challenge of Employee Democracy*, Pluto Press, 2003, p 134.

⁵⁵ See further Anthony Forsyth, 'The 'Transplantability' Debate Re-Visited: Can European Social Partnership Be Exported to Australia?' (2006) 27 *Comparative Labor Law and Policy Journal* 305, exploring the prospects for Australian implementation of European-style workplace democracy rights.

⁵⁶ Forward with Fairness, p 12.

unions, especially in protecting workers' safety, living standards and job security, is recognised as legitimate. Further, the rights of workers to seek assistance and representation from their union, and of union delegates to provide such support, will be protected.⁵⁷

Labor's policy essentially aims to restore the system of collective enterprise-level bargaining that it introduced in the early 1990s,⁵⁸ although with some significant modifications. The new system would be centred on voluntary negotiations for collective agreements between an employer and a union (or unions, where more than one union has coverage rights in a workplace); or between an employer and its employees, where the employees are not union members.⁵⁹ The ALP proposal also endorses the fundamental principle underpinning the ACTU policy: 'if a majority of employees want to bargain collectively, their employer will be required to bargain collectively with them in good faith.' The new regulatory agency that Labor proposes to establish, FWA, would be able to determine the level of support for collective bargaining among the employees, through similar methods to those outlined in the ACTU policy.⁶⁰ The notion of GFB, and the obligations it would impose on all bargaining participants, is explained by the ALP as follows:

'[GFB] is not new and already applies to commercial transactions in Australia.

[GFB] does not require bargaining participants to make concessions or sign up to an agreement where they do not agree to the terms.

Instead, [GFB] encourages and assists employers and employees to consider the issues central to bargaining and work efficiently towards making an agreement.'⁶¹

Promising 'freedom to bargain collectively without excessive government rules and regulations',⁶² Labor's bargaining framework would have the following main elements:⁶³

- '[S]imple' GFB obligations would apply equally to all parties, requiring them to (for example) attend and participate in meetings, disclose relevant information (unless it is commercially confidential), provide timely responses (with reasons) to the other

⁵⁷ Forward with Fairness, p 12.

⁵⁸ See further Forward with Fairness, p 13.

⁵⁹ Forward with Fairness, p 13.

⁶⁰ Forward with Fairness, p 14.

⁶¹ Forward with Fairness, p 15.

⁶² Forward with Fairness, p 13; see also p 15.

⁶³ Forward with Fairness, pp 15-16.

party's proposals, and '[refrain] from capricious or unfair conduct or conduct that undermines freedom of association or collective bargaining'.⁶⁴

- FWA would assist bargaining participants to bargain in good faith, and would be able to make orders to address situations where a party is not engaging in GFB.
- Where the parties are unable to reach an agreement, they will have three options: first, 'they can agree to walk away', leaving existing industrial arrangements in place; secondly, they can *jointly* ask FWA to help them make a deal, or *jointly* request FWA to determine specified issues; or thirdly, they might be able to take protected industrial action.
- '[P]rotected industrial action will be available during good faith collective bargaining, but only in accordance with Labor's clear, tough rules.'⁶⁵ Existing restrictions on industrial action before the expiry of an agreement, or in support of industry-wide bargaining,⁶⁶ will be retained, along with mandatory secret ballots and the prohibition of strike pay. Employers will continue to be able to use lockouts in response to protected action by employees/unions.
- FWA would also have power to end industrial action and 'determine a settlement between the parties', where protracted industrial action 'is causing significant harm to the bargaining participants' or 'is causing or may cause significant harm to the wider economy or to the safety or welfare of the community.'

4. A Closer Look at the ACTU Policy's Reliance on Foreign Worker Representation Models

This section examines the extent to which, and how, the ACTU policy is based upon overseas systems of worker representation. 'A fair go at work' expressly states that it draws upon elements of the UK, NZ and North American systems of union recognition and collective bargaining;⁶⁷ and that the ACTU's proposed GFB framework borrows from North

⁶⁴ Further, all parties would be free to choose who represents them in collective bargaining, with union members entitled to be represented by a union that is eligible to represent them; *Forward with Fairness*, p 14.

⁶⁵ See also Kevin Rudd MP, Federal Labor Leader, *Facing the Future*, Address to the National Press Club, 17 April 2007; Brad Norington and Dennis Shanahan, 'No strikes, unless it's bargaining time', *The Australian*, 28 April 2007.

⁶⁶ Although FWA could 'facilitate multi employer collective bargaining for low paid employees' in certain industries; *Forward with Fairness*, p 14.

⁶⁷ See *A fair go at work*, p 82, noting that 'none of these models lend themselves to wholesale adoption into the Australian industrial landscape'.

American and recent NZ law, along with previous experience under Australian Federal law and in some State jurisdictions.⁶⁸

In formulating its policy, the ACTU examined and evaluated the comparative merits of three different models of collective bargaining and union recognition.⁶⁹

- The continental European ‘constitutional’ model, operating in countries such as Italy, Germany and Sweden, in which rights to trade union organisation and collective bargaining, and the right to strike, are recognised in the national constitution⁷⁰ and legislation facilitating centralised or industry-level bargaining.⁷¹ Typically, these systems also involve trade unions in tripartite/corporatist processes for national economic and social policy formulation.⁷²
- The US/Canadian ‘certification’ or ‘recognition’ models, under which unions that can demonstrate majority support of employees in a bargaining unit obtain rights of recognition from employers for collective bargaining purposes. Majority support can be shown through either a secret ballot of employees, or a union membership ‘card check’ system. The process is regulated by legislation which, while varying between jurisdictions, generally also provides for GFB rights and obligations of the parties and prohibits certain ‘unfair labour practices’.
- The UK/NZ ‘hybrid’ models – UK legislation borrows from the North American approach by providing a statutory process for union recognition and bargaining rights based on majority employee support. While the NZ system draws on US/Canadian GFB concepts, it does not involve any procedure for union recognition.

