

## UNFAIR LABOUR PRACTICES, TRADE UNION VICTIMISATION AND VOICE: A COMPARISON OF AUSTRALIA AND THE UNITED KINGDOM

### ABSTRACT

The protection of collective worker voice in common law countries with strong collectivist traditions like Australia and the UK is problematic where collective bargaining and trade unions are no longer promoted by state apparatus. This article examines the changing nature of voice in the context of freedom of association protections in these two jurisdictions. We examine the effects of declining union security on trade union victimisation rights and consider whether increasing constitutionalisation of labour law results in a weakening of individual and collective voice. A particular focus of the article concerns the individualisation of collective processes in the Australian *Fair Work Act 2009* (Cth).

### I INTRODUCTION

The problem of labour law has become the problem of an entire economic order. A renovation of labour law is no longer possible without a renewal of that economic order ... The social requirements of labour law are no longer compatible with the individual character of the economic system.<sup>1</sup>

Hugo Sinzheimer, writing in 1933, warned labour lawyers of the dangers of an individualised economic system that undermined the social nature of labour law. Sinzheimer accepted as axiomatic that labour law cannot be separated from economic substructure. Lord Wedderburn took up this theme in a Sinzheimer Lecture in 1993, commenting on the apparent dichotomy between individual and collective interests, and prophesying that the wave of individualism would cause adaptations across the common law world and provide an opportunity to ‘disestablish collectivism ... and dismantle machineries of corporatist consensus in the name of competitiveness.’<sup>2</sup> Lord Wedderburn asked what the *employer* might gain by the introduction of new types of *individual* rights or interests.

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<sup>1</sup> Hugo Sinzheimer, ‘*Die Krisis des Arbeitsrechts*’ (1933) 1 *Arbeitsrecht* 1, quoted in Lord Wedderburn, ‘Labour Law and the Individual: Convergence or Diversity?’ in *Labour Law and Freedom, Further Essays in Labour Law* (Lawrence & Wishart, 1995).

<sup>2</sup> Wedderburn, above n 1, 311.

More recently, it has been noted that shifts in attitudes to union security arrangements are one of the outcomes of the constitutionalisation of labour law.<sup>3</sup> Does a shift to individual rights necessarily change the locus and quality of individual voice as well as collective voice? Our purpose in this article is to examine the changing nature of voice in the context of protection of freedom of association in two common law jurisdictions, Australia and the UK, focusing particularly on recent changes to the legislative framework under the Australian *Fair Work Act 2009* (Cth) (*'Fair Work Act'*).

## II INDIVIDUAL AND COLLECTIVE CONCEPTIONS OF VOICE

Worker voice in the context of freedom of association depends on how freedom of association is conceived and framed. For the purposes of this article, we are concerned primarily with traditional understandings of the concept of 'voice' as developed in industrial relations and labour law contexts, which focus on the expression of collective interests of workers.<sup>4</sup> We acknowledge the changing nature and functions of voice, particularly in terms of economic objectives, charted by Bogg and Novitz in their survey of voice for the *Voices at Work* project.<sup>5</sup> We aim to understand the processes and contexts in which collective voice has become muted in this changed environment and assess the effects of this on individual voice. It is contended that both individual and collective voice are weakened by the framing of rights as individually-based freedom of association rights founded on the ideology of choice, particularly the choice not to join a union.<sup>6</sup> Collective voice is also weakened if 'the fruits of collective action', particularly collective bargaining, are not adequately protected.<sup>7</sup> In this sense, further exploration of the strength of collective bargaining arrangements is essential to an analysis of rights to freedom of association. The libertarian individual rights approach to freedom of association emphasises the individual interests and choices of the worker, particularly the choice not to join a trade union,<sup>8</sup> while the collective approach emphasises the importance of trade union security for the protection of individual interests.

To treat the right as a purely individual right is to focus on the choice of the individual as an agent making a decision as to whether to associate and with whom to associate. This freedom of choice is considered important to individual freedom of speech and freedom of association. Libertarian conceptions of these rights embedded in

<sup>3</sup> Frances Raday, 'The Decline of Union Power — Structural Inevitability or Policy Choice?' in Joanne Conaghan, Richard Fischl and Karl Klare (eds), *Labour Law in an Era of Globalisation* (Oxford University Press, 2004) 353, 359.

<sup>4</sup> Alan Bogg and Tonia Novitz, 'Investigating Voice at Work' (2012) 33 *Comparative Labor Law and Policy Journal* 323, 326–32.

<sup>5</sup> *Ibid* 323.

<sup>6</sup> *Ibid* 330.

<sup>7</sup> David Quinn, 'To Be or Not to Be a Member — Is that the Only Question? Freedom of Association Under the *Workplace Relations Act*' (2004) 17 *Australian Journal of Labour Law* 1, 2.

<sup>8</sup> Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work* (Oxford University Press, 2<sup>nd</sup> ed, 2011) 529.

successive labour frameworks have promoted the right to dissociate as an integral element of the right to associate. The ‘choice’ theory of freedom of association, despite its hegemony in current liberal discourse, has been strongly refuted. Kahn-Freund, for example, observed that the positive freedom of association does not logically presuppose the negative freedom of association, otherwise any constitutional guarantee of a right would forbid all aspects of its opposite.<sup>9</sup>

As part of a set of individual freedoms, freedom of association is also linked with the right to free speech. The right to associate prevents the State from restricting group expression where individual members of the group have rights to speak out on the same issues.<sup>10</sup> This linkage of two fundamental rights highlights an important connection between freedom of association and worker voice. When workers group together, voice acquires a different quality of expression. This voice has greater impact and power and is more able to face other powerful voices such as capital and the State. From this, we can see the relevance and effect of restricting the locus of voice to individual rather than collective mechanisms as a means of controlling labour power.

The liberal focus on individual voice tends to deny the relevance of both the act of association and the function of the group in protecting the interests of the individual. This exclusivity of focus also treats the individual as the natural bearer of rights with the result that the collective entity remains unprotected. There has been much debate about the viability of group rights.<sup>11</sup> For the purposes of the present discussion, we will focus on the complementarity of individual and group interests for the proper functioning and exercise of rights of association. It is only by joining together that the mutual interests of the individual worker and the group can be realised. Kahn-Freund recognised this mutuality in stating that freedom of association is not just a fundamental human right but also ‘complementary to collective bargaining, a condition sine qua non of industrial relations’.<sup>12</sup> The idea that the group itself is necessary for the individual right to exist is a powerful argument in favour of group rights and strong trade union voice.<sup>13</sup> The group right is more than the sum of individual

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<sup>9</sup> Sheldon Leader, *Freedom of Association: A Study in Labor Law and Political Theory* (Yale University Press, 1992) 17.

<sup>10</sup> *Ibid* 26.

<sup>11</sup> See the discussion in Alan Bogg and Keith Ewing, ‘A (Muted) Voice at Work? Collective Bargaining in the Supreme Court of Canada’ (2012) 33 *Comparative Labor Law and Policy Journal* 379, 401–8.

<sup>12</sup> Paul Davies and Mark Freeland, *Kahn-Freund’s Labour and the Law* (Sweet and Maxwell, 3<sup>rd</sup> ed, 1983) 201.

<sup>13</sup> As Judge Sorensen (dissenting) stated in *Young, James and Webster v United Kingdom* [1982] 4 EHRR 38:

Individuals associate with each other for the purpose of pursuing common interests and pursuing common goals ... [positive freedom of association] concerns the individual as an active participant in social activities and it is in a sense a *collective* right in so far as it can only be exercised jointly by a plurality of individuals.

interests and more than a procedural right or act of participation.<sup>14</sup> Deakin characterises social, civil and political rights as part of a continuum (rather than being in opposition), in which social rights function through the act of association as a means of social integration and solidarity in the institutions of collective bargaining and the welfare state.<sup>15</sup> This depiction provides a space for integrating labour's constitution more effectively in capital's constitution,<sup>16</sup> thus reconciling Sinzheimer's dilemma regarding the problems of individualisation of the economic order.

