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WORKER VOICE IN AUSTRALIA AND NEW ZEALAND: THE ROLE OF THE STATE RECONFIGURED?

ABSTRACT

In our introduction to this symposium, we consider the significance of the role played by the State in offering opportunities for workers' voice and ensuring (or preventing) its efficacy. We examine how this role is currently being reconfigured, tracking ideological shifts, the development of institutional apparatus, the function of the state as the 'model employer' and the potential opportunities (or otherwise) offered by 'constitutionalisation' of labour norms.

I INTRODUCTION

The idea of 'voice' and its relevance to employees inside and outside the workplace is the subject of a Leverhulme Trust funded study. Since 2011, we have been investigating potential legal mechanisms for the promotion of voice in a variety of common law countries: Australia, Canada, New Zealand, the United Kingdom and the United States. Our intention has been to identify common concerns arising in UK, North American and Australasian labour markets and to capture the justifications for worker voice offered therein. In each context, we have considered the adequacy of current legal mechanisms, as well as their reform (or even replacement), with reference to the potential objectives of 'voice'.

The papers contained in this symposium were selected from an abundant offering presented at the third of our international and comparative workshops on 'Voices at Work'. This event was held at RMIT University, Melbourne in July 2012. Earlier workshops took place in Oxford (July 2011) and Toronto (March 2012). All three sought to tease out the diverse contexts and ways in which 'voice' can be claimed. A further edited book, *Voices at Work: Continuity and Change* (Oxford University Press) to be published in 2014, will bring together the distinctive contributions from each jurisdiction, providing further comparative engagement.

Through these events, it has emerged that what began solely as an instrumental use of 'voice' — on the worker side as a means by which to secure certain economic entitlements in terms of pay and conditions¹ and on the employer side as a strategy

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¹ Sidney Webb and Beatrice Webb, *A History of Trade Unionism* (1898) cited in Alan Bogg and Tonia Novitz, 'Investigating "Voice" at Work' (2011–12) 33 *Comparative Labor Law and Policy Journal* 323, 327.

to improve the efficiency and productivity of business — has shifted to gain larger significance.² We do not deny the ongoing relevance of the economic objectives underlying political facilitation of legal mechanisms for voice; indeed, tensions of this kind emerge strongly in the papers set out in this special issue and we consider these further in the context of ‘third way’ attempts at their reconciliation. We further acknowledge that to employers’ and workers’ economic interests can be added those of each nation state, which may be seeking to attract greater investment, generate ever higher gross domestic product and produce more extensive tax revenue, particularly in a time of recession and financial insecurity.³

Yet, there is also a kind of ‘legitimacy’ claimed through voice which goes beyond economic objectives. This legitimacy can be linked to both the human right to free speech and the value of democratic engagement within public and private spheres. It can also be linked to the desire for an egalitarian society in which the most vulnerable are protected. The idea that unions can act as workers’ collective representatives in exercising voice thus has the potential to give their role a further status, arguably beyond that which is offered by their role in the mere maintenance of balance of economic bargaining power. It may provide a new platform from which to speak and be heard.⁴

Australian and New Zealand trade union engagement with the language of voice is perhaps not as extensive as that in the UK, where this alternative framing of union functions has acquired considerably currency.⁵ Yet we observe that the Electrical Trades Union (‘ETU’) describes the role of the Australian Council of Trade Unions (‘ACTU’) as providing ‘a strong voice for working people and their families in politics, the economy and the community’;⁶ while the NZ Council for Trade Unions describes itself as ‘the united voice for working people and their families in New Zealand’.⁷ Moreover, the adoption (in 2011) of the name ‘United Voice’ by what was formerly known as the Liquor, Hospitality and Miscellaneous Union (‘LHMU’) may indicate a trend in this direction.⁸

² Albert O Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Harvard University Press, 1970); Richard B Freeman, ‘Individual Mobility and Union Voice in the Labour Markets’ (1976) 66 *American Economy Association* 361; Richard B Freeman, ‘The Exit-Voice Tradeoff in the Labor Market: Unionism, Job Tenure, Quits and Separations’ (1980) 94 *Qualitative Journal of Economics* 643, cited in Bogg and Novitz, above n 1.

³ Eric Tucker, ‘Labor’s Many Constitutions (and Capital’s Too)’ (2011–12) 33 *Comparative Labor Law and Policy Journal* 355, 360 ff.

⁴ Although there may also be costs in phrasing workers’ entitlements in solely ‘democratic’ terms. See Shae McCrystal and Tonia Novitz, ‘“Democratic” Preconditions for Strike Action — A Comparative Study of Australian and UK Labour Legislation’ (2012) 28(2) *International Journal of Comparative Labour Law and Industrial Relations* 115, 121–30.

⁵ Bogg and Novitz, above n 1, 338–9.

⁶ Electrical Trades Union, *Links* (2011) <<http://www.etunational.asn.au/Links/Links.html>>.

⁷ New Zealand Council of Trade Unions, *About Us* (2010) <<http://union.org.nz/about>>.

⁸ See the Fair Work Australia decision: *Re Liquor, Hospitality and Miscellaneous Union* [2011] FWA 766 (15 February 2011). From 1 January 2013, Fair Work Australia became the Fair Work Commission.

In what kind of shape do we now find the prevalent forms of employee voice in Australia and New Zealand? As in most industrialised countries, trade union membership has been falling for some time (although in Australia, the rate of membership decline has slowed in the last few years).⁹ The latest figures show union density in Australia at 18.4 per cent of workforce,¹⁰ and 17.4 per cent in New Zealand.¹¹ This compares with 26 per cent in the UK.¹² Yet only approximately 33 per cent of British workers are covered by a collective agreement;¹³ while in Australia, there is 42 per cent coverage by collective agreements and a further 16.1 per cent covered by awards.¹⁴ In other words, it is not the attractiveness of trade union membership which determines efficacy of worker voice, but the legal and institutional context in which voice is exercised.

Even at the height of ‘voluntarism’ under the British tradition of ‘collective laissez-faire’, there is now widespread retrospective acknowledgement that strong State support was critical to the emergence of enduring collective bargaining structures in the postwar period.¹⁵ Given the Australasian historical tradition of conciliation and arbitration, the importance of State presence in steering and supporting structures of worker voice is surely less revelatory as an insight to many readers of the *Adelaide Law Review*. Nor is it a surprise to those familiar with the International Labour Organisation (‘ILO’) Conventions Nos 87 and 98, which stress the significance of the role of the State in promoting freedom of association, the right to organise and collective bargaining.¹⁶

⁹ See Rae Cooper and Bradon Ellem, ‘Trade Unions and Collective Bargaining’ in Marian Baird, Keith Hancock and Joe Isaac (eds), *Work and Employment Relations: An Era of Change* (Federation Press, 2011) 34; Stephen Blumenfeld, ‘Collective Bargaining’ in Erling Rasmussen (ed), *Employment Relationships: Workers, Unions and Employers in New Zealand* (Auckland University Press, 2010) 40.

¹⁰ Australian Bureau of Statistics, ‘Employee Earnings, Benefits and Trade Union Membership, Australia’ (Statistical Report, Catalogue No 6310.0, August 2011).

