CHAPTER 1

WORK AND THE LAW IN THE 21ST CENTURY

This introductory chapter makes the case for a special field of labour law and places the development of Australian labour law in its international and historical context. The constitutional foundations of federal legislation in this field are explained, including their reliance on the corporations and external affairs powers to build a (largely) national system under the *Fair Work Act*. The chapter concludes with a guide to the remainder of the book.

REGULATING WORK

1.01 The significance of work

The relationships between workers and those who engage their labour are among the most important in contemporary society. Work contributes to personal and collective economic and social wealth; work provides a means for self-expression, and mutual advancement; work is a vital aspect of our personal identity and our realisation of purpose in our lives. The *International Covenant on Economic, Social and Cultural Rights* (ICESCR) recognises a 'right to work, which includes the right of everyone to the opportunity to gain [their] living by [their] work which [they] freely [choose or accept]'.[1] According to the ICESCR, the right to work 'is essential for realizing other human rights and forms an inseparable and inherent part of human dignity'.[2] The laws a society adopts in regulating these relationships are consequently enormously influential in constituting society itself, and reveal its most essential values.

1 Direct quotes from sources are edited to adopt gender inclusive language, with changes shown in square brackets.

2 CESCR, General Comment No 18, Article 6 of the ICESCR, E/C12/GC/18 (6 February 2006), [1]. For comprehensive commentary on ICESCR Article 6, see B Saul, D Kinley and J Mowbray *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (2014) 271-391.

1.02 Work relationships: why regulate them differently from commercial bargains?

A preliminary question for any student or practitioner of labour law is, why a separate body of law? Why should the law regulating the relationships between workers and those who engage them be any different from the general laws governing other commercial relationships? It is a question of deep significance for political economists. There is a school of thought (typified by economists such as F A Hayek, and political organisations such as the H R Nicholls Society) which holds that the laws of contract and property are sufficient to regulate transactions by which employers engage workers. As discussed in more detail in Chapter 3, contract law notoriously favours those with economic power. Leaving the welfare of working people to what H B Higgins famously described in the *Harvester* decision as the 'unequal contest, the "higgling of the market" for labour, with the pressure for bread on one side and the pressure for profits on the other',[3] has long been recognised as creating terrible risks to the well-being and dignity of the most vulnerable in our community. Over time, statute law has intervened to respond to society's evolving expectations as to the 'basic' or minimum wages and conditions that ought to apply to ensure decent living standards for working people. It is precisely because work is so vital to human dignity that special regulation is required to ensure decent minimum wages and conditions of work.

1.03 What kinds of 'law'?

This book explains the law of work in Australia in the twenty-first century—and that includes many sources of law. We shall consider the common or judge-made law that has emerged over the centuries from the resolution of disputes between employers, workers and unions. This includes employment contract law and the law of tort (or civil wrongs), which are essential sources of our labour laws. We shall also consider statutes made by Parliament. In particular we focus on the *Fair Work Act 2009* (Cth), which is the current federal statute governing employment and industrial relations in Australia, although we will occasionally need to refer to some state legislation, particularly when we consider work safety and anti-discrimination laws. The *Fair Work Act*, like its predecessor statutes,[4] authorises statutory instruments which govern the wages and working conditions of employees and override any contrary provisions in common law employment contracts. These include modern awards, enterprise agreements, and other determinations made by the Fair Work Commission. (The relationship between common law and statutory sources of law is explained at [1.14]–[1.18].)

Students of constitutional law will understand that the Commonwealth Parliament's powers to make laws are limited by the Australian *Constitution*, particularly s 51, so in this chapter (at [1.07]–[1.13]) we will briefly review the constitutional underpinnings of the

3 *Ex parte H V McKay* (1907) 2 CAR 1, 3.

4 *Conciliation and Arbitration Act 1904* (Cth); *Industrial Relations Act 1988* (Cth); *Workplace Relations Act 1996* (Cth).

Fair Work Act, and the path which federal law in this field has followed since federation. Before launching into that discussion, we will first reflect on the international law influences on Australian labour laws. Although Australia is an island nation with its own peculiar industrial relations history, the broad principles underpinning our labour laws are compatible with International Labour Organization (ILO) norms, often because Australia has been an influential participant in the ILO.

INTERNATIONAL LAW INFLUENCES

1.04 'Labour is not a commodity.' What does this mean?