We agree with Bogg and Ewing that the protection of worker interests in terms of real worker benefits, in the sense that Sinzheimer projected,<sup>17</sup> requires a dynamic or 'thick' version of freedom of association based on collective strength, which includes rights to collective bargaining and rights to strike, protected by the State.<sup>18</sup> A failure to maintain these collective institutions of voice, portrayed in the ensuing account of Australian and UK labour history, provides some evidence to support Sinzheimer's fears regarding the fate of labour rights in an individualistic economic order. The developing neo-liberal project arises to different degrees in a number of common law countries including Australia and the UK and also Canada and New Zealand. We now turn to discuss the freedom of association protections in their unique contextual frameworks, recognising that freedom of association as a substantive concept is capable of developing different paths in varied historical and institutional settings.

## II THE LAW

### *A Australia*

#### *1 The Early Era: 1904 to 1996*

Trade unions were the dominant voice that spoke and acted on behalf of employees in Australia's early industrial relations system; they had an elevated status as parties principal and were not confined to acting as agents of their members.<sup>19</sup> The system, which was based on compulsory conciliation and arbitration, encouraged and promoted the formation of employee and employer organisations, as it relied

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<sup>14</sup> See Bogg and Ewing, above n 11, 403–6.

<sup>15</sup> Simon Deakin, 'Social Rights in a Globalized Economy' in Philip Alston (ed), *Labour Rights as Human Rights* (Oxford University Press, 2005).

<sup>16</sup> Eric Tucker, 'Labor's Many Constitutions (and Capital's Too)' (2012) 33 *Comparative Labor Law and Policy Journal* 355, 358.

<sup>17</sup> For a fuller discussion of Sinzheimer's views on labour constitutions, see Ruth Dukes, 'Constitutionalising Employment Relations: Sinzheimer, Kahn-Freund and the Role of Labour Law' (2008) 35 *Journal of Law and Society* 341, quoted in Tucker, above n 16.

<sup>18</sup> Bogg and Ewing, above n 11, 389 adopt Eric Tucker's terminology of 'thin' and 'thick' labour rights, noting that a 'thin' right of freedom of association would involve the right to join and not join a trade union, *simpliciter*.

<sup>19</sup> Jill Murray, 'Work Choices and the Radical Revision of the Public Realm of Australian Statutory Labour Law' (2006) 35 *Industrial Law Journal* 343, 351.

on the effective operation of collective groups, especially trade unions.<sup>20</sup> This was reflected in the chief objects of the *Conciliation and Arbitration Act 1904* (Cth) and in this context, trade unions were bestowed with an integral and privileged role.<sup>21</sup> Registration by trade unions was not compulsory, however if a trade union sought recognition before the Court of Conciliation and Arbitration, it had to be registered. Registration conferred upon trade unions a corporate legal personality, which also gave them an exclusive right to represent workers who fell within their constitutional coverage.<sup>22</sup> Further, as the system was compulsory, unions also had the power to compel employers to enter into conciliation and arbitration once an industrial dispute arose.<sup>23</sup>

The privileged role granted to trade unions in the industrial relations system came at a price however, in the form of a high degree of legal regulation which allowed the State to intervene in the affairs of trade unions.<sup>24</sup> Examples of the kind of intervention to which trade unions have been subject include broad powers to strike down union rules that are judged ‘oppressive, unreasonable or unjust’ and general duties on trade union officials which mirror the duties imposed on directors and officers of companies under corporations legislation.<sup>25</sup> The level of regulation in Australia is considered to be higher than in most of Australia’s international counterparts, and it continues under the *Fair Work Act*.<sup>26</sup> The original freedom of association provision that applied to union employees, as introduced in 1904, read as follows:

No employer shall dismiss any employee from his employment by reason merely of the fact that the employee is an officer or member of an organization or is entitled to the benefit of an industrial agreement or award. Penalty: Twenty Pounds.<sup>27</sup>

This provision has survived successive repeals of the industrial relations laws throughout the last century. The current protections contained in ss 346(a) and 341(1) (a) of the *Fair Work Act* are the ‘lineal descendant(s)’ of the original provision.<sup>28</sup>

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<sup>20</sup> Henry Bournes Higgins, ‘A New Province for Law and Order: Industrial Peace through the Minimum Wage and Arbitration’ (1915) 29 *Harvard Law Review* 13, 23; Rae Cooper and Bradon Ellem, ‘The Neoliberal State, Trade Unions and Collective Bargaining in Australia’ (2008) 46 *British Journal of Industrial Relations* 532, 535.

<sup>21</sup> *Conciliation and Arbitration Act 1904* (Cth) s 3(vi).

<sup>22</sup> Anthony Forsyth, ‘Trade Union Regulation and the Accountability of Union Office-Holders: Examining the Corporate Model’ (2000) 13 *Australian Journal of Labour Law* 28; Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5<sup>th</sup> ed, 2010) 668 [20.20].

<sup>23</sup> Creighton and Stewart, above n 22, 29 [2.24], 36 [2.45], 37 [2.47].

<sup>24</sup> *Ibid* 34 [2.37], 669–70 [20.23].

<sup>25</sup> *Fair Work Registered Organisations Act 2009* (Cth) s 142(1), pt 2 ch 9.

<sup>26</sup> Forsyth, above n 22, 2; Creighton and Stewart, above n 22, 669 [20.22].

<sup>27</sup> *Commonwealth Conciliation and Arbitration Act 1904* (Cth) s 9(1).

<sup>28</sup> Creighton and Stewart, above n 23, 566–7 [17.87].

The original protection included a reverse onus of proof to assist employees; this remains in the present legislation in a modified form.<sup>29</sup> Laws were introduced to expand the protection so that it applied to circumstances not confined to dismissal from employment. The phrases ‘injure the employee in their employment’ and ‘alter the position of the employee to their prejudice’ were introduced in 1909 and 1914 and now form part of the present ‘adverse action’ provisions.<sup>30</sup> These concepts capture a wide range of conduct. Injury in employment covers injury of any compensable kind.<sup>31</sup> Prejudicial alteration is the broadest category as it covers injury of any compensable kind and ‘any adverse affectation of, or deterioration in, the advantages enjoyed by the employee before the conduct in question’.<sup>32</sup> Later amendments expanded the proscribed grounds and were part of a framework that provided trade union security. Many of these protections, albeit in different legislative form, remain in the present Act.<sup>33</sup>

Public policy favoured the expansion of the protections for trade unionists until the mid-1970s. Laws were then introduced in a piecemeal fashion that effectively weakened the privileged role of trade unions and with it, their status as the exclusive voice on behalf of employees. In 1977, the Fraser Liberal/National Coalition government introduced the strike-break protections, which were designed to weaken the effectiveness of closed shop arrangements by making it illegal for employers to adversely treat employees who refused to take strike action.<sup>34</sup> In 1993, under the Keating Labor government, a provision was introduced protecting non-unionists from dismissal if they refused to join a trade union.<sup>35</sup> In the same context, the Keating government also introduced structural changes to the system through the *Industrial Relations Reform*

<sup>29</sup> *Conciliation and Arbitration Act 1904* (Cth) s 9(3); *Fair Work Act* s 361.

<sup>30</sup> Amended by *Conciliation and Arbitration Act 1909* (Cth); *Conciliation and Arbitration Act 1914* (Cth); see discussion in *Greater Dandenong City Council v Australian Municipal, Clerical and Services Union* (2001) 112 FCR 232, 244–5 [51]–[52]. The relevant phrases are now in *Fair Work Act* s 342(1).