The ACTU did not explicitly reject the constitutional model, although it did so implicitly by endorsing elements of the other models. Further, the AIER Report (which influenced the

⁶⁸ A fair go at work, p 59; see also note 20 above, and notes 129-130 below. GFB is also a feature of State industrial legislation in Queensland, Western Australia and South Australia, although these laws are now overridden (for employers and employees covered by the Federal system) by virtue of the Work Choices Act amendments.

⁶⁹ For detailed discussion see AIER Report, pp xiii-xiv, 25-60, 77-112; I gratefully acknowledge the work of the Report’s co-authors, especially Peter Gahan, in identifying these categorisations for the three overseas models.

⁷⁰ See for example Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 1989.

⁷¹ Although increasingly, company-level ‘opt-outs’ from sectoral agreements have become features of these systems: see AIER Report, pp 49-50; A fair go at work, p 55; and, for example, Michael Whittall, ‘Modell Deutschland under Pressure: The Growing Tensions between Works Councils and Trade Unions’ (2005) 26 *Economic and Industrial Democracy* 569.

development of the ACTU's position) found that the constitutional systems were 'clearly not adaptable in the sense that the Australian Constitution does not explicitly include provisions for [union] recognition or collective bargaining rights, or the right to strike'.⁷³ On the other hand, it was considered that certain aspects of the constitutional model could be applied in the Australian context, such as Sweden's system of statutory rights and protections for workplace union representatives, and the Italian/Swedish arrangements for 'coordinated bargaining through framework agreements.'⁷⁴ The workplace democracy rights of European-style works councils were also thought to be adaptable in some form,⁷⁵ and these have found expression (albeit to a very limited extent) in the ACTU's assertion of the need for recognition of the information and consultation rights of Australian workers.⁷⁶

The ACTU rejected a central tenet of the certification model – mandatory employee ballots – on the grounds that the US and Canadian systems invite employer opposition and hostility, fail to provide collective bargaining rights for workers in the absence of majority support, and promote competitive unionism.⁷⁷ Clearly, the ACTU's overriding concern was with the first of these considerations:

'Imposing a threshold to trigger the requirement to bargain creates an obvious point for tension, dissent and disputation about the form of the agreement. It has become, in Canada and the [US] ..., a focus for undue interference in employees' right to choose collective representation.

The extent to which employers have used the certification process as an opportunity to undermine collective bargaining ..., and to thwart, rather than give effect to, employees' free choice has warned us against such a system.'⁷⁸

A Brief Examination of the US and Canadian Systems

Under the US *National Labor Relations Act* ('NLRA'), if a union can show that it has the support of at least 30 per cent of the workers sharing a 'community of interests' in an 'appropriate' bargaining unit, it can petition the National Labor Relations Board ('NLRB') for

⁷² See further, for example, Anne Trebilcock (ed), *Towards Social Dialogue: Tripartite Cooperation in National Economic and Social Policy-Making*, 1994.

⁷³ AIER Report, p xvi.

⁷⁴ See AIER Report, pp xvi-xvii, 61, 63-64, and Appendix 2.

⁷⁵ AIER Report, pp xvii, 19-20, 63-64.

⁷⁶ See notes 53-55 above; this proposal is not taken up in the ALP's Forward with Fairness policy, reflecting Australia's lack of readiness at the present time to embrace European workplace democracy concepts; for further detail, see Forsyth 2006 (above note 55).

⁷⁷ A fair go at work, p 57; see further pp 82-86.

a secret ballot election to be held to determine whether collective bargaining should occur in the workplace. If a majority of the workers voting in the election supports the union, then the NLRB certifies the result and the employer must bargain with the union over 'mandatory' subjects directly affecting working terms and conditions.⁷⁹

The labour law systems of Canada and most of its provinces follow this basic model, although in some provinces, the question of majority employee support can be determined by checking the numbers of signatures on union membership cards, without the need for a workplace ballot.⁸⁰ In Quebec, for example, if a union can show majority support by employees in a bargaining unit through the card check system, it becomes entitled to recognition by the employer for collective bargaining purposes. If the union has less than 50 per cent support, but more than 35 per cent, a ballot is held; if the union obtains majority support in the ballot, it obtains recognition rights.⁸¹

In practice, however, as the ACTU observed, the North American union recognition systems have provided significant opportunities for employers to frustrate union efforts to establish footholds for collective bargaining. The US system, in particular, '[has] been characterized by conflict and protracted litigation', with employers engaging in hostile resistance to both union attempts to gain recognition and (where the union does succeed) to the collective bargaining process itself.⁸² The result is that although unions in the US often wait until they have 60-70 per cent employee support in a bargaining unit before initiating the NLRA process, they are ultimately successful in only around half of workplaces where they seek recognition rights.⁸³

Employer tactics during union recognition campaigns in the US include dismissing union activists or threatening dismissal; restricting union access to employees for communication purposes; highlighting to employees the possibility of plant closures or other adverse consequences if collective bargaining is mandated; and lengthy delays through strategic

⁷⁸ A fair go at work, pp 82-83; see also pp 89-90.