The notion set out in [1.01]–[1.02] that the regulation of work must respect the humanity of the worker is encapsulated in the cry, which 'echoes down the centuries' and has been adopted by the ILO, that 'labour is not a commodity'.[5] Professor Hugh Collins describes this rallying cry as paradoxical, because employers do indeed purchase labour in a market, just as they purchase raw materials for production.[6] They do not purchase workers; workers are legal persons, not property. Employers purchase labour power from workers. Nevertheless, 'labour is not a commodity' can be given at least two sensible meanings for the purposes of a study of the regulation of work in a contemporary democracy.[7]

First, the pricing of labour (the setting of minimum wages) must not be left to the 'invisible hand' of an unregulated market, because decent wages are essential to the sustenance of workers and their dependants. Labour is not like corn, or coal, or any other commodity, because it cannot be extracted without the commitment of the human labourer. Secondly, workers cannot be bought and sold. In a democratic society that abhors slavery, the worker's consent must always be obtained to any transfer from one employer to another. Employment contracts are not assignable as a part of a sale of a business (though they may be novated—that is, made afresh on the same terms—with the express consent of the worker).[8] These meanings assert fundamental principles that must be respected in any system of labour law: wages and working conditions must respect the human dignity of workers, and workers must be afforded autonomy in their choice of work.

5 H Collins, *Employment Law* (2003), 3. See ILO *Declaration on Social Justice for a Fair Globalization*, adopted by the International Labour Conference at its Ninety-seventh Session, Geneva, 10 June 2008, 6. ILO documents can be accessed at http:www.ilo.org.

6 Collins, above n5, 3.

7 See P O'Higgins, '"Labour is not a Commodity"—An Irish Contribution to International Labour Law' (1997) 26 *Industrial Law Journal* 225, 230.

8 See *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014.

1.05 The ILO and its influence

Although this book focuses on the law of work in Australia, it is valuable to consider the international context in which Australian labour law has developed.[9] Australia has been a member of the ILO since its foundation in 1919, and (with the exception of a short period of time during the Howard government's incumbency) has held a seat on the ILO's Governing Body.[10] The ILO was originally established as an arm of the League of Nations following the First World War, and after the dissolution of the League of Nations became a specialised agency of the United Nations (UN). The ILO's initial Constitution, set out in Part XIII of the *Treaty of Versailles*,[11] recognised that a lasting peace, and global economic and political stability, depended upon the establishment of socially just conditions for the working people of the world. (Remember that this treaty was also made only a short time after the Bolshevik revolution in Russia.) The fundamental principles of this initial Constitution were reaffirmed in a revision in 1944 (the *Declaration of Philadelphia*)[12] and again in the 1998 *Declaration on Fundamental Principles and Rights at Work*, and the 2008 *Declaration on Social Justice for a Fair Globalisation*.[13] They include that labour is not to be treated as a commodity or article of commerce; respect for freedom of association and the effective recognition of rights to collective bargaining; abolition of all forms of forced labour (slavery) and child labour; and in the more recent declarations, the elimination of discrimination in employment. Most recently, the ILO marked its centenary with the *ILO Centenary Declaration for the Future of Work*, reaffirming the 'aims, purposes, principles, and mandate' set out in its Constitution and the *Declaration of Philadelphia*.[14]

The members of the ILO (of which there were 187 in 2019) are nation states which have 'endorsed the principles and rights set out in its Constitution and in the *Declaration of Philadelphia*, and have undertaken to work towards attaining the overall objectives of the Organisation to the best of their resources and fully in line with their specific circumstances'.[15] Each member state appoints four delegates to the International Labour Conference, which operates similarly to a parliament: two government-appointed delegates; one delegate representing the state's employers; and one delegate representing worker organisations. The Conference meets annually, and considers proposals for the adoption of Conventions and recommendations. Collectively, these instruments form the *International Labour Code*, dealing with a wide range of matters affecting the interests of working people. Many of the 190

9 See R Owens et al, *The Law of Work* (2nd edn, 2011), Ch 2 for a more extensive explanation of the role of the ILO.

10 Commonwealth of Australia *Parliamentary Debates* House of Representatives, 2 May 1996, 277–8 (Hon Peter Reith). See A Kent 'Australia and the International Human Rights Regime' in J Cotton and J Ravenhill (eds) *The National Interest in a Global Era: Australia in World Affairs 1996–2000* (2001), 267.

11 *Treaty of Peace between the Allied and Associated Powers and Germany* (Pt XIII Labour) [1920] ATS 1.

12 *Declaration Concerning the Aims and Purpose of the International Labour Organisation*. ILO documents can be accessed at <www.ilo.org>.

13 Adopted by the International Labour Conference at its 97th Session, Geneva, 10 June 2008.

14 Adopted at the 108th Session in Geneva, 21 June 2019.

15 *1998 Declaration of Fundamental Principles and Rights at Work*, Art 1.

Conventions deal with technical matters such as working conditions and safety standards in particular industries and occupations, and some promote fundamental principles, such as the right to freedom of association and collective bargaining,[16] equal remuneration,[17] and the abolition of child labour.[18] The most recently adopted Convention concerns violence and harassment at work.[19] Throughout the following chapters in this book we will reflect on these fundamental themes and how they are treated in contemporary Australian labour law.