<sup>31</sup> *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia [No 3]* (1998) 195 CLR 1 [4] (Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ).

<sup>32</sup> *Ibid.*

<sup>33</sup> The protected grounds included: appearing as witness or giving evidence in a proceeding under the Act (*Conciliation and Arbitration Act 1914* (Cth), now in the *Fair Work Act* s 341(1)(b)); and participation in union activities which were expressly authorised by the union (*Conciliation and Arbitration Act 1973* (Cth), now in an expanded form in the *Fair Work Act* s 347 (b)(ii)–(v)). The protections which have not subsisted in current legislation are: a union member who is dissatisfied with their conditions of employment and seeks better industrial conditions (*Conciliation and Arbitration Act 1920* (Cth)); and an employee who was absent from work because of trade union duties (*Conciliation and Arbitration Act 1947* (Cth)).

<sup>34</sup> *Conciliation and Arbitration Act 1904* (Cth) s 5(1)(aa) amended by *Conciliation and Arbitration Act 1977* (Cth); D R Hall, ‘Commonwealth Controls with Respect to Victimisation of Employees’ (1982) 56 *Australian Law Journal* 176, 183; see also *Fair Work Act* ss 346(b), 347(b)(iii)–(iv).

<sup>35</sup> *Industrial Relations Act 1988* (Cth) s 170DF(1)(c).



*Act 1993* (Cth) to reorient ‘the system away from conciliation and arbitration, and in favour of collective bargaining’ mainly at the single enterprise level.<sup>36</sup> The Australian Industrial Relations Commission (‘AIRC’) had power to conciliate and ensure that parties met good faith bargaining requirements,<sup>37</sup> but it had no power to compel an employer to commence bargaining.<sup>38</sup> This was in stark contrast to the power unions had to compel employers to appear before the AIRC under the conciliation and arbitration system. Under the enterprise bargaining regime introduced in 1993, trade union security declined and with it, the privileged role of unions.<sup>39</sup>

## 2 *The Workplace Relations Act Era: 1996 to 2009*

The dominant theme that arises in the next era is the individualisation of labour law and policy in Australia, which was strongly promoted by the Coalition government led by John Howard.<sup>40</sup> Unions and the AIRC were viewed as third party interveners in the workplace.<sup>41</sup> Further, employers could refuse to negotiate with employees and unions for a collective agreement even if there was majority support for collective bargaining by workers.<sup>42</sup> Two of the most controversial changes were the introduction

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<sup>36</sup> Breen Creighton and Andrew Stewart, *Labour Law: An Introduction* (Federation Press, 2<sup>nd</sup> ed, 1994) 133 [627]; see also *Industrial Relations Reform Act 1993* (Cth) s 4, objects 3(a), (d).

<sup>37</sup> Creighton and Stewart, above n 36, 134 [630]. Under the present system the Fair Work Commission can only make bargaining orders upon application by one of the bargaining representatives: see ss 229, 230 of the *Fair Work Act*. In contrast, the 1993 laws gave the Australian Industrial Relations Commission the power to intervene of its own accord: *Industrial Relations Reform Act 1993* (Cth) s 170QH(2).

<sup>38</sup> See discussion on *Asahi Diamond Industrial Australia Pty Ltd v Automotive, Food, Metals and Engineering Union* (1995) 59 IR 385 in Ron McCallum, ‘Trade Union Recognition and Australia’s Neo-Liberal Voluntary Bargaining Laws’ (2002) 57 *Relations Industrielles/Industrial Relations* 225, 235–236; Richard Naughton, ‘Bargaining in Good Faith’ in Paul Ronfeldt and Ron McCallum (eds), *Enterprise Bargaining Trade Unions and the Law* (Federation Press, 1995) 84.

<sup>39</sup> Phillipa Weeks, ‘Union Security and Union Recognition in Australia’ in Paul Ronfeldt and Ron McCallum (eds), *Enterprise Bargaining Trade Unions and the Law* (Federation Press, 1995) 184, 194.

<sup>40</sup> Stephen Deery and Richard Mitchell (eds), *Employment Relations: Individualisation and Union Exclusion: An International Study* (Federation Press, 1999); Amanda Coulthard, ‘The Individualisation of Australian Labour Law’ (1997) 13 *International Journal of Comparative Labour Law and Industrial Relations* 95; David Peetz, *Brave New Workplace: How Individual Contracts are Changing Our Jobs* (Allen and Unwin, 2006); Richard Mitchell and Joel Fetter, ‘Human Resource Management and Individualisation in Australian Labour Law’ (2003) 45 *Journal of Industrial Relations* 292.

<sup>41</sup> Richard Naughton, ‘Sailing into Uncharted Seas: The Role of Unions Under the *Workplace Relations Act 1996* (Cth)’ (1997) 10 *Australian Journal of Labour Law* 1.

<sup>42</sup> Rae Cooper and Bradon Ellem, ‘Getting to the Table? Fair Work, Unions and Collective Bargaining’ in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia’s Fair Work Act in International Perspective* (Routledge, 2012) 135, 138.

of individual statutory agreements called Australian Workplace Agreements ('AWAs') and the promotion of the negative right of association.<sup>43</sup> In this framework, the Howard government introduced substantial changes to the freedom of association laws. The laws were couched in terms of individual choice and the rights of individuals.<sup>44</sup> This, however, did not entail a reduction of the positive rights of association developed over the last century; instead, the rights of workers not to join a union were strengthened by the *Workplace Relations Act 1996* (Cth). The new freedom of association laws outlawed a range of actions broader than dismissal from employment including 'injury to employment' and 'prejudicial alteration of the employee's position'.<sup>45</sup> This elevated protection for non-unionists to the same level as unionists, by affording them equal protection in relation to their right not to join a union.<sup>46</sup>

The object of encouraging and facilitating the organisation of representative groups, which had been part of the industrial relations laws from 1904, was also abandoned. In its place was inserted a new object which ensured that both the positive and negative aspects of freedom of association would be upheld.<sup>47</sup> The union movement secured important wins before the courts using the freedom of association laws throughout this period, which was probably an unintended outcome.<sup>48</sup> However, in spite of the union successes, the protections 'were largely devoid of substance' as employers were not compelled to recognise employees' demands to bargain collectively.<sup>49</sup> The Howard government introduced more dramatic reforms in 2005 through the *Work Choices* legislation, which further individualised Australia's industrial relations system.<sup>50</sup> The freedom of association protections, however, were left relatively untouched,<sup>51</sup> but the institutional framework and the bargaining system were significantly altered to orient the system further towards private individual agreement-making governed by a low safety net of five minimum conditions.<sup>52</sup> Space does not allow us to discuss the complexities of the *Work Choices* reforms in

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<sup>43</sup> Naughton, above n 41.

<sup>44</sup> Ibid. See also Quinn, above n 7, 2–3.

<sup>45</sup> *Workplace Relations Act 1996* (Cth) pt XA, ss 298K(1), 298L(1)(b).

<sup>46</sup> Ibid ss 298K(1), 298L(1)(a).

<sup>47</sup> Ibid s 3(f); Naughton, above n 41.

<sup>48</sup> Cooper and Ellem, above n 42, 138.

<sup>49</sup> Ibid.

<sup>50</sup> *Workplace Relations Amendment (Work Choices) Act 2005* (Cth); 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.

<sup>51</sup> The Work Choices amendments imposed a higher burden of proof in relation to actions based on the one ground on which the union movement seemed to have most success: see Colin Fenwick and John Howe, 'Union Security After Work Choices' in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: the New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009) 164, 178.