¹¹ Ministry of Business, Innovation and Employment, *Union Membership Return Report 2011* <<http://www.dol.govt.nz/er/starting/unions/registration/membership2011.asp>>.

¹² Department of Business Innovation and Skills, *Trade Union Membership 2011* (2012) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/16381/12-p77-trade-union-membership-2011.pdf>.

¹³ In 2008 estimated at 36 per cent and now in 2012 estimated widely at 33 per cent. See European Industrial Relations Observatory On-line, *United Kingdom: Industrial Relations Profile* (15 April, 2013) <http://www.eurofound.europa.eu/eiro/country/united.kingdom_4.htm>; Niels-Erik Wergin-Cheek, ‘Collective Bargaining Has Been Decentralised in the UK and Germany Over the Past Three Decades. But in Germany, Unions Have Retained Much More Power’ on London School of Economics and Political Science, *European Politics and Policy* (12 April 2012) <<http://blogs.lse.ac.uk/europpblog/2012/04/12/germany-uk-unions/>>.

¹⁴ Australian Bureau of Statistics, ‘Employee Earnings and Hours, Australia’ (Statistical Report, Catalogue No 6306.0, May 2012).

¹⁵ Keith D Ewing, ‘The State and Industrial Relations: “Collective Laissez-Faire” Revisited’ (1998) 5 *Historical Studies in Industrial Relations* 1.

¹⁶ See, respectively, International Labour Organisation, *Freedom of Association and Protection of the Right to Organise Convention 1948*, opened for signature 1948, 68 UNTS 17 (entered into force generally 4 July 1950; entered into force for Australia

Nevertheless, the papers in this special issue disclose a potentially radical reconfiguration of the State's role in Australia and New Zealand in respect of the regulation of worker voice in recent decades. This reconfiguration is likely to have significant effects on the character and shape of worker voice in the Australian and New Zealand systems. We detect four distinct dimensions to this process of reconfiguration: the role of ideology, the changing institutional context of the State's regulatory involvement, the State as employer, and the interface between industrial relations systems and wider democratic structures of public governance.

II IDEOLOGY

The recognition of a relation between labour law and political ideology is hardly a novel insight.¹⁷ In turn, the parameters of worker voice are structured and delineated in important ways by the forces of ideological contestation in the public sphere. The papers suggest that political ideology is increasingly fluid and contested in the Australasian context, with shifts in ideology leading sometimes to quite radical normative ruptures in the institutional and regulatory context of Australian and New Zealand labour law.

The natural reaction of a British labour lawyer viewing the history of Australasian labour law is to be captured by the institutional differences. The general system of compulsory conciliation and arbitration that characterised the Australasian approach is, through British eyes, an alien thing. It can be contrasted with the British theory of 'collective laissez-faire' which emphasised the role of *indirect* legal and administrative supports to a system of *voluntary* collective bargaining.¹⁸ Yet these institutional differences reflect a deeper ideological divergence. This emerges very strongly from Naughton and Pittard's paper where they trace the intricate web of institutional connections between the compulsory conciliation and arbitration structure, the system of 'awards' based on the 'test case' method, the privileged role of 'registered' trade unions in that system, and the normative concern to define and enforce a safety net of minimum labour standards shaped by the human needs associated with leading a fulfilling life in a civilised community.¹⁹

28 February 1973) art 11 (*ILO Convention No 87*); International Labour Organisation, *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) arts 3–4 (*ILO Convention No 98*).

¹⁷ See, eg, Sandra Fredman, 'The New Rights: Labour Law and Ideology in the Thatcher Years' (1992) 12 *Oxford Journal of Legal Studies* 24.

¹⁸ For a general discussion of this preference for indirect supports, see Alan L Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart Publishing, 2009) ch 1. Compulsory arbitration was not unknown to the British system: see Lord Wedderburn, *Labour Law and Freedom* (Lawrence and Wishart, 1995) 11.

¹⁹ Richard Naughton and Marilyn J Pittard, 'The Voices of the Low Paid and Workers Reliant on Minimum Employment Standards' (2013) 34 *Adelaide Law Review* 119.

This was an ideology of strong egalitarianism, based upon a political norm of protecting the vulnerable from the exploitation that would otherwise result from unimpeded free markets in the sphere of work.²⁰ Modern theories of egalitarian liberalism would seem to provide a strong philosophical validation of the Australian ideological tradition. For example, John Rawls famously articulated both the principle of ‘fair equality of opportunity’ and the ‘difference’ principle in his theory of justice.²¹ Fair equality of opportunity demands that social disadvantages be corrected through education and the limiting of undue concentrations of wealth, so that citizens can participate in the political community under conditions of fairness. The difference principle holds that inequalities are permitted only to the extent that this benefits the least advantaged group in society.

This ideology of egalitarianism, deeply embedded in the historical Australian and New Zealand tradition, contrasts in three important ways with the British ideology of ‘collective laissez-faire’. First, it is animated by the value of equality, whereas collective laissez-faire was animated by the value of liberty (and specifically the liberty of groups to pursue their own purposes through collective bargaining free from State interference).²² Secondly, it countenanced a much more interventionist role for State institutions to support a universal floor of entitlements to protect the most vulnerable workers. Thirdly, it led to an extensive set of institutional arrangements, especially the system of compulsory arbitration, which left a deep imprint on civil society. The papers in this symposium demonstrate that this ideology of egalitarianism has been intensely contested in recent decades. However, the papers also demonstrate that the ideology of egalitarianism has been more resilient in the face of those contestatory pressures than the British ideology of collective laissez-faire.²³ For example, and as Naughton and Pittard observe, it is notable that the *Fair Work Act 2009* (Cth) (*‘Fair Work Act’*) contains a multi-employer bargaining stream mechanism for ‘low paid workers’, although its lack of efficacy is clearly troubling.²⁴

There are at least three ideological shifts, more or less nascent, that can be traced in the papers. First, we detect the strong emergence of a neoliberal ‘deregulatory’ ideology in both Australia and New Zealand. One striking example can be seen in Walker and Tipple’s analysis of events surrounding the Hobbit dispute over the employment

²⁰ For a philosophical discussion of such a political norm, see Robert E Goodin, *Protecting the Vulnerable* (University of Chicago Press, 1985).

²¹ John Rawls, *A Theory of Justice* (Oxford University Press, revised ed, 1999). See also Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press, 2000).

²² Bogg, above n 18, 9–15.

²³ See Paul L Davies and Mark R Freedland, *Labour Legislation and Public Policy* (Oxford University Press, 1993) ch 1.