⁷⁹ Nancy Peters, 'The United Kingdom Recalibrates the U.S. National Labor Relations Act: Possible Lessons for the United States' (2004) 25 *Comparative Labor Law and Policy Journal* 227, at 230-231, 234; for detail, see David Twomey, *Labor and Employment Law: Text and Cases*, 13th edition, Thomson/West, 2007, Chapter 3 (especially pp 84-115) and Chapter 4 (especially pp 161-170).

⁸⁰ AIER Report, p 35.

⁸¹ Laura Dubinsky, *Resisting Union-Busting Techniques: Lessons from Quebec*, Institute of Employment Rights, London, 2000, p 8.

⁸² Peters 2004, pp 227, 229-230; see further, for example, Roy Adams, 'Why Statutory Union Recognition is Bad Labour Policy: The North American Experience' (1999) 30 *Industrial Relations Journal* 96.

⁸³ A fair go at work, p 43, referring to G Mayer, *Labor Union Recognition Procedures: Use of Secret Ballots and Card Checks*, Congressional Research Service, Library of Congress, 23 May 2005; see further Peters, pp 235-236, also noting estimates that only one-third of recognised unions go on to negotiate a 'first contract' with employers.

litigation (including jurisdictional objections and appeals against the union's recognition application).⁸⁴ These and other anti-union practices are commonly adopted by employers in Quebec⁸⁵ and other Canadian provinces. However, the ACTU found that 'Canadian unionists compare their laws favourably to those in the [US].' Further, the union success rate in recognition campaigns in Canada is just below 70 per cent.⁸⁶ Overall, rates of union membership and collective bargaining density are lower in the US than in Australia, while in Canada union membership is higher (although declining) and collective bargaining coverage is lower.⁸⁷

The pitfalls of the North American certification/recognition model led the ACTU to opt, instead, in favour of the hybrid systems of NZ and the UK, with particular emphasis on the latter:

'We believe that a test of majority support should not be necessary to oblige employers to bargain in good faith with their workforce. In that regard, the UK model of voluntary negotiations without reference to the tribunals is more culturally appropriate to Australia's labour relations history. ...

The recommendation that we have made does not provide that employers can routinely test whether a union has bargaining authority. It assumes that parties will generally respect each other's authority, and that it is only where an employer refuses to bargain ... that the issue of representation need be tested.'⁸⁸

Union Recognition under UK law

The union recognition law that has operated in the UK since 1999⁸⁹ is aimed at promoting voluntary recognition agreements between employers and unions, with the (complex)

⁸⁴ See *A fair go at work*, pp 44-45; AIER Report, pp 40-43; for further detail, see Twomey 2007, Chapter 4.

⁸⁵ See Dubinsky 2000, pp 10-17, examining employer tactics aimed at forcing the union into a ballot (which is considered harder to win than a card check), such as offering employees union resignation cards, or challenging the status of the bargaining unit or the representative nature of the union; and attempts to prevent union organising drives from ever commencing, such as through the formation of 'company unions'.

⁸⁶ *A fair go at work*, pp 41-42; recognised unions go on to achieve a collective agreement in 92 per cent of cases, often due to the availability of the 'first contract arbitration' mechanism (see further pp 40, 77-78) – a version of this mechanism is built into the ACTU policy, see note 46 above.

⁸⁷ For example in 2001, private sector union density in the US was 9.0 per cent, and in Canada 18.3 per cent: see James Brudney, 'Isolated and Politicized: The NLRB's Uncertain Future' (2005) 26 *Comparative Labor Law and Policy Journal* 221, at p 253. Less than 10 per cent of the private sector workforce in the US is covered by collective agreements: see Ronald McCallum, 'Plunder Downunder: Transplanting the Anglo-American Labor Law Model to Australia' (2005) 26 *Comparative Labor Law and Policy Journal* 381, at p 388. Overall union membership density in the US is currently estimated to be around 13 per cent, and in Canada 30 per cent; the figures for overall collective bargaining coverage are around 15 per cent of the workforce in the US, and 32 per cent in Canada: see AIER Report, p xvi.

⁸⁸ *A fair go at work*, p 83.

statutory recognition procedure operating as a 'fallback' in the event of an employer's refusal to negotiate.⁹⁰ A union initiates the voluntary process by submitting a written request to the employer for recognition for collective bargaining. If the employer accedes to that request, the union is recognised for the relevant bargaining unit without having to demonstrate any minimum threshold of employee support.⁹¹ If the employer refuses the union's request, the union can seek to activate the statutory procedure (although this can only occur where the employer employs more than 20 workers⁹²).

The union applies to an independent public body, the Central Arbitration Committee ('CAC'), which must be satisfied that at least 10 per cent of the workers in the bargaining unit are union members (for example, by card check) *and* that a majority of the bargaining unit is likely to support recognition of the union.⁹³ The latter requirement can be satisfied by the holding of a ballot; *or* by the union proving majority membership, without any requirement for a ballot (unless the CAC decides that a ballot is necessary, for example because it becomes aware that a significant number of union members do not want the union to conduct collective bargaining on their behalf). If the union is supported by a majority of workers voting in the ballot, *and* at least 40 per cent of the workers in the bargaining unit, the CAC must issue a declaration that the union is entitled to engage in collective bargaining on behalf of the bargaining unit.⁹⁴ Once recognition is granted, the employer must negotiate with the union over pay, hours and holidays. If the parties cannot agree on a process for bargaining within 30 days, the CAC can impose a detailed statutory bargaining method upon them.⁹⁵

So, while adopting the principle of majority employee support on which the UK's statutory union recognition procedure is based, the ACTU policy modifies it to address concerns arising from the way in which it has operated to require the holding of workplace ballots even where majority support for collective bargaining was already evident.⁹⁶ The UK

⁸⁹ *Trade Union and Labour Relations (Consolidation) Act 1992* (UK), Schedule A1, introduced by the *Employment Relations Act 1999* (UK).