<sup>52</sup> Murray, above n 19; Jill Murray and Rosemary Owens, 'The Safety Net: Labour Standards in the New Era' in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: the New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009) 40.



great detail; suffice to say, the reforms overall further undermined the role of trade unions and collective bargaining.

### 3 *Fair Work Act*

The *Fair Work Act* was introduced by the Labor government led by Prime Minister Kevin Rudd.<sup>53</sup> Breen Creighton has aptly described the legislation as ‘an attenuated return to collectivism’.<sup>54</sup> The Act has reinstated collective bargaining as the prime form of statutory agreement-making.<sup>55</sup> Legislative support has also been introduced to enable unions to fulfil their representative role in bargaining for workers, including the ability to compel an employer to bargain if a majority support determination is obtained,<sup>56</sup> and the low threshold requirement for a union to be a bargaining representative. A union only needs one union member in the workplace to be involved in bargaining.<sup>57</sup> Australia has avoided the complications that arise from the union recognition procedures in other countries such as the UK and the US.<sup>58</sup> The *Fair Work Act* has also introduced good faith bargaining obligations.<sup>59</sup> These are important changes which can facilitate and protect trade union voice in the face of employer resistance to union involvement in collective bargaining. However, the *Fair Work Act* does not endow unions with the measure of security they enjoyed during the conciliation and arbitration era.<sup>60</sup> A trade union can still be displaced as a bargaining representative by the choice of its own members.<sup>61</sup> Further, the legislation permits multiple bargaining representatives as each employee has the right to appoint their own bargaining representative, which may or may not be a union. There is no concept of an exclusive bargaining representative under the *Fair Work Act*

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<sup>53</sup> For a detailed discussion of the Act see Andrew Stewart, ‘A Question of Balance: Labor’s New Vision for Workplace Regulation’ (2009) 22 *Australian Journal of Labour Law* 3.

<sup>54</sup> Breen Creighton, ‘A Retreat from Individualism: the Fair Work Act and the Re-Collectivisation of Australian Labour Law’ (2011) 40 *Industrial Law Journal* 116, 134.

<sup>55</sup> *Ibid* 123. The ability to enter into new AWAs was removed by transitional legislation in 2008.

<sup>56</sup> *Fair Work Act* s 237; Richard Naughton, ‘The Role of Fair Work Australia’ in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia’s Fair Work Act in International Perspective* (Routledge, 2012) 68, 75–6.

<sup>57</sup> *Fair Work Act* s 176(1)(b)(i).

<sup>58</sup> Anthony Forsyth, ‘Comparing Purposes and Concepts in United States and Australian Collective Bargaining Law’ in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia’s Fair Work Act in International Perspective* (Routledge, 2012) 203.

<sup>59</sup> *Fair Work Act* s 228; Naughton, above n 56, 78–84.

<sup>60</sup> For examples of collective bargaining under the Act, see Cooper and Ellem, above n 42, 139.

<sup>61</sup> *Fair Work Act* s 176(1)(c).

unlike other jurisdictions.<sup>62</sup> Cooper and Ellem have perceptively characterised collective bargaining under the *Fair Work Act* as ‘an individual right to be exercised, for the most part at single enterprise level, involving bargaining agents that are not necessarily unions.’<sup>63</sup>

(a) *Industrial Activities*

The freedom of association protections, now called the ‘industrial activities’ provisions,<sup>64</sup> also display features of individual rights that may or may not be exercised in favour of a union. The provisions are located in Part 3-1 of the *Fair Work Act* dealing with ‘General Protections’. This part also contains a bundle of individual rights encompassing discrimination and a wider form of victimisation protection called ‘workplace rights’.<sup>65</sup> The industrial activities protections apply to activities done, or conversely not done, on behalf of an ‘industrial association’ which encompasses trade unions and informal groups of employees; therefore the protections are clearly not confined to trade unions.<sup>66</sup> Further, the protections are still founded upon the ideology of choice and give equal weight to the positive and negative aspects of the freedom.<sup>67</sup> The *Fair Work Act* has adopted a neutral stance regarding the positive and negative concepts of freedom of association in terms of the legislative language in the relevant sections.<sup>68</sup> The right to freedom of association is recognised in the objects of the *Fair Work Act* but it has been placed in the context of fairness, the right to representation at work and the prevention of discrimination.<sup>69</sup> There is now no reference to the organisation of representative groups in the principal objects of the *Fair Work Act* at all. The *Act* appears to characterise associational rights in an

<sup>62</sup> Breen Creighton and Anthony Forsyth, ‘Rediscovering Collective Bargaining’ in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia’s Fair Work Act in International Perspective* (Routledge, 2012) 1, 13.

<sup>63</sup> Cooper and Ellem, above n 42, 139. See also Creighton, above n 54.

<sup>64</sup> *Fair Work Act* ss 346–7.

<sup>65</sup> *Fair Work Act* pt 3-1 ss 334–64. For cases dealing with ‘workplace rights’ see *Qantas Airways Ltd v Australian Licensed Aircraft Engineers Association* (2012) 202 FCR 244; *Barnett v Territory Insurance Office* (2011) 196 FCR 116; *Australian Licenced Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd* (2011) 193 FCR 526; *Jones v Queensland Tertiary Admissions Centre Ltd (No 2)* (2010) 186 FCR 22.

<sup>66</sup> *Fair Work Act* s 12. See Rosemary Owens, Joellen Riley, Jill Murray, *The Law of Work* (Oxford University Press, 2<sup>nd</sup> ed, 2011) 461 [10.3.2.4].

<sup>67</sup> The ideology of choice is reflected in the objects of the General Protections pt 3-1, s 336(b) of the *Fair Work Act*; see John Howe, ‘Government as Industrial Relations Role Model’ in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia’s Fair Work Act in International Perspective* (Routledge, 2012) 182, 189. See Naughton, above n 41, 8 regarding the debate as to whether the rights should be given equal weight.

<sup>68</sup> This is done by using the exact same expressions for the positive and negative choice to participate or not participate in an industrial activity; see *Fair Work Act* ss 346, 347(a)–(b).

<sup>69</sup> *Fair Work Act* s 3(f).

individualised way, as the individual is at the centre of the freedom. At all stages of engaging in industrial activities, associational rights are conceived primarily as an individual's choice, which may or may not be exercised in favour of the union.<sup>70</sup>

The relevant provisions are complex and space does not permit a detailed examination of them here.<sup>71</sup> We briefly explain the main protections in ss 346 and 347. A breach of s 346 occurs if an employer has taken 'adverse action' against an employee *because* the employee (a), is or is not, or was or was not, an officer or member of an industrial association;<sup>72</sup> or, (b), engages, or has at any time engaged or proposed to engage, in industrial activity within the meaning of ss 347(a) or (b); or, (c), does not engage, or has at any time not engaged or proposed to not engage, in industrial activity within the meaning of ss 347(c)–(g).<sup>73</sup> The causation element is central to finding a breach of the *Act*, and therefore its interpretation is crucial to the scope of the protections. The High Court in the decision of *The Board of Bendigo Regional Institute of Technical and Further Education v Barclay* ('*Barclay*')<sup>74</sup> adopted a narrow reading of the relevant provisions. It is worth examining the decision more closely.

Mr Barclay worked as a senior teacher at the Bendigo Regional Institute of Technical and Further Education ('BRIT') and was also a sub-branch president of the Australian Education Union ('AEU'). Mr Barclay sent an email to AEU members warning them to refuse to do anything fraudulent, as some members had approached him alleging they had been asked to sign fraudulent documents relating to an upcoming audit.<sup>75</sup> Dr Harvey, the Chief Executive Officer of BRIT, was given a copy of the email and suspended Mr Barclay, denying him access to his emails and the premises. Dr Harvey's principal concern was that the email was distributed without involving management, and she also took issue with Mr Barclay's refusal to provide particulars in response to the allegations.<sup>76</sup> In relation to the latter point, Dr Harvey seemed not to be cognisant of Mr Barclay's duty to keep the confidences of the union members, which was acknowledged by the Court.<sup>77</sup> Dr Harvey also considered Mr Barclay's conduct to be a breach of the relevant public sector code of conduct. The High Court affirmed the primary judge's decision<sup>78</sup> that BRIT had not breached the

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<sup>70</sup> This is indicated by the protection of the choice to engage or not in engage in industrial activities in *Fair Work Act* ss 346–7.