²⁴ See Richard Naughton, ‘The Low Paid Bargaining Scheme — An Interesting Idea, But Can it Work?’ (2011) 22 *Australian Journal of Labour Law* 214; 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) 152–4; Naughton and Pittard, above n 19.

status of contractors in the New Zealand film industry. The stark reality of threatened capital flight as a lever for the enactment of legislation designed to impede collective organisation is laid bare in their account of the dispute.²⁵ What is interesting here is the government's public narration of events through a neoliberal ideological prism, conflating the common good with the attraction of inward investment through deregulation.²⁶ Neoliberal ideology was also used as public justification of the Howard government's promotion of contractual flexibility through individualised 'Australian Workplace Agreements'. Bray and Stewart's paper demonstrates how 'voice' can be a powerful analytical device in drawing attention to 'process'. Agreement-making, whether individual or collective, is not the same as agreement-negotiating. The British experience demonstrates a paradox that is confirmed also in Bray and Stewart's paper: individualisation of contracting leads to a highly standardised and formalised contractual form that entrenches managerial authority in defining that contractual form, which is the very antithesis of individual 'flexibility' and thus individual voice.²⁷

More recently, we detect two ideologies emerging in the 'Fair Work' era. One might be described as a 'third way' competitiveness ideology. Labour market regulation is justified by its contribution to competitive firms based upon high quality and productive employment practices.²⁸ Workers should be treated fairly because workers treated fairly will tend to be more productive. In the British context, this has tended to be associated with new regulatory techniques such as 'light regulation', with regulatory methods responsive to managerial adaptability through mechanisms of derogation.²⁹ For example, Naughton and Pittard draw attention to the fact that the Fair Work Commission must be satisfied that a 'low paid' workplace determination will promote future enterprise bargaining and enhance the '*productivity and efficiency in the enterprises*'.³⁰ This is quintessential third way rhetoric.³¹

Another ideology might be described as 'liberal neutrality'. This involves a shift away from a perfectionist view of the State's role as *promoting* the regulatory

²⁵ Bernard Walker and Rupert Tipple, 'The Hobbit Affair: A New Frontier for Unions?' (2013) 34 *Adelaide Law Review* 65.

²⁶ For a theoretical analysis of the State's unique positioning through the technique of narrating public events in particular ways, see Chris Howell, *Trade Unions and the State* (Princeton University Press, 2005) ch 2.

²⁷ Mark Bray and Andrew Stewart, 'From the Arbitration System to the *Fair Work Act*: The Changing Approach in Australia to Voice and Representation at Work' (2013) 34 *Adelaide Law Review* 21; see also William Brown, Simon Deakin, David Nash, and Sarah Oxenbridge, 'The Employment Contract: From Collective Procedures to Individual Rights' (2000) 38 *British Journal of Industrial Relations* 611.

²⁸ Hugh Collins, 'Regulating the Employment Relation for Competitiveness' (2001) 30 *Industrial Law Journal* 17.

²⁹ Paul L Davies and Mark R Freedland, *Towards a Flexible Labour Market* (Oxford University Press, 2006) 242–3.

³⁰ Naughton and Pittard, above n 19.

³¹ Sandra Fredman, 'The Ideology of New Labour Law' in Catherine Barnard, Simon Deakin and Gillian S Morris (eds), *The Future of Labour Law* (Cambridge University Press, 2004) 9.

activities of representative trade unions (either through collective bargaining or through privileged participation in the system of arbitration awards) and towards a 'state neutrality' view. According to the latter view, the State should confine itself to implementing and enforcing a neutral procedural framework enabling workers to choose to be (or, equally, to choose not to be) represented by a particular trade union. This 'state neutrality' model would tend to be aligned with regulatory mechanisms such as ballot procedures, where the State's role is confined to aggregating workers' preferences, rather than shaping those preferences in order to promote particular substantive outcomes.³² The messages are somewhat complex in the *Fair Work Act*, and hence the difference between perfectionism and neutrality is likely one of degree rather than a simple binary distinction.³³ However, the emphasis on majoritarian ballot procedures to test employees' collective preferences in respect of collective agreements,³⁴ along with symmetrical protection for 'negative' rights of non-membership of a union and refusal to participate in trade union activities,³⁵ do indicate a creeping influence of US-style 'liberal neutrality' on the Australian system. It remains to be seen how enduring the imprint of egalitarian ideology will be, given its deeper historical basis and its institutional manifestations in the political economy of Australian conciliation and arbitration.

III THE CHANGING INSTITUTIONAL CONTEXT OF STATE INVOLVEMENT

The State is not a unitary phenomenon. Its institutional manifestations are manifold. State steering of industrial relations systems can occur through a variety of institutional forms: legislatures enacting statutory labour standards; governmental influence over the bargaining activities of the social partners exercised either through corporatist structures or through the use of public procurement; arbitration courts issuing binding awards; other forms of State supported dispute resolution machinery such as conciliation or mediation; and ordinary courts interpreting legislated standards or applying common law principles. The mix of these institutional forms, and thus the ways in which the State engages with other actors in the industrial relations system, is highly organic. It is sensitive to the political and constitutional structures in a particular legal system.³⁶ The papers in this special issue demonstrate how the institutional profile of the State has evolved in Australia and New Zealand. In turn,

³² For further discussion, see Alan L Bogg and Tonia Novitz, 'Recognition in Respect of Bargaining in the United Kingdom: Collective Autonomy and Political Neutrality in Context' in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, 2012) 225.

³³ 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, 13–17.

³⁴ Bray and Stewart, above n 27.

³⁵ Victoria Lambropoulos and Michael Wynn, 'Unfair Labour Practices, Trade Union Victimization and Voice: A Comparison of Australia and the United Kingdom' (2013) 34 *Adelaide Law Review* 43.

³⁶ For discussion in a comparative context, see Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1.

this has created new opportunities for positive State influence, while also creating new risks and impediments to the realisation of effective worker voice.

The historical centrepiece of the Australian institutional tradition was the conciliation and arbitration system introduced first in New Zealand, then in a number of Australian colonies and the Commonwealth, in the 1890s and 1900s.³⁷ That system, or rather those systems, placed voice through union representation front and centre — for example, in the Australian context, by bestowing certain legal privileges on registered trade unions (including the ability to compel employers to engage in the conciliation and arbitration process, leading to the making of industrial ‘awards’ regulating terms and conditions of employment).³⁸ Using Bray and Stewart’s taxonomy of regulatory modes this was a system of ‘delegated regulation’, with terms and conditions of employment set by an independent arbitral body. Other modes of regulation such as ‘statutory regulation’ or ‘collective agreement-making’ initially occupied a subsidiary role, although they have since gained in significance.

In theoretical terms, at least, this system might appear problematic in simultaneously impeding political and industrial channels of worker voice reflected in the enactment of statutory rights and the negotiation of collective agreements. Kahn-Freund famously disparaged compulsory arbitration as politically repugnant in its illiberal negation of group freedom in industrial civil society, a feature of totalitarian political regimes.³⁹ Yet institutions must be evaluated in their total social, political and economic context. The particular form of compulsory arbitration in Australia ensured a vigorously independent trade union movement, with registered trade unions given a privileged position in the formulation, variation and enforcement of awards.⁴⁰ In this way, and somewhat paradoxically, ‘delegated regulation’ through compulsory arbitration gave rise to an especially strong form of collective voice exercised through registered trade unions in the Australian system. The concept of award-making has survived through to the present day in the guise of the Fair Work Commission’s regulatory activities. However, it is an institutional structure that has undergone significant change.