⁹⁰ For detailed discussion, see Hugh Collins, K D Ewing and Aileen McColgan, *Labour Law: Text and Materials*, Hart Publishing, Oxford, 2001, pp 809-849.

⁹¹ A fair go at work, p 46; Peters 2004, pp 235, 242, noting also that the union *must* seek voluntary recognition before activating the statutory process.

⁹² Collins, Ewing and McColgan 2001, p 819; see also K D Ewing and Anne Hock, *The Next Step: Trade Union Recognition in Small Enterprises*, Popularis Ltd, Kingston upon Thames, 2003.

⁹³ Collins, Ewing and McColgan 2001, p 820.

⁹⁴ Collins, Ewing and McColgan 2001, pp 820-821.

⁹⁵ Peters 2004, p 234.

⁹⁶ A fair go at work, pp 88-89, noting that ballots have been ordered by the CAC in 25 per cent of cases where the union had a majority of members in the bargaining unit.

legislation was in fact amended in 2004⁹⁷ to address this issue by requiring the CAC to order a ballot in such circumstances, only where there is *credible* evidence of a lack of support for the union in the bargaining unit.⁹⁸ The 2004 amendments also dealt with various employer tactics to undermine union recognition claims that had emerged since the statutory procedure commenced operation.⁹⁹

The processes operating under UK law are generally considered to have been effective in stimulating greater levels of union recognition for collective bargaining, most of which has occurred on a voluntary basis ‘in the shadow’ of the statutory provisions.¹⁰⁰ However, the number of new voluntary recognition agreements has fallen considerably since 2001, with greater reliance now being placed on the statutory procedure.¹⁰¹ In fact, in recent years, unions have pursued more recognition campaigns but these have resulted in fewer recognition deals, as union efforts to extend recognition into smaller, traditionally non-union workplaces have met with hostile employer responses.¹⁰² Evidence also suggests that union recognition in the UK generally leads to productive collective bargaining negotiations.¹⁰³ But despite the existence of the statutory recognition procedure, overall union membership and collective bargaining levels in the UK continue to decline.¹⁰⁴ In fact, the ACTU found that UK unions do not view the legislation as capable of restoring union density or collective bargaining rates to ‘pre-Thatcher levels’.¹⁰⁵

⁹⁷ *Employment Relations Act 2004* (UK).

⁹⁸ A fair go at work, p 89.

⁹⁹ These tactics were similar to those adopted by North American employers, discussed above; for further detail, including discussion of the legislative response in the UK (which essentially amounts to the provision of greater union access to workers in the ballot period, and prohibitions on and remedies against certain ‘unfair practices’), see Alan Bogg, ‘Employment Relations Act 2004: Another False Dawn for Collectivism’ (2005) 34 *Industrial Law Journal* 72. See also Dubinsky 2000, pp 18-22; and K D Ewing, Sian Moore and Stephen Wood, *Unfair Labour Practices: Trade Union Recognition and Employer Resistance*, Institute of Employment Rights, London, 2003.

¹⁰⁰ Peters 2004, pp 235-236, 243, showing that 94 per cent of recognition deals between 2000 and 2002 were entered into voluntarily; see further Gregor Gall, ‘The First Five Years of Britain’s Third Statutory Union Recognition Procedure’ (2005) 34 *Industrial Law Journal* 345.

¹⁰¹ Gall 2005, p 347, indicating that by 2004, 27 per cent of new recognition agreements had involved some use of the statutory process; see further James Arrowsmith, ‘Research shows fall in union recognition agreements’, *eironline*, European Foundation for the Improvement of Living and Working Conditions, May 2006, available at: <http://www.eurofound.europa.eu/eiro/>.

¹⁰² See further Arrowsmith 2006; and Gregor Gall, ‘Trade Union Recognition in Britain – An Emerging Crisis for Trade Unions?’, *Union Ideas Network*, 12 August 2006, available at: <http://uin.org.uk/>.

¹⁰³ Peters 2004, pp 237-242, 244-248.

¹⁰⁴ The latest figures, for 2006, show that union density in the UK is 28.4 per cent (58.8 per cent in the public sector; 16.6 per cent in the private sector) and collective bargaining coverage is at 33.5 per cent of the workforce (its lowest level since 1997): see ‘TUC hails small drop in union numbers a “success story”’, *Labour Research*, June 2007, p 7.

¹⁰⁵ A fair go at work, p 50; see further Gall 2006, finding that there has been no resurgence in absolute and relative union membership levels, nor in collective bargaining coverage – rather, there has been some stabilisation at ‘vastly lower levels following many years of substantial annual decline’.