<sup>71</sup> For a detailed discussion see Creighton and Stewart, above n 22, 566–8 [17.87]–[17.91].

<sup>72</sup> This includes 'activities carried out as an incident of membership' or activities incidental to being an official: *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212, 224 [39]–[40]. Although the High Court overruled this decision (see below), they did not disturb this aspect of the Full Federal Court's reasoning.

<sup>73</sup> Section 347(c) is intended to catch industrial activities that are unlawful under the Act.

<sup>74</sup> (2012) 290 ALR 647.

<sup>75</sup> *Ibid* 650 [11] (French CJ and Crennan J).

<sup>76</sup> *Ibid* 654 [30] (French CJ and Crennan J).

<sup>77</sup> *Ibid*.

<sup>78</sup> *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251.

*Fair Work Act*.<sup>79</sup> In making its decision, the Court clarified the causation test for the purposes of the ‘adverse action’ provisions. The test is whether the employer has acted against the employee because of a proscribed reason.<sup>80</sup> This proscribed reason must be an immediate or operative reason for the conduct to breach the *Fair Work Act*.<sup>81</sup> Dr Harvey’s evidence, which was accepted by the primary judge, was that she suspended Mr Barclay for reasons other than the proscribed or protected reasons under the *Act*. Further, the Court expressly rejected a reading of the provisions that could give union officials an advantage not enjoyed by other workers.<sup>82</sup> The decision demonstrates that unionists are not granted an advantage over other employees in the workplace. In the light of the wider framework of the legislation, this interpretation is most likely correct.

The approach to causation adopted by the High Court does not address situations where people may have unconscious bias or reasons of which they are not cognisant whilst acting. In anti-discrimination law it has long been accepted that a perpetrator may still discriminate against an employee even though there was no deliberate intent.<sup>83</sup> Further, the High Court’s approach may not protect a union official where their duty to their members comes into conflict with their position as an employee. There will be occasions where a unionist acts lawfully as a union official but it will not be agreeable to management, and, therefore can be categorised as misconduct. As occurred in *Barclay*, an employer can take action against the union official in their capacity as an employee. This will mean there will be no breach of the Act if this was the only reason for the action.<sup>84</sup> The Australian law will be discussed again in Part III of the article; we now turn to the United Kingdom provisions.

### *A The United Kingdom*

#### *1 Early History*

The UK victimisation provisions now embedded in *Trade Union Labour Relations (Consolidation) Act 1992* (UK) c 52 (*‘TULR(C)A’*) are the product of a very different historical development to Australian law. Whereas Australian trade unions operated in a highly regulated labour environment as a result of their role in the compulsory

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<sup>79</sup> *Barclay* (2012) 290 ALR 647, 662 [65] (French CJ and Crennan J), 676 [128], 677 [131] (Gummow and Hayne JJ).

<sup>80</sup> *Ibid* 654 [31] (French CJ and Crennan J).

<sup>81</sup> *Ibid* 662 [62], 671 [104], 677 [140].

<sup>82</sup> *Ibid* 662 [60] (French CJ and Crennan J).

<sup>83</sup> Anna Chapman et al, ‘Adverse Action, Discrimination and the Reverse Onus of Proof: Exploring the Developing Jurisprudence’ (Paper presented at Australian Labour Law Biennial Conference, Canberra, 16–17 November 2012) 16, 18.

<sup>84</sup> *Barclay* (2012) 290 ALR 647, 653 [27] (French CJ and Crennan J). The independent review of the *Fair Work Act* has also recommended that the approach essentially adopted by the High Court be maintained: see Commonwealth of Australia, *Towards More Productive and Equitable Workplaces: an Evaluation of the Fair Work Legislation* (2012) recommendation 47, 236–7.

arbitration and conciliation system, British trade unions prospered in a voluntary system which gave precedence to free collective bargaining between the industrial parties. When Kahn-Freund termed this system as one of ‘collective laissez-faire’ he was referring to the lack of legal compulsion on both sides to reach any agreement and also to an industrial balance achieved between capital and labour in the absence of formal legal controls.<sup>85</sup>

Given the laissez-faire or abstentionist industrial environment where collective bargaining provided labour norms, but where there was no duty to bargain and collective agreements themselves were not legally enforceable, it is thus not surprising that the first victimisation provisions in the UK did not appear on the statute book until the *Industrial Relations Act 1971*.<sup>86</sup> Even then, the provisions were primarily designed as part of a corporatist initiative in which the government attempted to overturn the UK’s voluntary system and get trade unions to register in a public framework as a mechanism of State control and restriction. When trade unions refused to register and the legislation failed dramatically in 1974, Kahn-Freund wryly observed that ‘the proclamation of freedom of organisation was a dead, one might say, a still-born letter’.<sup>87</sup> Nevertheless these provisions have remained the bedrock of the UK’s protection against trade union victimisation, so it is important to consider further their overall context.

The Report of the Royal Commission on Trade Unions and Employers’ Associations (‘Donovan Report’, named after the Chairperson of the Commission, Lord Donovan) in 1968 gave the specific impetus to the UK’s trade union victimisation provisions. The recommendations were contained in a chapter headed ‘The Extension of Collective Bargaining’ and were designed to support the collective framework involving collective bargaining, trade union recognition and wages councils. At this time, collective bargaining was widespread: about half of British manual workers were trade union members; Wages Councils, originally introduced in 1909, covered three and a half million workers<sup>88</sup> and trade union recognition was actively supported by the State in order to encourage collective bargaining. The Donovan Report identified discrimination against employees in the context of recognition as a primary reason for introducing specific measures supporting freedom of association.<sup>89</sup> The

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<sup>85</sup> O Kahn-Freund, ‘Labour Law’ in Morris Ginsberg (ed), *Law and Opinion in England in the Twentieth Century* (Stevens, 1959):

allowing free play to the collective forces of society and (limiting) the intervention of the law to those marginal areas in which the disparity of these forces, ... is so great as to prevent the successful operation of what is so very characteristically called negotiating machinery.

<sup>86</sup> UK trade unions had not ever argued for such legislation, preferring to rely on their own industrial power.

<sup>87</sup> Davies and Freedland, above n 12, 211.

<sup>88</sup> *Wages Councils Act 1959*, 7 & 8 Eliz 2, c 69; they were introduced by the *Trade Boards Act 1909*, 9 Edw 7, c 22.