These institutional changes often cast light on deeper shifts in the position and prestige of worker voice in Australian labour law. For example, Bray and Stewart observe that under the new regime of ‘modern awards’, annual wage reviews are conducted in a spirit of civic participation, soliciting submissions from a wide range of interested parties. As such, ‘unions receive no special treatment, though they

³⁷ See Stuart Macintyre and Richard Mitchell (eds), *Foundations of Arbitration* (Oxford University Press, 1989); Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) 29–34. See also Bray and Stewart, above n 27; Naughton and Pittard, above n 19.

³⁸ See further Bray and Stewart, above n 27.

³⁹ Otto Kahn-Freund, ‘Intergroup Conflicts and their Settlement’, in Otto Kahn-Freund, *Selected Writings* (Stevens Stevens, 1978) 41.

⁴⁰ A point acknowledged by Kahn-Freund in his later work: on which, see Paul L Davies and Mark R Freedland (eds), *Kahn-Freund’s Labour and the Law* (Stevens and Sons, 3rd ed, 1983) 147–53.

clearly remain influential “stakeholders”.⁴¹ This is also perhaps a reflection of the influence of principles of political neutrality, eschewing privilege for special interest groups, in the legislative schema. The changes in the nature and scale of ‘delegated regulation’ through compulsory arbitration have corresponded with an escalating role for other State institutions.

Since the late 1980s, statutory schemes of collective bargaining have overtaken conciliation and arbitration as the major focus for determining employment conditions in both Australia and New Zealand. In the latter, the increased emphasis on collective bargaining was interrupted by the operation of the *Employment Contracts Act 1991* (NZ) throughout the 1990s.⁴² This was followed by the shift back to collective voice mechanisms under the *Employment Relations Act 2000* (NZ), including the introduction of good faith bargaining obligations.⁴³ In Australia, a formalised system of ‘enterprise bargaining’ was initially grafted onto the traditional conciliation and arbitration framework, under the *Industrial Relations Reform Act 1993* (Cth).⁴⁴ Then, from 1996, union and non-union bargaining options⁴⁵ were accompanied by the availability of individual statutory agreements (known as ‘Australian Workplace Agreements’ or ‘AWAs’).⁴⁶ These were one of the main instruments through which the conservative Coalition government (1996–2007) sought to dilute collective voice for workers.⁴⁷ In contrast, the Labor government since 2007 has sought to re-orient Australia’s workplace relations system towards collective bargaining.⁴⁸ As in New Zealand,

⁴¹ Bray and Stewart, above n 27.

⁴² With its prioritisation of individualised negotiation, this legislation significantly weakened employee voice: see Raymond Harbridge (ed), *Employment Contracts: New Zealand Experiences* (Victoria University Press, 1993); Gordon Anderson, *Reconstructing New Zealand’s Labour Law: Consensus or Divergence?* (Victoria University Press, 2011).

⁴³ See Anderson, above n 42; Rasmussen, above n 9; Breen Creighton and Pam Nuttall, ‘Good Faith Bargaining Down Under’ (2012) 33 *Comparative Labor Law and Policy Journal* 257.

⁴⁴ See Richard Naughton, ‘The New Bargaining Regime under the *Industrial Relations Reform Act*’ (1994) 7 *Australian Journal of Labour Law* 147; Bray and Stewart, above n 27.

⁴⁵ See Marilyn Pittard, ‘Collective Employment Relationships: Reforms to Arbitrated Awards and Certified Agreements’ (1997) 10 *Australian Journal of Labour Law* 62.

⁴⁶ *Workplace Relations Act 1996* (Cth) pt VID; *Workplace Relations Act 1996* (Cth), as amended by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) pt VB. See, eg, Ron McCallum, ‘Australian Workplace Agreements: An Analysis’ (1997) 10 *Australian Journal of Labour Law* 50; Joel Fetter, ‘Work Choices and Australian Workplace Agreements’ (2006) 1 *Australian Journal of Labour Law* 210.

⁴⁷ 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; Cameron Roles and Michael O’Donnell, ‘The *Fair Work Act* and Worker Voice in the Australian Public Service’ (2013) 34 *Adelaide Law Review* 93.

⁴⁸ See Breen Creighton, ‘A Retreat from Individualism? The *Fair Work Act 2009* and the Re-Collectivisation of Australian Labour Law’ (2011) 40 *Industrial Law Journal* 116; Bray and Stewart, above n 27.

Labor's *Fair Work Act* imposes good faith bargaining requirements on employer and employee bargaining representatives involved in enterprise agreement negotiations.⁴⁹

A Government-initiated review found that (between 1 July 2009 and 31 December 2011) the *Fair Work Act* had;

extended the benefits of collective agreements to approximately an additional 440 000 employees. It has provided employees with a greater voice in the bargaining process by facilitating collective bargaining when a majority of employees wish to do so and by allowing employees to be effectively represented by their union.⁵⁰

However, some important limitations in the *Fair Work Act* bargaining framework have been highlighted in its first few years of operation, including narrow interpretations of the good faith bargaining requirements, which have allowed employers to (for example): bypass union bargaining representatives by communicating directly with employees during agreement negotiations;⁵¹ engage in 'surface bargaining';⁵² and request employees to vote on a proposed agreement once an impasse is reached, notwithstanding that a union wishes to continue negotiations.⁵³ There are some parallels here with the situation in New Zealand⁵⁴ — in both countries, good faith bargaining has turned out to be an avenue paved with complexities, rather than a

⁴⁹ *Fair Work Act 2009* pt 2–4, which contains a number of other innovations aimed at promoting collective bargaining, including 'majority support determinations' (the effect of which is to compel a reluctant employer to bargain, akin to the union recognition mechanisms operating in North American collective bargaining systems); and the 'low paid bargaining stream'. See Creighton and Nuttall, above n 43; Breen Creighton and Anthony Forsyth (eds), above n 24; Naughton and Pittard, above n 19.

⁵⁰ John Edwards, Ron McCallum and Michael Moore, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation* (Australian Government, June 2012) 153, footnote omitted (and see further at chs 6 and 7). See also Anthony Forsyth, 'The Impact of "Good Faith" Obligations on Collective Bargaining Practices and Outcomes in Australia, Canada and the United States' (2011) 16 *Canadian Labour and Employment Law Journal* 1.

⁵¹ *Construction, Forestry, Mining and Energy Union v Tahmoor Coal Pty Ltd* [2010] FWA 3510 (5 May 2010). See Alex Bukarica and Andrew Dallas, *Good Faith Bargaining under the Fair Work Act 2009: Lessons from the Collective Bargaining Experience in Canada and New Zealand* (Federation Press, 2012).

⁵² Cf *Endeavour Coal Pty Ltd v Association of Professional Engineers, Scientists and Managers, Australia (Collieries' Staff Division)* [2012] FWA 1891 (22 March 2012); *Endeavour Coal Pty Ltd v Association of Professional Engineers, Scientists and Managers, Australia* (2012) 206 FCR 576.

⁵³ *Construction, Forestry, Mining and Energy Union v Tahmoor Coal Pty Ltd* [2010] FWA 3510 (5 May 2010); see also, eg, *Australian Municipal, Administrative, Clerical and Services Union v Global Tele Sales Pty Ltd* [2011] FWA 3916 (22 June 2011).