NZ's Good Faith Bargaining Laws

Under the *Employment Relations Act 2000* (NZ) ('ERA'), in contrast to the US/Canadian recognition systems, a registered union can initiate collective bargaining with an employer where it has two members in the workplace, and the resulting collective agreement will cover union members only.¹⁰⁶ However, the NZ legislation adopts the North American approach to GFB, with some variations that have also found their way into the ACTU policy. In NZ, good faith collective bargaining operates as one element of the overarching principle of 'good faith employment relations' instituted by the ERA.¹⁰⁷

In the North American jurisdictions, GFB obligations apply to the bargaining *process* but they do not extend to (ultimately) compelling a party to enter into an agreement.¹⁰⁸ This was also the case under the NZ legislation, as originally enacted. However, amendments in 2004¹⁰⁹ introduced a *duty* on parties engaged in GFB *to conclude* an agreement, unless they have 'a genuine reason, based on reasonable grounds, not to' – and this genuine reason cannot be based on opposition or objection in principle to bargaining or being party to a collective agreement.¹¹⁰ This curious provision in the ERA has not yet been tested judicially.¹¹¹ As indicated in section 3 above, the ACTU policy adopts the US/Canadian position that GFB does not require a party to make concessions leading to an agreement. But (seemingly at odds with that position) it also introduces a version of the NZ duty to conclude an agreement – ie the obligation imposed on a party that refuses to bargain, to demonstrate to the AIRC why GFB orders should not be made (with opposition to collective agreements not being considered a valid reason).¹¹²

In terms of the bargaining process and tactics, the statutory indicators of what constitutes GFB under the ERA¹¹³ are supplemented by a more detailed GFB 'code' which may become relevant in determining whether a party has breached its GFB obligations.¹¹⁴

¹⁰⁶ McCallum 2002, pp 243-244; Gordon Anderson, 'Transplanting and Growing Good Faith in New Zealand Labour Law' (2006) 19 *Australian Journal of Labour Law* 1, at pp 8-9.

¹⁰⁷ See Anderson 2006; and Bill Hodge, 'Good Faith in Employment Law' (2005) 11 *New Zealand Business Law Quarterly* 490.

¹⁰⁸ Hodge 2005, pp 493-497; see also Twomey 2007, p 162.

¹⁰⁹ *Employment Relations Amendment Act 2004* (NZ).

¹¹⁰ Anderson 2006, p 10.

¹¹¹ Hodge 2005, p 500, speculating whether the adoption by employers of positions such as 'we have other priorities for our resources' or 'you do not represent the majority of our workforce', in response to union collective bargaining claims, might breach the duty to conclude an agreement under the ERA.

¹¹² See note 39 above.

¹¹³ See Anderson 2006, pp 10-13; again, these essentially reflect the obligations applicable under North American law, and are captured in both the ACTU and ALP policies, see section 3 above.

¹¹⁴ Anderson 2006, pp 10-11; see NZ Minister of Labour, *Code of Good Faith in Collective Bargaining*, 9 August 2005, available at: <http://www.ers.govt.nz/goodfaith/code.html>.

However, it appears that NZ law (following the US position) allows parties to adopt ‘take it or leave it’ positions, so long as they continue to meet with, and consider and respond to proposals put by, the other party.¹¹⁵

Another important aspect of the NZ system is its provision for ‘facilitation’ and a form of arbitration of bargaining deadlocks, by the Employment Relations Authority.¹¹⁶ Facilitation involves the authority making private, non-binding recommendations about the process or substantive content of the bargaining, although such recommendations can be made public in order to pressure a party to agree to the recommended settlement. Facilitation is available where: a party has engaged in serious and sustained breaches of its GFB obligations, which have significantly undermined the bargaining; the bargaining has been protracted and, despite extensive efforts, the parties have not been able to reach agreement; protracted or acrimonious strikes or lockouts have occurred; or a proposed strike or lockout may affect the public interest substantially (that is, economic or community well-being are threatened).

Serious instances of ‘bad faith’ on the part of a bargaining party may also provide the basis for the authority to ‘fix’ or determine the provisions of a collective agreement (although this power has not yet been exercised), or even the imposition of monetary penalties. These aspects of the NZ system have been wrapped up in the ACTU’s concept of ‘last resort arbitration’,¹¹⁷ which also (somewhat confusingly) appears to contain elements of the Canadian notion of ‘first contract arbitration’.¹¹⁸ In the ACTU’s view, ‘bargaining with an eye to the possibility of arbitration is a significant institutional mechanism that encourages and supports fair and genuine bargaining’.¹¹⁹

However, it should be noted that private sector collective bargaining coverage in NZ fell from 21 per cent to 9 per cent in the first five years of the ERA’s operation.¹²⁰ The 2004 amendments to the legislation, which also included new remedies against employer tactics

¹¹⁵ For detailed discussion (including an overview of relevant US and Canadian case law), see Hodge 2005, pp 493-497, 500-501; see further Twomey 2007, pp 165-170; and note the recent decision of the Supreme Court of Canada in *Health Services and Support – Facilities Subsector Bargaining Assn. v British Columbia*, 2007 SCC 27 (8 June 2007), especially at paras [97]-[106].

¹¹⁶ The following description draws upon Anderson 2006, p 16; and Hodge 2005, pp 501-502.

¹¹⁷ See notes 45-46 above.

¹¹⁸ See notes 46 and 86 above; and *A fair go at work*, pp 77-78.

¹¹⁹ *A fair go at work*, p 78.