<sup>89</sup> Royal Commission on Trade Unions and Employers’ Association, *Report*, Cmnd 3623 (1968) [219] (‘Donovan Report’) clearly recognises collective objects: ‘It is impossible to separate problems of freedom of association from those of trade union recognition. Unless employees join a union there will be no union for the employer to recognise’.

language of the original statutory provision in s 5 of the *Industrial Relations Act 1971* (UK) c 72 followed closely the language of International Labour Organisation's *Right to Organise and Collective Bargaining Convention 1949* art 1 on anti-union discrimination.<sup>90</sup> Membership and activities were protected under separate limbs of the statutory section and a dissociation right was also included. This statutory rubric was largely crystallised in the Social Contract legislation of 1975-6, when a Labor government re-enacted the original provisions. It was this legislation that Wedderburn referred to with confidence as 'building a collective "right to associate" out of the bricks of certain "individual" employment rights'.<sup>91</sup>

The original victimisation protections in 1971 were enacted, however, in the framework of unfair dismissal laws. The rights were later consolidated in the *Employment Protection (Consolidation) Act 1978* (UK) c 44 ('*Employment Protection Act*') to include a right not to be dismissed because of membership or participation in the activities of an independent trade union at an appropriate time<sup>92</sup> and a right not to be subjected to action short of dismissal.<sup>93</sup> The rights were intended, as Donovan had prescribed, to promote collective bargaining in a collective framework. For example, the previous statutory procedure under section 8 of the *Terms and Conditions of Employment Act 1959* was strengthened under schedule 11 of the *Employment Protection Act 1975* to enable independent trade unions to apply for awards of common terms and conditions not less favourable than the 'general level'. In addition, a statutory recognition procedure gave the Advisory, Conciliation and Arbitration Service ('ACAS') a wide discretion to recommend recognition on the application of a trade union and interestingly, the remedy for failure to comply by an employer was an award by the Central Arbitration Committee ('CAC'). This was done by compulsory unilateral arbitration of the relevant terms in employees' contracts of employment. This period of British labour law can be seen as the high point in terms of support for collective institutions and the examples above indicate a high degree of State intervention to support collective bargaining, albeit in a voluntary system. Collective voice was actively promoted as the natural adjunct of a system of mature collective bargaining and the individual framework protecting freedom of association was designed to further this.

## 2 The Margaret Thatcher Reforms: 1979 to 1990

When these 'collective props' were dismantled under the Thatcher administration, which came to power on a mandate to reduce trade union power in 1979, the trade union victimisation rights became isolated as purely individual rights. The

<sup>90</sup> *Right to Organise and Collective Bargaining Convention 1949*, opened for signature 1 July 1949, 96 UNTS 257 (entered into force generally 18 July 1951; entered into force for Australia 28 February 1973) art 1; Stephen Evans and Roy Lewis, 'Anti-Union Discrimination: Practice, Law and Policy' (1985) 16 *Industrial Law Journal* 88, 106, 89.

<sup>91</sup> Lord Wedderburn, 'The *Employment Protection Act 1975*: Collective Aspects' (1976) 39 *Modern Law Review* 169.

<sup>92</sup> *Employment Protection Act 1975* (UK) c 71, s 58(1)(a)(b).

<sup>93</sup> *Ibid* s 23(1)(a)(b).



incoming Conservative government moved swiftly to repeal the statutory recognition procedure and the Schedule 11 procedure for extension of collective agreements.<sup>94</sup> The repeal of the Fair Wages Resolution in 1982 and wages councils in 1986 further damaged long-standing collective bargaining structures. In this context, Wedderburn's individual 'building blocks' for a right to organise appeared more fragile than he had anticipated in 1976. The statutory framework now became subject to two major forces: first, the individualist rhetoric favouring the right to dissociate and second, a narrow and sometimes arcane interpretation by the judiciary.

The theme which encapsulates the Thatcher industrial relations policies from 1979 onwards was the attack on solidaristic behaviour associated with trade unions and the encouragement of individual values.<sup>95</sup> The appeals to the individual to define his or her own interests, in opposition to the collective, involved an appeal to libertarian ideology which emphasised a market of free individuals. The latter was distorted by trade union compulsion of any form.<sup>96</sup> This ideology presupposed a conflict between individual rights and collective interests.<sup>97</sup> The individualisation of working life was promoted in all areas: strikes were limited to individual workplaces, individual union members were encouraged to oppose union collective discipline<sup>98</sup> and workers were encouraged not to join trade unions. The rhetorical appeal to liberal notions of freedom and democracy combined to cement a matrix of individual rights as moral claims to undermine legitimate collective interests.<sup>99</sup> In effect, individual voice, through the medium of democratic choice, became an instrument to deny collective power.

The selective appeal for individual rights is seen most starkly in the dissociation rights which were introduced incrementally throughout the 1980s in order to destabilise trade unions generally and the closed shop in particular. The process of prioritising dissociation began as early as 1980<sup>100</sup> and reached its culmination in 1990 with the introduction of an absolute ban on the pre-entry closed shop. Section 1 of the *Employment Act 1990* provided a right, for the first time, for job applicants not to

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<sup>94</sup> *Employment Act 1980* (UK) c 42.

<sup>95</sup> Paul Davies and Mark Freedland, *Labour Legislation and Public Policy: A Contemporary History* (Clarendon Law Series, 1993) 428.

<sup>96</sup> The writings of Hayek were an important influence: see Lord Wedderburn, 'Freedom of Association and Philosophies of Labour Law' (1989) 18 *Industrial Law Journal* 1. Hayek was also invited to Australia at the same time.

<sup>97</sup> James Prior, introducing the first *Employment Bill* in 1979, while talking of balance between individual and collective action, asserted that '[o]ur guiding principle has been ... to ensure that the rights of the individual are respected and upheld, at the place of work as in every facet of our lives': United Kingdom, *Parliamentary Debates*, House of Commons, 17 December 1979, vol 976, col 59.

<sup>98</sup> *Employment Act 1988* (UK) c 19, s 3.

<sup>99</sup> Sandra Fredman, 'The New Rights: Labour Law and Ideology in the Thatcher Years' (1992) 12 *Oxford Journal of Legal Studies* 24.

<sup>100</sup> *Employment Act 1980* (UK) c 42, s 15 introduced a limited dissociation right for 'action short of dismissal'.

be discriminated against on grounds of trade union membership. However, it failed to prevent the real object of recruitment discrimination, as it only protected the bare right of membership but not activities necessary or incidental to union membership and, in any event, had been introduced with an attack on the pre-entry closed shop in mind.<sup>101</sup>

### 3 *The Tony Blair Government: 1997 to 2007*

The return of a New Labour government in 1997 retained the core of the previous administration's restrictions on trade unions, including the restrictive strike laws and trade union internal controls. Thus the collective base, despite the re-introduction of a statutory recognition procedure in 1999, remained weak. In this climate, the re-assertion of individual choice as the ultimate criterion for collective representation and the promotion of trade unions as business partners<sup>102</sup> rather than collective defenders resulted in an industrial landscape where individual worker voice became fragmented across a variety of non-union mechanisms<sup>103</sup> and collective voice has often become a muted voice of cooperation. The continuing decline in collective bargaining has been complemented by an expansion of individual rights in the areas of minimum wages, working time and family-friendly rights. In this de-collectivised environment, the UK trade union victimisation rights have been considerably weakened, and depend on the declining strength of trade unions to prosecute individual cases.

### 4 *The Current Provisions: the Trade Union Labour Relations (Consolidation) Act 1992*

The UK rights now comprise a bundle of individual remedies contained in the *TULR(C)A*. The protections relate to three types of discrimination: dismissal, detriment and refusal of employment. Dismissal on grounds of trade union membership, activities, or making use of trade union services is unlawful under *TULR(C)A* s 152; dismissal for failing to accept an inducement not to be a trade union member or relinquish collectively agreed terms is also proscribed under this section. 'Detriment' on similar trade union grounds is covered under *TULR(C)A* s 146. Finally, refusal of employment on grounds of union membership arises under *TULR(C)A* s 137.

The protections relating to inducements were introduced by the *Employment Relations Act 2004* (UK), ('*Employment Relations Act*') in order to correct deficiencies exposed by the European Court of Human Rights decision in *Wilson v United Kingdom* ('*Wilson and Palmer*').<sup>104</sup> Unlawful inducements cover two broad categories: inducements relating to union membership, activities and services: *TULR(C)A* s 145A and inducements relating to collective bargaining: *TULR(C)A* s 145B.