⁵⁴ See Pam Nuttall, 'Collective Bargaining and Good Faith Obligations in New Zealand' in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, 2012) 290; Anderson, above n 42; Creighton and Nuttall, above n 43.

strong ‘shot in the arm’ to collective representation and worker voice.⁵⁵ It may be that the ‘neutrality’ implicit in requiring good faith from both sides does not fit with the reality of industrial relations.

Some of the papers also identify the importance of the courts in shaping regimes of worker voice. The common law, in particular, never ceases to surprise. In Walker and Tipple’s fascinating exploration of the twists and turns of the Hobbit dispute, they point to the progressive judgment of the New Zealand Supreme Court in *Bryson v Three Foot Six Ltd* (‘*Bryson*’).⁵⁶ The Court disregarded the label inserted into the contractual documentation and concluded on the basis of the reality of the relationship that a ‘contractor’ in the film industry was an employee rather than an independent contractor. The effect of this was to circumvent the doctrine of restraint of trade, which might otherwise restrict collective action by workers in the film industry. There are parallels with recent developments in the UK, where the United Kingdom Supreme Court in *Autoclenz Ltd v Belcher* (‘*Autoclenz*’) recently deployed a purposive approach to the characterisation of contractual relations, in circumstances where the true agreement suggested personal employment and this diverged from sham contractual documentation designed to suggest otherwise.⁵⁷ In the New Zealand context, this bold judicial approach was reversed by a special legislative amendment introduced under intense pressure from a multinational film company threatening capital flight. This legislative amendment reasserted the primacy of the written contractual documentation. In the UK context, the development of a purposive doctrine was necessitated by longstanding legislative inaction to remedy the precarious position of those engaged in sham self-employment.⁵⁸ The institutional insulation of courts from the intense political pressures wielded by economically powerful actors on the legislative process means that the common law sometimes reveals itself as a technique of emancipation. Walker and Tipple’s paper, along with recent UK developments, suggests that it is distorting simply to assert that the common law is, at all times and in all places, (to use Eric Tucker’s terminology) ‘Capital’s Constitution’.⁵⁹

⁵⁵ This generally reflects North American experience with good faith bargaining laws (although the Australian model is arguably more effective than its United States or Canadian counterparts): see, eg, Bukarica and Dallas, above n 51; Forsyth, ‘The Impact of “Good Faith” Obligations on Collective Bargaining Practices and Outcomes in Australia, Canada and the United States’, above n 50; 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; Sara Slinn, ‘The Canadian Conception of Collective Representation and Bargaining’ in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia’s Fair Work Act in International Perspective* (Routledge, 2012) 246.

⁵⁶ [2005] 3 NZLR 721.

⁵⁷ [2011] 4 All ER 745. For discussion, see Alan L Bogg, ‘Sham Self-Employment in the Supreme Court’ (2012) 41 *Industrial Law Journal* 328.

⁵⁸ Alan L Bogg, ‘Sham Self-Employment’, above n 57, 329.

⁵⁹ Tucker, above n 3.

Yet Lambropoulos and Wynn's paper demonstrates that any assessment of the courts' regulatory role should be measured and circumspect. Specifically, courts in Australia and the UK have often adopted meagre interpretations of statutory freedom of association provisions that do little to protect *trade union* voice from employer victimisation. In a recent decision of the High Court of Australia such a provision was read very narrowly.⁶⁰ The employee, a trade union workplace representative, was subjected to disciplinary action for sending an email to union members alleging that the employer was implicated in fraudulent activities and encouraging union members to seek support from the union if they were affected by the alleged fraud. Mr Barclay and his union brought a claim alleging adverse action attributable to his status as a union official and engaging in industrial activity contrary to s 346 of the *Fair Work Act*. This statutory provision was supported by a reverse onus clause. In the view of the Court, however, 'a person who happens to be engaged in industrial activity should not have an advantage not enjoyed by other workers'.⁶¹ The effect of this is to insert a strict comparator test into s 346, enabling an employer to discharge the onus where it can demonstrate that a non-union employee would have been treated in the same way. Where the adverse treatment would have been dispensed equally to workers who are not trade unionists, this operates as an effective defence to a claim of *discriminatory* victimisation. The UK case law is similarly replete with examples of judicial reasoning that are obtuse to the collective realities of workplace organisational activities.⁶² Despite progressive decisions such as *Bryson* and *Autoclenz*, these other cases demonstrate that the courts are often insufficiently attuned to the distinctive position of *trade union* voice when interpreting statutory provisions.

The profile of the legislature has also changed in tandem with this realignment of 'delegated regulation' in the Australian system. As Naughton and Pittard's article outlines, there has been a gear change in the regulatory significance of legislated standards in providing a 'floor of rights' for all workers through the mechanism of the 'National Employment Standards' ('NES'). This is supplemented by a safety net of 'modern awards' administered by the Fair Work Commission. Naughton and Pittard identify a series of powerful concerns about the NES mechanism. Specifically, an increasing reliance on statutory labour standards risks static rigidity. Statutory standards may only be amended if channels of political influence are open to worker voice. As the authors observe, 'there is no systemic or enshrined right to seek and request such change, let alone ensure that it actually occurs'.⁶³ By contrast, channels of political influence seem highly receptive to global capital, as Walker and Tipple's account of the Hobbit dispute demonstrates.

⁶⁰ *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 290 ALR 647. Cf *Pearce v W D Peacock Co Ltd* (1917) 23 CLR 199.

⁶¹ *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 290 ALR 647, 662 [60].

⁶² Most notoriously, *Carrington v Therm-A-Stor* [1983] ICR 208, as discussed by Lambropoulos and Wynn, above n 35.

⁶³ Naughton and Pittard, above n 19.

IV THE STATE AS EMPLOYER

The sphere of public sector employment is vital in shaping the wider context of worker voice within a particular legal system. In Howe's terms, when the State acts as an employer it also acts as a 'role model' for employers in the private sector.⁶⁴ The ways in which the State conceptualises and implements voice arrangements in respect of its own public sector employees is therefore symbolically significant in the wider labour market, while also being of vital importance to public sector employees themselves. These signalling effects could be very powerful in steering the behaviour of private actors by identifying certain patterns of behaviour as normatively desirable.⁶⁵ It is therefore important for an evaluation of the 'State as employer' to be incorporated into an analysis of the mechanisms that States have at their disposal to steer behaviour and shape private preferences. A narrow focus on labour relations statutes will miss important elements of the total regulatory picture. Public sector employment practices are the living ideology of the government's industrial relations agenda. This is of vital contemporary significance in comparative labour law scholarship. The recent financial crisis has precipitated what some commentators have described as a 'war' on public sector collective bargaining and trade unionism in many US states and in the UK, driven by a political commitment to public spending reductions to reduce budget deficits.⁶⁶ An understanding of the recent Australian experience enables us to identify whether Anglo-American experience is part of a broader pattern of convergence, and the possibilities for a re-imagining of trade union strategies of resistance to public sector attacks in the US and the UK.