¹²⁰ Over the same period, coverage in the public sector dropped from 69 to 61 per cent; overall collective bargaining coverage in NZ is now approximately 23 per cent: see Hodge 2005, pp 502-503; and Anderson 2006, p 9, explaining that a major reason for the significant reduction since 2000 has been the fact that only union members can be subject to a collective agreement under the ERA.

to undermine bargaining, are not expected to lead to any substantial increase in bargaining density.¹²¹

5. Assessing the ALP Policy: How Much Does it Reflect the ACTU's Reliance on Overseas Models?

Turning now to assess the extent to which the ALP policy incorporates elements of the overseas worker representation models drawn upon by the ACTU, it can be seen that Labor's policy omits certain features which would arguably provide a stronger platform for union-based collective bargaining. Both the ACTU and Labor policies aim to establish a voluntary collective bargaining system, backed up by statutory processes, following the UK model. Both policies also seek to accord significant respect to the wishes of employees as to whether they wish to engage in collective bargaining, through the 'majority support' principle – with employee ballots being one of several ways of determining whether majority support exists, rather than a mandatory requirement as in the US and (to a lesser extent) Canada and the UK. The content of the GFB duties applicable to negotiating parties is also broadly similar in the ACTU and Labor policies, although the latter does not include any formulation of the 'duty to conclude' an agreement under NZ law.

The two policies also provide for intervention in bargaining disputes by an external agency. However, it is in relation to the extent of that intervention and the circumstances when it may be available that the Labor and ACTU proposals differ markedly. Both provide for the bargaining process to be overseen by the Federal industrial tribunal (the AIRC, under the ACTU policy; the new body, FWA, under the ALP policy). Both also enable the tribunal to make orders to deal with situations where a party flouts its GFB obligations. These would be orders regarding the *process* of bargaining only – for example, requiring a party to attend meetings, to respond to offers made by the other party, or to provide information substantiating positions adopted in the negotiations. The ACTU formulation of NZ's duty to conclude an agreement might also enable the tribunal to make orders having the effect of forcing a party to make concessions leading to an agreement. However, Labor has clearly stated that this would not be permissible under its policy.¹²²

Intractable bargaining disputes involving industrial action that threatens economic or community welfare could, under both policies, lead to termination of the bargaining and an

¹²¹ See Anderson 2006, pp 14-15, 18.

¹²² 'FWA could intervene to resolve good faith bargaining breaches: Gillard', *Workforce*, Issue 1584, 4 May 2007.

arbitrated outcome by the tribunal.¹²³ Under Labor's policy, it is only in these circumstances, or where industrial action is harming the bargaining participants, that arbitration in the bargaining sphere could occur. Despite Government and employer claims to the contrary,¹²⁴ the ALP has explicitly rejected the broader notion of 'last resort arbitration' promoted by the ACTU,¹²⁵ and with it, the idea (based on NZ law) of breaches of GFB obligations triggering various forms of tribunal intervention.¹²⁶ Under Labor's plan, FWA could only become involved in assisting parties to resolve a bargaining impasse, or arbitrate outstanding issues, *where both parties agree*.¹²⁷

In summary, therefore, the ALP policy clearly does provide stronger support for collective bargaining than the existing legal framework¹²⁸ – but not to the extent desired by the ACTU. Further, in my view, Labor's proposal is deficient in two key respects. First, it inherits several major shortcomings of the former Federal statutory GFB regime that operated in the mid-1990s,¹²⁹ which were exposed in two test cases on the operation of those provisions – that the tribunal's role in the process was facilitative only, not interventionist; it could only make orders relating to the bargaining process, not the substance of the negotiations; and it could not make orders compelling a party to negotiate.¹³⁰ Secondly, it fails to adequately address a major problem of the bargaining framework that has operated since 1996 – the ability of an employer to simply refuse to

¹²³ In fact, this reflects the current legal position, see WR Act, ss 430(3) and Part 9, Division 8; the Minister for Workplace Relations also has the power to terminate a bargaining period on similar grounds, see s 498.

¹²⁴ See for example Jason Koutsoukis, 'Rudd's pitch to working families', *Sunday Age*, 29 April 2007 (quoting the Chief Executive of Australian Industry Group); 'Who would gain from last resort arbitration?', *Workforce*, Issue 1585, 11 May 2007 (quoting the Workplace Relations Minister).

¹²⁵ See for example Mark Skulley, 'Unions look for open window', *The Australian Financial Review*, 30 April 2007; 'Gillard makes IR pitch to business', *Workplace Express*, 30 April 2007; 'ALP fails to resolve AWA transition with AMMA', *Workplace Express*, 2 May 2007; Brad Norington, 'Gillard's new bid to back unions', *The Australian*, 10 May 2007 (all quoting the Shadow Minister for Industrial Relations, or her representative).

¹²⁶ Although this might be possible under Labor's policy, to the extent that GFB breaches could be said to be harming a bargaining participant to the extent necessary to justify termination of the bargaining and arbitration by FWA; see 'Last resort arbitration' grey area', *Workforce*, Issue 1585, 11 May 2007. Some critiques of the ALP policy have also highlighted the potential for the 'harm to bargaining participants' provision to be used by unions to engage in damaging industrial action aimed at engineering an arbitrated outcome; see for example Brad Norington, 'Gillard's new bid to back unions', *The Australian*, 10 May 2007; 'Labor's battle to woo business', *Workforce*, Issue 1585, 11 May 2007; Australian Industry Group, 'AWA Focus Ignores Broader Business Concerns with Labor's IR Policies', *Statement*, 18 May 2007.

¹²⁷ See section 3 above; and 'No automatic union involvement in bargaining under Labor', *Workforce*, Issue 1584, 4 May 2007. Again, this is essentially the current legal position; WR Act, ss 704-706 limit AIRC intervention in bargaining disputes to situations where both parties consent to it, but arbitration is precluded even if both parties want it (see Forsyth 2006, above note 14).