<sup>101</sup> Bob Simpson, 'The *Employment Act 1990* in Context' (1991) 54 *Modern Law Review* 418, 422.

<sup>102</sup> Department of Trade and Industry, *Fairness at Work White Paper*, Cmnd 3968 (1998) 16 [4.3]: 'collective representation can help achieve important business objectives'.

<sup>103</sup> ACAS now actively promotes non-union representation channels alongside trade union machinery.

<sup>104</sup> *Wilson v United Kingdom* [2002] V Eur Court HR 49.

It is worth examining these rights a little more closely as they form the basis of a right to representation in UK law and as such, provide substance to individual and collective voice at work. Section 145B is important in protecting workers from inducements to forgo rights to representation by a trade union for collective bargaining. In *Wilson and Palmer*, the applicants were denied pay increases for refusing to relinquish representation by their union (*Palmer*)<sup>105</sup> or refusing to sign personal contracts in lieu of collective bargaining (*Wilson*).<sup>106</sup> The European Court of Human Rights held that representation rights involved two aspects: the right to instruct the union to make representations and the right to be represented by the union in regulating relations with employers.<sup>107</sup> Protection under s 145B is dependent on the union being recognised or seeking to be recognised. This section is also limited by a dominant purpose test: the employer must show what was the sole or main purpose in making the offers.<sup>108</sup> In addition, UK law has restricted the representation right to individual workers who are trade union members and maintained its rigid exclusion of collective dimensions of voice, despite the fact that trade union voice is given specific recognition by the European Court of Human Rights under art 11 as a separate and independent right from the individual.<sup>109</sup>

Section 145A recognises that membership of a union involves more than just holding a union card and is not confined to representation. It also includes other services and benefits,<sup>110</sup> so the ‘use of union services’ is given explicit protection. Under the section, workers have rights not to have offers made to relinquish their rights to membership, activities and the use of union services. ‘Trade union services’ are broadly drafted to include ‘services made available to the employee by an independent trade union by virtue of membership of the trade union’.<sup>111</sup> This would include raising grievances with employers, negotiating terms for individual employees and also extend to financial and other services.<sup>112</sup> These provisions are important to the expression of individual voice at work, protecting individual mechanisms of grievance and representation. To the extent that representation rights are important union organising tools, the inducement provisions recognise substantive aspects of collective voice, albeit that they are only vested in the individual.

We have seen from this preliminary discussion of the inducement rights arising from *Wilson and Palmer* that UK law makes a rigid distinction between individual and collective voice. We will develop this argument by an examination of the statutory wording of the concept of ‘detriment’. *TULR(C)A* s 146 states as follows:

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<sup>105</sup> Ibid 56–7 [14].

<sup>106</sup> Ibid 55 [10].

<sup>107</sup> Ibid 67 [46].

<sup>108</sup> *TULR(C)A* s 145D(2).

<sup>109</sup> *Wilson and Palmer*, 68 [48].

<sup>110</sup> Keith Ewing, ‘The Implications of *Wilson and Palmer*’ (2003) 32 *Industrial Law Journal* 1, 7.

<sup>111</sup> *TULR(C)A* s 145A(4).

<sup>112</sup> Simon Deakin and Gillian S Morris, *Labour Law* (Hart Publishing, 6<sup>th</sup> ed, 2012) 828.

A worker has the right not to be subjected to any detriment *as an individual* by any act or any failure to act, by his employer if the act or failure to act takes place for the sole or main purpose of—

- (a) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so,
- (b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time.
- (ba) preventing or deterring him from making use of union services ...
- (c) compelling him to be or become a member of any trade union or of a particular trade union

Three particular concepts are worthy of note. The first illustrates the individualism of the English approach in the fact that victimisation must be suffered ‘as an individual’. This phrase was not part of the original enactment and was inserted in 1975 by Parliament with the probable object of preventing claims by rival trade unions and fostering the maintenance of stable bargaining arrangements.<sup>113</sup> Despite these apparently collectivist origins, the phrase has been interpreted to draw a distinction between individual and collective activities rather than distinguishing between organising and negotiating activities.<sup>114</sup> This has resulted in a reduction of the scope of the protection so that it only applies in situations where individuals can prove an effect on them as individuals rather than when they are acting together as a collective.<sup>115</sup>

The UK provisions only protect an individual employee’s activities in a trade union context rather than the activities of the union. In *Therm-A-Stor Ltd v Atkins*,<sup>116</sup> protection was denied to 20 individuals who were dismissed after a trade union had begun a concerted recruitment drive in order to obtain recognition with an employer. The employment tribunal found that the employer held strong anti-union views and further, the dismissals were a reaction to the union’s efforts to seek recognition. The Court of Appeal, however, refused a purposive construction of the statute, with Lord Donaldson holding that ‘the reason for the dismissal had nothing to do with anything which the employee concerned had personally done’.<sup>117</sup> Lord Donaldson stated further that ‘the section is not concerned with an employer’s reactions to a trade union’s activities, but with his reactions to an individual employee’s activities in a

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<sup>113</sup> As a result of *Post Office v Union of Post Office Workers* [1974] ICR 378, where the House of Lords supported the right of a minority but registered trade union which the employer did not recognise, to gain facilities as against the recognised union which had no claim as it remained unregistered.

<sup>114</sup> Deakin and Morris, above n 108, 841.

<sup>115</sup> *Farnsworth v McCoid* [1999] IRLR 626 established that the protection is not confined to the individual in his capacity as such, so a shop steward who was de-recognised was protected.

<sup>116</sup> [1983] IRLR 78 (*Atkins*).

<sup>117</sup> *Ibid* 80 [13].

trade union context'.<sup>118</sup> While this interpretation is justified on a literal construction of *TULR(C)A* s 152, it highlights the delicate borderline between individual and collective activities. A worker is now protected against detriment or dismissal in cases of victimisation where a trade union has applied for statutory recognition,<sup>119</sup> but the lacuna left by *Atkins* remains a serious limitation in the UK provisions.

The second point relates to the onus of proof provisions. A breach of the provision is based on an employer's act where the employer's 'sole or main purpose' is to subject the employee to detriment relating to a proscribed ground in section 146. Once the actions are alleged it is up to the employer to show what their sole or main purpose for acting was.<sup>120</sup> The employee still, however, has the major burden of showing that the employer's purpose breached the provision. English courts have applied a narrow construction of purpose in cases such as *Gallagher v Department of Transport*<sup>121</sup> where Neill LJ stated that 'purpose' and 'effect' were quite different. This approach permits employers to disguise their motives for acting. The sole or main purpose test has also caused difficulties in relation to the inducements protections. In the *Wilson and Palmer* cases, the employer relied on ostensibly 'neutral' business reasons: the stated aim in *Wilson* was to introduce individual contracts and in *Palmer* to achieve 'flexibility'. Despite extensive re-drafting of the provisions on employer purpose in the light of the employees' successful appeals to the European Court of Human Rights, a Labour government still felt justified in permitting business reasons to override other factors in the determination of the employer's 'sole or main purpose'.<sup>122</sup>

The third point relates to the protection of trade union activities by means of the concept of 'participation in the activities of an independent trade union at an appropriate time'. Trade union 'activities' have been left to definition by case law. Typical organisational activities such as recruitment are covered.<sup>123</sup> English law specifically protects the activities of an independent trade union so that trade union voice is protected, as opposed to the more general protection accorded to an 'industrial association' in Australian law. The concept has, however, caused difficulties both in terms of the issue of authorisation of activities by the trade union<sup>124</sup> and consent from employers for such activities.<sup>125</sup>

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<sup>118</sup> Ibid 80 [15]. The Court of Appeal reversed the Employment Appeal Tribunal which applied a purposive construction on the grounds that any other interpretation would leave the Act a dead letter.