To this end, Roles and O'Donnell's analysis of collective bargaining in the Australian Public Service provides powerful insights into the regulatory context of Australian public sector collective bargaining. The *Fair Work Act* marked a decisive break with the neoliberalism of the Howard era which had 'prioritized managerial unilateralism, individualism and union exclusion in employment relations'.⁶⁷ Roles and O'Donnell conclude that this shift in ideological and regulatory context led to strongly mobilised trade union voice in public sector collective bargaining in the 2011–12 bargaining round, contributing to bargaining outcomes that maintained real wages and resisted the erosion of other terms and conditions of employment. While Australian political discourse has not been untouched by

⁶⁴ 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.

⁶⁵ See John Godard, 'Institutional Environments, Employer Practices, and States in Liberal Market Economies' (2002) 41 *Industrial Relations* 249, cited in Howe, above n 64, 183.

⁶⁶ For an account of the 'war' in the US context, see Richard B Freeman and Eunice Han, 'The War against Public Sector Collective Bargaining in the US' (2012) 54 *Journal of Industrial Relations* 386. On the UK position, see Alan L Bogg and Keith D Ewing, *The Political Attack on Workplace Representation — A Legal Response* (Institute of Employment Rights, 2013).

⁶⁷ Roles and O'Donnell, above n 47.

the rhetoric of austerity and the imperatives of budgetary restraint (particularly in the States of Queensland and New South Wales), Roles and O'Donnell's analysis present a cautiously optimistic prospectus for public sector trade unionism. Three features of their analysis are particularly worthy of note.

First, their analysis reinforces the importance of considering the bargaining activities of social actors in their total regulatory context. Specifically, public sector bargaining by employers in the Australian Public Service is guided by the principles set out in the *Australian Public Service Bargaining Framework* ('*APSBF*'),⁶⁸ and in many ways the *APSBF* adopts a more promotional tone towards trade unions than the formal legal requirements in the *Fair Work Act*, which seem more closely aligned with a 'liberal neutrality' ideology. This supports the approach of those who reject a 'legal positivistic' methodology focused narrowly on the State's regulatory activity as implemented through formal statutory laws.⁶⁹ Secondly, they identify ways in which creative strategies for generating industrial pressure can emerge out of statutory rules designed to regulate and restrict industrial action. Thus, management in some public sector organisations put 'early offer' agreements to the workforce for a direct vote as a bargaining tactic, given that a majority of employees voting in favour would validate such a collective agreement under the statutory framework. Roles and O'Donnell demonstrate how unions used this opportunity to successfully mobilise employees to vote 'no', which then served to fortify the unions' bargaining positions. In a similar vein, strike ballots were also used successfully by unions to mobilise social pressure on employers. These findings echo earlier research on the use of mandatory strike ballots by unions in the UK to strengthen their negotiating position.⁷⁰ It also underscores the unpredictability of regulatory consequences in this area of the law, especially where regulatory design might reflect trite assumptions about driving wedges between the 'moderate' voices of individual employees and the 'immoderate' voice of the trade union through 'democratic' ballot procedures. Finally, the principles in *APSBF* reflect the dominance of a 'third way' competitiveness ideology in requiring salary increases to be matched by productivity improvements, and subject to an annualised wage increase ceiling of 3 per cent. While the Australian public sector unions managed to circumvent this restriction through smart bargaining in the 2011–12 round, the UK experience suggests that the ideological membrane between competitiveness and deregulation is somewhat thin and highly porous. Australian unions need to be vigilant to this kind of ideological slippage and elision, the consequences of which can be quite stark for public sector collective bargaining.

Viewed in comparative perspective, Roles and O'Donnell's paper suggests that there is no evidence of an Australian alignment with the Anglo-American pattern of events in public sector collective bargaining. In fact, the dynamics of events differ in important ways in the US and the UK.

⁶⁸ Australian Public Service Commission, *APS Public Service Bargaining Framework* (2011) <<http://www.apsc.gov.au/publications-and-media/current-publications/aps-public-service-bargaining-framework>>.

⁶⁹ Howe, above n 64; Ewing, above n 15.

⁷⁰ Jane Elgar and Bob Simpson, *The Impact of the Law on Industrial Disputes in the 1980s* (Institute of Employment Rights, 1992).

In the US, the 'war' is being conducted at the state level led by the election of conservative Republican governors in states as diverse as Indiana, Missouri and Wisconsin.⁷¹ Public sector employees are not covered by the federal labour relations statute, the *National Labor Relations Act*.⁷² Instead, public sector collective bargaining is regulated at state level with legal frameworks ranging from supportive through to prohibitive. As Freeman and Han's account demonstrates, the retrenchment of state regulation has sometimes involved the revocation of executive orders permitting public sector collective bargaining, as in Indiana.⁷³ It has sometimes involved the legislative dismantling of laws supporting collective bargaining and the substitution of a more restrictive legal regime, as in Wisconsin.⁷⁴ This regulatory context in the US, and especially its federal dimension, means that the optimistic prospectus offered by Roles and O'Donnell on the Australian trajectory may not shed much light on the American prospectus. Specifically, state level public sector employees in the US are not covered by the general statutory framework specifying a legal duty to bargain in good faith,⁷⁵ whereas in Australia the *Fair Work Act* framework governs the relations of both private and federal public sector employees.⁷⁶ This general statutory coverage provides an important legal bulwark against rapid shifts in the governance of Australian public sector employment, whereas the political revocation of executive orders in some US states such as Indiana has demonstrated such instruments to be a precarious foundation for worker voice.⁷⁷

In the UK the problems have been somewhat different. The Coalition government has presided over a radical shift in public policy regarding trade unions and collective bargaining, from neutrality to thinly disguised hostility. In the public sector, the victimisation of trade union representatives has been a growing problem, and this has been coupled with the recent issuing of executive guidance to reduce trade union time off and facilities time in the public sector.⁷⁸ Compulsory collective bargaining over superannuation terms in civil service employment has been unilaterally removed

⁷¹ For an excellent discussion, see Freeman and Han, above n 66.

⁷² *National Labor Relations Act of 1935*, 29 USC §§ 151–69.

⁷³ Freeman and Han, above n 66, 390.

⁷⁴ *Ibid* 391.

⁷⁵ *Ibid* 388.

⁷⁶ The *Fair Work Act* also regulates the employment of public sector employees in the state of Victoria, and in the Australian Capital Territory and Northern Territory.

⁷⁷ See Freeman and Han, above n 66, 390. This point has also been made by Howe in respect of 'non-legislative' techniques of support in the Australian context (Howe, above n 64, 200), though the existence of the *Fair Work Act* as a statutory framework provides an important point of contrast with the US position.