¹²⁸ Which is basically limited to allowing protected industrial action to be taken in support of claims during bargaining for a new collective agreement; see again notes 18-20 above.

¹²⁹ See notes 20 and 68 above, referring to section 170QK of the *Industrial Relations Act 1988* (Cth), inserted by the *Industrial Relations Reform Act 1993* (Cth).

¹³⁰ See *ABC Case* (Appeal by CPSU, AIRC Full Bench, L4605, 31 August 1994); *Asahi Diamond Industrial Australia Pty Ltd v Automotive, Food, Metals and Engineering Union* (1995) 59 IR 385; for comment on the latter decision, see McCallum 2002, pp 235-236.

negotiate a collective agreement with a union.¹³¹ Certainly, the imposition of express GFB obligations based on the principle of majority employee support will go some way towards assisting unions in dealing with recalcitrant employers that refuse to bargain.¹³² However, in the final analysis, where tribunal intervention to assist bargaining parties is essentially a voluntary process, and there is no spectre of arbitration, some employers may still decide to ‘tough it out’ – and the law will, as now, allow them to do so.

This tends to undermine the critics of Labor’s policy who have argued that it is simply about restoring union power.¹³³ The conclusion that the ALP intends to deliver upon some (but by no means all) of the union movement’s agenda for dismantling the Work Choices legislation is fortified, when one considers other aspects of the ALP policy. The unions have indeed achieved a significant concession in the form of Labor’s commitment to abolish AWAs. On the other hand, not unlike the Blair Government in the UK, Labor has unashamedly sought to ‘win over’ the business community by indicating that it will maintain the current strict limits on strikes and other forms of industrial action.¹³⁴

The ALP has also supported recent Government amendments to the WR Act, to prohibit the inclusion of ‘union bargaining fees’ in workplace agreements;¹³⁵ and has decided to retain the Government’s specialist ‘watchdog’ over unlawful union conduct in the construction industry (the Australian Building and Construction Commission) until 2010, after initially stating that it would scrap the body once elected.¹³⁶ Most recently, Labor has been at pains to distance itself from alleged ‘union thugs’;¹³⁷ has expressed support for the current tight restrictions on union ‘right of entry’ to workplaces;¹³⁸ and has highlighted ‘[t]rue non-union collective bargaining’ as a feature of its industrial relations policy, allowing

¹³¹ See note 18 above.

¹³² For instance, the Finance Sector Union has indicated that Labor’s policy would enhance its prospects of negotiating collective agreements with major employers in the banking industry, predicting that it could meet the ‘test’ of majority employee support ‘at all banks across the sector’: see ‘Collective bargaining a boon for non-traditional workers: FSU’, *Workforce*, Issue 1584, 4 May 2007; see also Mark Skulley and Eric Johnston, ‘BHP warns Rudd on IR damage’, *The Australian Financial Review*, 1 May 2007.

¹³³ See notes 32 above and 141 below.

¹³⁴ See section 3 above; but note Laura Tingle and David Crowe, ‘Rudd IR pitch fails business test’, *The Australian Financial Review*, 18 April 2007.

¹³⁵ See Brad Norington, ‘Gillard move likely to enrage unions’, *The Australian*, 8 May 2007; ‘Labor says it will support Hockey’s anti-bargaining fees amendment’, *Workplace Express*, 24 May 2007.

¹³⁶ See ‘Labor’s ABCC policy welcomed by business, opposed by unions’, *Workplace Express*, 1 June 2007; and Meaghan Shaw, ‘Union anger builds over watchdog plan’, *The Age*, 26 June 2007.

¹³⁷ See for example ‘ALP will sack unionists for threats or use of violence’, *Workplace Express*, 25 June 2007.

¹³⁸ See Steve Lewis and Brad Norington, ‘Liberals scare strategy to target unions’, *The Australian*, 27 June 2007.

employers to reach non-union agreements without ‘any union input at all. ... Indeed, a union would not even know it was being made.’¹³⁹

Not so long ago, the adoption of such policies would have been unthinkable for an incoming Labor Government. Now, they appear to be the price that Labor – and the unions (for the most part)¹⁴⁰ – are willing to pay in order to remove the Coalition Government from office.¹⁴¹ This really demonstrates just how far the Government’s Work Choices reforms have shifted the industrial relations terrain in Australia in favour of employers.¹⁴²

Finally, it should be noted that there is a degree of inconsistency in the Government’s strident opposition to Labor’s policy support for collective bargaining and GFB,¹⁴³ for two reasons. First, the Government maintains that in comparison to Labor’s GFB framework permitting (among other ills) unions to obtain industry-wide bargaining outcomes, under the current legal arrangements there are ‘no [GFB] requirements’.¹⁴⁴ The latter proposition is only partly true. As indicated earlier in this paper, the express powers of the AIRC to make GFB orders were repealed in 1996,¹⁴⁵ and there are no obligations on bargaining parties under the WR Act that use the GFB nomenclature. However, there *are* several provisions requiring the parties to ‘genuinely try to reach agreement’ with each other.¹⁴⁶ Further, in several recent cases, the AIRC has interpreted these provisions as imposing obligations on the parties, in their approaches to conducting negotiations and the bargaining tactics they adopt, that are typical of many GFB systems.¹⁴⁷ So it can be said that a form of GFB *is* operating, indirectly, under the current legal framework – although

¹³⁹ See Julia Gillard, Deputy Labor Leader, Shadow Minister for Employment and Industrial Relations, *Melbourne Press Club Speech*, 25 June 2007, pp 2-3.