<sup>119</sup> *TULR(C)A* sch A1 para 156.

<sup>120</sup> *TULR(C)A* s 148.

<sup>121</sup> [1994] IRLR 231.

<sup>122</sup> *TULR(C)A* s 145D(4)(c): 'rewarding those particular workers for their high level of performance ... or special value to the employer'.

<sup>123</sup> *Lyon v St James Press Ltd* [1976] IRLR 215.

<sup>124</sup> Specific authorisation may be required for individual members who are not shop stewards: *Chant v Aquaboats* [1978] ICR 643.

<sup>125</sup> Agreement or consent of the employer is required for activities within working hours: *TULR(C)A* s 146(2)(b).

### III COMPARATIVE LINKAGES ON VOICE

We have traced two different approaches to freedom of association through a brief *excursus* into Australian and UK labour history, showing how a liberal individualist approach has dominated over collectivist approaches. The trends in both jurisdictions in recent decades have tended to result in weak or ‘thin’ expressions of collective voice. Australia and the UK have followed very different paths in labour history, where strong trade union movements grew in both countries out of quite different regimes. Conciliation and arbitration were instrumental in providing the state machinery to support a strong autonomous voice for trade unions in Australia whereas collective voice in the UK was promoted through autonomous collective bargaining. However with the loss of these institutions, collective voice has been replaced by more fractured and diffuse voice mechanisms. Paradoxically, the weakening of collective voice arose in Australia with the establishing of enterprise bargaining to replace the system of conciliation and arbitration, augmenting collective bargaining from 1993 onwards, whereas collective voice was diminished in the UK by means of reducing collective bargaining.

The *Fair Work Act* in Australia has strengthened collective voice mechanisms compared to the previous *Workplace Relations Act* era. However, the *Act* presents a mixed picture. The *Act* has strengthened the ability to take collective action. It has introduced innovative procedures to support unions in bargaining, which importantly avoid some of the complications experienced by unions in other countries such as the US and the UK.<sup>126</sup> However, individual rights and choices are firmly the dominant voice mechanisms adopted by the *Act*. This is particularly evident through the laws regarding the choice of bargaining representatives and the fact that a bargaining representative need not be a collective.<sup>127</sup> Trade unions are one of many potential voices in collective bargaining. This power given to the individual makes the collective voice vulnerable to the choice of disparate individuals who may or may not act consistently in favour of the collective. The ‘industrial activities’ protections also primarily protect the choices of individuals. The prime focus of the protection is the choice of the individual regarding whether to join a union or not, participate in lawful industrial activities or not participate in them, etc.<sup>128</sup> This paradigm, upon which the rights are built, obscures the need to protect the viability of the collective. Individual voice may also be weakened by the primacy given to choice. If a strong collective does not exist to represent the individual’s interests then the ability of the individual voice to have an impact in the face of other powerful interests is ‘muted’<sup>129</sup> or at least muffled.

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<sup>126</sup> *Fair Work Act* ss 176, 237: unions only need one member in the workplace to be a bargaining representative, avoiding the need to establish majoritarian support before they can be recognised during bargaining. As a bargaining representative, they also have the power to compel an employer to bargain if a majority support determination is obtained.

<sup>127</sup> *Ibid* s 176.

<sup>128</sup> *Fair Work Act* ss 346–7.

<sup>129</sup> Bogg and Ewing, above n 11.



In considering the UK environment, it might be helpful to note the influence of different notions of voice. As in Australia, traditional conceptions of voice expressed in terms of bargaining power have, both in state policy and other forms of discourse, been in competition with different paradigms, such as economic efficiency.<sup>130</sup> The inclusion of economic objectives, particularly in recent Human Resource Management ('HRM') models of voice,<sup>131</sup> has paved the way for a renewed ascendance of neo-liberal thinking on UK labour policy with the effect that trade unions have to some extent, become harnessed to business objectives, reducing their essential autonomy. Hyman has proposed the criteria of autonomy, legitimacy and efficacy as yardsticks to measure voice and representational mechanisms.<sup>132</sup> Judged by these criteria, it is hard to see that the voice of the British worker at an individual or collective level has been adequately safeguarded since 1979.

In terms of the structure and locus of worker voice in the UK, moves to apply broader principles of representativity to the workplace as a result of EU frameworks of information and consultation, have resulted in a bifurcation of voice mechanisms, with employers being able to consult with elected 'employee representatives' where no independent union is recognised. European Union-imposed requirements have thus promoted wider constituencies for the expression of individual voice, but this alternative representation has effectively reduced national collective bargaining.<sup>133</sup> Collective voice has been progressively weakened as non-union forms of employee representation such as 'workforce agreements' have been introduced in many areas of employment.

Economic imperatives have led to the decentralisation of wage fixing machinery in both jurisdictions. Different routes have been taken to confine bargaining to local levels. State-regulated enterprise bargaining is the preferred method in Australia, whereas the UK has reduced national collective bargaining with a variety of strategies including abolition of statutory wages councils for low-paid workers, compulsory competitive tendering in the public sector and outlawing of secondary industrial action.<sup>134</sup> The pursuit of flexibility has thus led to a reduction of collective voice as union monopoly power has been eroded. In this competitive climate, unions have been unable to attract individual members, particularly where preference is made on an individual cost-benefit analysis.<sup>135</sup>

The UK has not witnessed a return to any form of collectivisation, as has occurred in Australia, albeit in an 'attenuated'<sup>136</sup> form. The only major support for collective

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<sup>130</sup> Bogg and Novitz, above n 4, 324.

<sup>131</sup> For further discussion of these models, see *ibid* 340 ff.

<sup>132</sup> Richard Hyman, 'The Future of Employee Representation' (1997) 35 *British Journal of Industrial Relations* 309, 310–11.

<sup>133</sup> Deakin and Morris, above n 108, 870; see Paul Davies and Claire Kilpatrick, 'UK Worker Representation After Single Channel' (2004) 33 *Industrial Law Journal* 121.

<sup>134</sup> Deakin and Morris, above n 108, 38.

<sup>135</sup> Raday, above n 3, 360.

<sup>136</sup> Creighton, above n 54, 134.

bargaining to be introduced by the New Labour administration was a weak statutory recognition procedure<sup>137</sup> imposing a majoritarian requirement for union representation — a process which Australia has avoided. Against this background, individual voice ultimately remains fractured and uncertain. The UK's protection of freedom of association has recently been expanded in scope as a result of the discourse of human rights under art 11 by means of the intervention of the European Court of Human Rights. The recognition of rights vested separately in a trade union is an important step forward. These, however, will not concretise fully if trade unions are treated merely as associations of individual members.

#### IV CONCLUSION

The *Fair Work Act* is attempting to bring together strong individual choice mechanisms with legislative supports that also enable a strong collective voice to grow through collective bargaining. This attempt to balance collective and individual voice is an interesting experiment that seems not to have been attempted in other common law jurisdictions. It is too early to tell whether this experiment will also lead to stronger voice for workers overall in the traditional sense that we have adopted in this article. UK law has not, so far regained the balance that was lost when State policy promoting collective bargaining was reversed in the 1980s. Collective laissez-faire did not survive the strong economic currents which swept through the UK system of labour relations in this period.<sup>138</sup> If the balance of industrial forces were to be readjusted and a 'thicker' form of freedom of association introduced, perhaps following developments in the European Court of Human Rights, then UK collective voice might be re-invigorated and individual voice both stabilised and strengthened. This, however, is doubtful in the current chill winds of economic austerity.

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<sup>137</sup> *TULR(C)A* sch A1.

<sup>138</sup> In this sense, Hugo Sinzheimer's forebodings regarding the hegemony of 'capital's constitution' were indeed prescient: see above n 1.