⁷⁸ Cabinet Office, *Consultation on Reform to Trade Union Facility Time and Facilities in the Civil Service* (8 October 2012) <<https://www.gov.uk/government/consultations/reform-to-trade-union-facility-time-and-facilities-in-the-civil-service>>. According to *The Guardian*, these changes represented a 'massive clampdown on trade union activities in the civil service': Patrick Wintour and Nicholas Watt, 'Cabinet Office: Maude to Curb Trade Union Activities of Civil Servants', *The Guardian* (London), 6 October 2012, 7.

by legislative enactment, such that the Civil Service Compensation Scheme (once a monument to collective bargaining) emerges as highly ineffectual.⁷⁹ In the National Health Service, legislative reform enables the contracting out of healthcare provision, with the subsequent likelihood of a reduction in collective bargaining units and industrial muscle.⁸⁰ In the UK context, the general statutory law on freedom of association rights applies fully to public sector employees,⁸¹ but those protections have been interpreted so restrictively by the courts that the protection offered is rather scant.⁸² This leaves public sector voice highly sensitive to ideological shifts in the political complexion of the government: there is a form of statutory entrenchment of freedom of association rights, but what is entrenched is so vapid that it is ineffective as a brake on radical swings towards a highly deregulatory agenda.⁸³ Thus, Roles and O'Donnell's optimistic prospectus for Australia holds as little relevance for UK as for US public sector labour relations, at least at the current time.

V WORKER VOICE AND THE DISCOURSE OF 'CONSTITUTIONALISATION'

Lambropoulos and Wynn invoke the discourse of constitutionalisation as an opening salvo in their paper. Of course, constitutionalisation is a most slippery concept. As Harry Arthurs has observed, it is a form of discourse that encompasses 'multiple models' not all of which may be compatible with each other.⁸⁴ Yet its analytic value is that it directs attention to the ways in which worker voice is nested within a broader set of political and constitutional structures. Worker voice is a facet of political governance. It reminds us that labour law is just one domain within which legal norms and structures might realise (or impede) democratisation through worker voice. Other domains such as public law and constitutional law should also be brought more fully into view. In our view, this vital analytic dimension is touched upon by the papers in this symposium in three important ways.

⁷⁹ See the effect of the *Superannuation Act 2010* (UK), which removed the administrative entitlement of workers (under statute) to collective negotiation over such terms under what was section 2(3) of the *Superannuation Act 1972* (UK). See, inter alia, *R (PCS) v Minister for the Civil Service* [2010] ICR 1198; and *PCS v Minister for the Civil Service* [2011] EWHC 2041 (10 August 2011), discussed in Tonia Novitz, 'Labour Rights and Property Rights: Implications for (and Beyond) Redundancy Payments and Pensions?' (2012) 41 *Industrial Law Journal* 136, 153–60.

⁸⁰ See the *Health and Social Care Act 2012* (UK) and further Bogg and Ewing, above n 66.

⁸¹ Except as regards industrial action for certain limited groups of public sector workers, especially firefighters and prison workers, and others working in key industries such as water provision and telecommunications; in respect of which, see Simon Deakin and Gillian Morris, *Labour Law* (Hart Publishing, 6th ed, 2012) 1045.

⁸² See *Carrington v Therm-A-Stor* [1983] ICR 208.

⁸³ See Lambropoulos and Wynn, above n 35.

⁸⁴ Harry Arthurs, 'The Constitutionalization of Employment Relations: Multiple Models, Pernicious Problems' (2010) 19 *Social and Legal Studies* 403. For a broader view of the discourse, see Ruth Dukes, 'Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund, and the Role of Labour Law' (2008) 35 *Journal of Law and Society* 341.

First, ‘constitutionalisation’ might imply the entrenchment of a cluster of labour rights.⁸⁵ Entrenchment might occur in a strong form through a written constitution, or it might involve weaker entrenchment through a set of statutory rights. The papers demonstrate how necessary it is to engage in a careful assessment of the virtues and vices of entrenchment. On the one hand, entrenchment might lead to a kind of ‘ossification’ of the kind lamented by Cynthia Estlund in the US context, where structural and institutional barriers in the structures of democratic governance impede necessary political change.⁸⁶ A number of the papers highlight this risk with the rising significance of statutory labour standards in the Australian system.⁸⁷ On the other hand, Walker and Tipples’ analysis of the Hobbit dispute draws attention to the ways in which some degree of ossification can be very valuable in impeding rapid legislative changes precipitated by powerful global corporations seeking favourable regulatory concessions in exchange for economic investment. The basis of public sector labour relations in discretionary executive instruments also points to the virtue of ossification. Ministerial orders and codes of practice can disappear quietly. Legislative repeal is a public legislative act that must be conducted in the public forum. This also intensifies the scrutiny of the integrity of the democratic process, the ways in which it is blocked to workers’ voices (whether through trade unions or otherwise) and the ways in which it is open to the voice(s) of capital.

Secondly, the structure and function of collective bargaining is a matter of vital significance. Australasian labour law has been constructed around a model of decentralised enterprise-based bargaining, rather than European-style sectoral collective bargaining. This has enormous political ramifications. Keith Ewing has drawn attention to a most important distinction between ‘representative’ and ‘regulatory’ modes of collective bargaining.⁸⁸ The Anglo-American and, we venture to suggest, the Australasian model, envisage collective bargaining as a private market activity conducted by trade unions on a decentralised basis as agents of a circumscribed bargaining unit. This is coupled with a consent-based model of representational legitimacy, either through a pluralistic system of members-only agency bargaining or through majoritarian procedures. By contrast, the ‘regulatory’ mode conceives of collective bargaining as a public regulatory activity conducted either on a sectoral or a national level. It is therefore a form of public governance, more akin to legislating than bargaining.⁸⁹ This is aligned with a more organic view of trade unions, with trade unions enjoying their own prerogatives as institutions with their own inherent legitimacy.⁹⁰ In this respect, trade unions acquire their own standing in the constitutional order quite apart from any authorising act of consent by workers. This

⁸⁵ Arthurs, above n 84, 405.

⁸⁶ Cynthia L Estlund, ‘The Ossification of American Labor Law’ (2002) 102 *Columbia Law Review* 1527.

⁸⁷ Bray and Stewart, above n 27, Naughton and Pittard, above n 19.

⁸⁸ Keith D Ewing, ‘The Function of Trade Unions’ (2005) 34 *Industrial Law Journal* 1.

⁸⁹ For discussion, see Alan L Bogg, ‘The Death of Statutory Union Recognition in the United Kingdom’ (2012) 54 *Journal of Industrial Relations* 409, 410.

⁹⁰ Bogg, above n 18, 29–33.

has obvious implications for the extent to which wider democratic processes are permeable to workers' interests articulated through trade unions.

A process of coerced decentralisation of collective bargaining is now under way in Europe, especially in countries such as Greece that have sought bailout packages administered by the troika of the International Monetary Fund, the European Central Bank and the European Commission.⁹¹ Decentralisation is viewed by critics as a technique of disempowerment of labour's collective voice. European observers will watch the Australian and New Zealand experience anxiously to determine whether this correlation of decentralisation and disempowerment is a necessity or a contingent fact.