¹⁴⁰ See for example ‘Unions accept ALP IR policy’, *Workplace Express*, 29 April 2007; but note ‘ETU vows to fight ALP’s ‘anti-worker’ policy’, *Workforce Daily*, 18 April 2007.

¹⁴¹ See for example Geoffrey Barker, ‘Secret ballots send stalwarts into spin’, and Laura Tingle, ‘Hard Labor is treading a fine line’, both in *The Australian Financial Review*, 18 April 2007; and ‘Editorial: Gillard’s fine-tuning on IR most welcome’, *The Australian*, 27 June 2007.

¹⁴² See further, for example, Forsyth and Sutherland 2006 (above notes 13 and 17); McCrystal 2006; and Fetter 2006.

¹⁴³ See for example ‘Labor IR plan puts unions back in business, says Hockey’, *Workplace Express*, 30 April 2007; ‘Everything comes in 10s – or is that 11s?’, *Workforce*, Issue 1585, 11 May 2007 (quoting the Prime Minister as saying that the Labor policy would ‘put union power ahead of workers’ jobs’ and ‘hand over to an IR system dominated by collective bargaining’).

¹⁴⁴ See the Workplace Relations Minister’s analysis comparing Work Choices with Labor’s policy, referred to in ‘Labor IR plan puts unions back in business, says Hockey’, *Workplace Express*, 30 April 2007.

¹⁴⁵ See notes 20, 68 and 129 above.

¹⁴⁶ See *WR Act*, ss 439, 461(1) and 430(2), which enable the AIRC to consider whether parties have been, or are, genuinely trying to reach agreement, at various points in the bargaining process (eg when a union seeks an order to enable a ‘protected action ballot’ to occur, as a pre-condition to taking lawful industrial action).

¹⁴⁷ See for example *TWU v Sita Australia P/L* (PR973523, 3 August 2006); *AMWU and CEPU v BP Refinery (Bulwer Island Pty Ltd)* (PR973642, 10 August 2006); *LHMU WA Branch v CSBP Limited* ([2007] AIRC 112, 14 February 2007); *AMWU and CEPU v P & H Minepro Australasia Pty Ltd* ([2007] AIRC 233, 26 March

the relevant provisions of the WR Act provide an insufficient basis for GFB, compared to the rights and obligations applicable under NZ, Canadian and US law.

Secondly, while decrying collective bargaining in the industrial relations sphere, the Government has been trumpeting the virtues of collective bargaining for small businesses when negotiating with larger firms,¹⁴⁸ and has recently amended the *Trade Practices Act 1974* (Cth) to make it easier for this to occur.¹⁴⁹ If, as the Government proclaims, '[s]mall businesses can benefit by joining together to negotiate with a larger business, who is their common customer or supplier',¹⁵⁰ it must be questioned why the law should not also give effect to the wishes of employees who prefer to join together to negotiate working conditions with their employer.

6. Conclusion

This paper has examined recent developments in the debate over worker representation in Australia. It has shown that overseas systems of worker representation based on union recognition and collective bargaining laws have strongly influenced that debate. The ACTU's new collective bargaining policy document draws on aspects of the US, Canadian and UK models, and in particular, NZ's GFB laws. However, the ALP industrial relations policy is a substantially diluted version of the ACTU blueprint. If implemented, the Labor policy would result in some (albeit minimal) 'borrowing' from overseas worker representation laws, through the adoption of the UK concept of a voluntary collective bargaining system backed up by a statutory framework; the North American/UK notion of bargaining rights flowing from the principle of majority employee support; and North American/NZ-style GFB rights and obligations.

It seems that stronger supports for collective bargaining, such as the NZ mechanisms for facilitation and last resort arbitration to resolve bargaining impasses, will not find their way into Australia's labour laws if the ALP is elected to office at the election later this year. What will emerge will be a blend of several overseas worker representation models, resulting in some improvement to the current legal framework's subversion of collective bargaining to individualised agreement-making. On the other hand, if the Coalition Government is re-elected, we can expect to see further steps taken towards the goal of

2007); *CEPU and AMWU v CSBP Limited* ([2007] AIRC 133, 20 April 2007); *AMWU and CFMEU v Skilled Group Limited and Busicom Solutions Pty Ltd* ([2007] AIRC 251, 9 May 2007).

¹⁴⁸ Australian Government, Department of Industry, Tourism and Resources, 'Collective Bargaining: making it easier to do business', advertisement in *The Age*, 2 June 2007.

¹⁴⁹ See for example Shae McCrystal, 'Collective Bargaining by Independent Contractors: Challenges from Labour Law' (2007) 20 *Australian Journal of Labour Law* 1.

'individualising' Australian labour relations – leaving Australia as the only OECD nation that fails to preserve the right of employees to choose to engage in collective bargaining by requiring employers to recognise that choice.¹⁵¹ The upcoming Federal election will therefore be critical in determining the worker representation rights of Australian workers for many years into the future.

¹⁵⁰ Australian Government advertisement, above note 144.

¹⁵¹ Chris Briggs, Rae Cooper and Bradon Ellem, 'What about collective bargaining?' in *The State of Industrial Relations: The State of the States 2005*, Evatt Foundation, Sydney, 2005, p 66.

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