Finally, it is vital to assess the potential for constitutionalised human rights norms to infuse processes of voice in order to enhance the 'capabilities' of workers to exercise real democratic influence over their working lives. In this respect, Reilly's exploration of the limitations of voice in ameliorating patterns of gender inequality in New Zealand universities is salutary.⁹² Despite the provision of voice through participatory workplace mechanisms, subtle and invidious cultural and social constraints can silence voice through fear or distort voice through false consciousness. Moreover, we should also be wary of assuming that women's interests are unitary. Women's experiences and interests are rich, diverse and varied, and we should expect voice to reflect that variety.⁹³ The 'reflexive law' paradigm creates procedural spaces, within which those voices can be heard. On this reflexive approach, communicative spaces are structured by human rights norms that augment what Deakin and Koukiadaki have termed 'capability for voice'.⁹⁴ Reilly's paper points to areas for further investigation. Specifically, it raises difficult issues of regulatory theory to ascertain *why* legal gender equality norms are failing to enable the voice capabilities of women workers. Given the conclusions of Deakin and Koukiadaki that trade unions significantly enhance voice capability within the context of consultation over corporate restructuring,⁹⁵ we think that this raises

⁹¹ Aristeia Koukiadaki and Lefteris Kretsos, 'Opening Pandora's Box: The Sovereign Debt Crisis and Labour Market Regulation in Greece' (2012) 41 *Industrial Law Journal* 276; see also Youcef Ghellab and Konstantinos Papadakis, 'The Politics of Economic Adjustment in Europe: State Unilateralism or Social Dialogue?' in International Labour Organisation, *The Global Crisis: Causes, Responses and Challenges* (International Labour Organisation, 2012) 81.

⁹² Amanda Reilly, 'Voice and Gender Inequality in New Zealand Universities' (2013) 34 *Adelaide Law Review* 81.

⁹³ For a 'reflexive law' analysis of this phenomenon, see Wanjiru Njoya, 'Job Security in a Flexible Labor Market: Challenges and Possibilities for Worker Voice' (2012) 33 *Comparative Labor Law and Policy Journal* 459.

⁹⁴ Simon Deakin and Aristeia Koukiadaki, 'Capability Theory, Employee Voice, and Corporate Restructuring: Evidence from UK Case Studies' (2012) 33 *Comparative Labor Law and Policy Journal* 427, drawing upon Amartya Sen, *Development as Freedom* (Oxford University Press, 2000).

⁹⁵ *Ibid.*

interesting lines of enquiry in the sphere of gender equality too. Reilly suggests that channelling voice through trade unions might ameliorate some of the difficulties she identifies, but as trade union representation is already an established part of the infrastructure of New Zealand universities, she recognises that something more than this may be necessary.⁹⁶ There is a reminder here that the State cannot necessarily, by offering opportunities for trade union representation, ensure access to voice. Capabilities are likely to be internally as well as externally constructed, posing the question as how trade unions (as workers' collectivities) can themselves reflect upon and reformulate what they offer around voice(s).

One particular fertile channel of constitutionalisation in the UK and Canada has been the utilisation of constitutional litigation to develop fundamental labour rights such as the right to collective bargaining. In Canada this has culminated in the recent Supreme Court of Canada decision in *Fraser v Ontario*.⁹⁷ In the UK, constitutional litigation strategies have been focused upon art 11's protection of freedom of association in the ECHR,⁹⁸ with a spate of recent case law recognising fundamental rights to collective bargaining and strike as inherent in the general protection of the right to form and join trade unions 'for the protection of his interests'.⁹⁹ The potentials and pitfalls of constitutional litigation in this sphere has been fiercely contested, though we agree that 'as conventional voluntary and political modes of action have been battered by a sustained neoliberal assault on workers' interests, constitutional litigation has emerged as another possible strategy for the vindication of workers' fundamental labour rights'.¹⁰⁰ The distinctive constitutional arrangements in Australia and New Zealand would seem to preclude this as a viable legal strategy at the present time. This may prove to be a rather acute factor for workers in the Antipodes, especially in the New Zealand context. As Walker and Tipples' paper demonstrates, fundamental ILO norms were simply disregarded in the Hobbit dispute. Scholars such as Tucker have rightly drawn attention to the ways in which labour's international constitution in the ILO setting is 'soft' when measured against the metric of enforceability.¹⁰¹ The constitutional litigation in *Fraser* and *Demir and Baykara* provides a potentially powerful technique for 'hardening' ILO norms in national settings.¹⁰²

⁹⁶ Reilly, above n 92.

⁹⁷ [2011] 2 SCR 3.

⁹⁸ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 11.

⁹⁹ On the right to collective bargaining, see *Demir v Turkey* [2008] Eur Court HR 1345; on the right to strike, see *Enerji Yapi Yol-Sen v Turkey* [2009] Eur Court HR 2251.

¹⁰⁰ Alan L Bogg and Keith D Ewing, 'A (Muted) Voice at Work? Collective Bargaining in the Supreme Court of Canada' (2012) 33 *Comparative Labor Law and Policy Journal* 379, 413.

¹⁰¹ Tucker, above n 3.

¹⁰² See, for an excellent exploration of this potential, Keith D Ewing and John Hendy, 'The Dramatic Implications of *Demir and Baykara*' (2010) 39 *Industrial Law Journal* 2.

VI CONCLUSION

In the introduction to this symposium on Australasian ‘Voice at Work’, we have sought to explain the origins of our project and how the papers offered here provide a valuable resource for scholars and practitioners assessing the trajectory of worker voice in Australia and New Zealand. While we cannot do full justice to the nuance and richness of the collection, we suggest a deeper theme that recurs across the contributions, namely the role of the State in steering mechanisms for worker voice and the ways in which that role is currently being reconfigured.

We note that an egalitarian tradition played a profound role in the origins of Australian and New Zealand industrial relations law, but is (as is the case elsewhere) being challenged by the neoliberal discourse of choice and economic efficiency. In terms of institutions, we observe the shift from a central role for the State in conciliation and arbitration of awards in which unions were given a privileged position to other institutional forms which contemplate non-union actors and indeed greater individualisation of negotiation over terms and conditions. This is a shift perhaps more stark in New Zealand than in Australia, but one which all our contributors highlight as a potential concern. Notably, in neither country have the statutory good faith bargaining requirements reaped the benefits apparently intended.

The apparent weakness of trade unions as political actors may have the potential to be remedied by a strongly mobilised union voice in the public sector (and Australia offers a powerful example of what can be achieved), but in the US and the UK we have been made painfully aware of the fragility of such entitlements. In this sense, the comparative exercise can only be taken so far.

The inverse is also true, namely that Australia and New Zealand lack the scope for constitutional litigation which could reinforce and prioritise the status of labour rights as fundamental human rights, which we have observed in other jurisdictions. There remains, therefore, the potential peril that workers’ freedom of association (and the freedom of speech that they thereby achieve) remains subject to political repeal and strategies of legislative restriction. The silencing of worker voice is an action unlikely to be taken by any State in totality, but remains a matter of degree as opposed to an absolute.

The Australasian message on voice is therefore mixed and complex. While not only the State has a part to play here, we can identify the myriad ways in which the State’s role remains significant. This much we can detect from the effects of its manifest configurations and reconfigurations in an Australian and New Zealand setting. In different ways, the papers also reveal the vital respect in which deeply embedded public political philosophies are often the ‘silent prologue’ to legal norms, institutions and structures.¹⁰³

¹⁰³ On the concept of ‘public political philosophy’, see Michael J Sandel, *Democracy’s Discontent* (Harvard University Press, 1998) ch 1. The terminology of ‘silent prologue’ is borrowed from Ronald Dworkin, *Law’s Empire* (Fontana, 1986) 90.