The Governing Body of the ILO is an executive 'cabinet' of 56 members: 28 elected from among the government delegates and 14 each from among the employer and worker delegates. The Governing Body also oversees the work of several specialist committees such as the Committee on Freedom of Association. The administrative arm or secretariat of the ILO is the International Labour Office, headed by the Director-General. This body, with its head office in Geneva and many regional and national offices around the globe, performs a range of functions: research, data collection, preparation of publications, provision of technical support to member states, and training for employer and worker organisations. It also monitors the ratification of Conventions.

1.06 ILO Conventions and Australian Law

The adoption of a Convention by the International Labour Conference does not automatically bind member states to ratify the Convention domestically. That will be a matter for a member state's own executive government. In Australia, ratification of an ILO Convention does not automatically create domestic legal obligations to comply with the Convention. Obligations set out in ILO Conventions will become binding only when they are enacted in domestic legislation.[20] The Commonwealth Parliament has power under s 51(xxix) of the Australian *Constitution* (the external affairs power) to enact laws giving effect to ratified ILO Conventions, so long as the domestic legislation is 'appropriate and adapted' to compliance with the ILO Convention.[21]

Australian parliaments have taken advantage of the existence of a number of ratified ILO Conventions to support Commonwealth labour laws. For example, parental leave entitlements (discussed at [5.14]) and protections from unlawful dismissal on discriminatory grounds (see [9.12]) can be extended to all Australian employees because they are based on this constitutional power (see [1.10]). A thorough knowledge of the ILO Conventions is therefore a valuable resource for potential law reform, as new laws based appropriately on ILO Conventions can extend to all Commonwealth subjects.

16 ILO C087 *Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87); and ILO C098 *Right to Organise and Collective Bargaining Convention*, 1949.

17 ILO C100 *Equal Remuneration Convention*, 1951.

18 ILO C138 *Minimum Age Convention*, 1973, and ILO C182 *Worst Forms of Child Labour Convention*, 1999.

19 ILO C190, *Violence and Harassment*, 2019.

20 *Kioa v West* (1985) 159 CLR 550, 570; *Dietrich v The Queen* (1992) 177 CLR 292, 305.

21 See *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168, 258; *Victoria v Commonwealth* (1996) 187 CLR 416, 487.

The domestic implementation of and compliance with ratified Conventions is monitored by the ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR), comprising a panel of 20 independent experts appointed by the Director-General. The CEACR may also refer matters to an expert committee for consideration, such as the Committee on Freedom of Association (CFA).

Australia's record of compliance with ILO Conventions bears some blemishes.[22] One of the more notable complaints against Australia occurred when the Hawke Labor government intervened in the 1989–90 airline pilots' dispute.[23] Another concerned the 1998 Waterfront dispute.[24] The provisions in the *Fair Work Act* restricting the right to take protected industrial action have also provoked complaint.[25] More recently, the Commonwealth Public Sector Union (CPSU) brought a complaint about the New South Wales government's legislation restricting the pay rises that could be granted to state public servants to no more than 2.5 per cent per annum.[26]

It is hardly surprising that the ILO has often found grounds for criticism of Australian industrial laws dealing with collective bargaining and the right to take industrial action. The idiosyncratic system of conciliation and arbitration adopted in Australia as the basis for its first federal statute regulating labour relations assumed that the 'rude and barbarous processes of strike and lockout' promoted by the ILO's right to strike should be replaced with compulsory arbitration administered by a state authority.[27] Under this system, strikes were technically illegal, although they were often strategically used to attract the jurisdiction of the tribunal, which would then settle the dispute by making a binding award. In order to understand this 'new province for law and order' established in Australia, we need to sketch a little of Australia's industrial history.[28]

22 See B Creighton, 'The ILO and the Protection of Human Rights in Australia' (1998) *22 Melbourne University Law Review* 239.

23 See Case No 1511 *277th Report of the Committee of Freedom of Association*, 1991, Geneva, paras 151-246. For a discussion of the case generating this complaint see K McEvoy and R Owens, 'On a Wing and a Prayer: The Pilots' Dispute in the International Context' (1993) 6 *Australian Journal of Labour Law* 1. See [7.03].

24 See *Complaint against the Government of Australia Presented by the International Confederation of Free Trade Unions (ICFTU), the International Transport Workers' Federation (ITF), the Australian Council of Trade Unions (ACTU) and the Maritime Union of Australia (MUA)*, Report No 320 of the Committee of Freedom of Association (Case No 1963) 2000. For commentary, see J Murray, 'Australia in the Dock: The ILO's Decision on the Waterfront Dispute' (2000) 13 *Australian Journal of Labour Law* 167.

25 See Case No 2698 (Australia), *357th Report of the CFA*, 2010, [165]–[229]. For commentary see S McCrystal, 'Fair Work in the International Spotlight: the CEPU Complaint to the ILO's Committee on Freedom of Association' (2011) 24 *Australian Journal of Labour Law* 163.

26 See Case No 3118 (Australia), 377th Report of the CFA, 2016, [126]–[185]. For commentary on this measure, see G Carabetta, 'Public Sector Wages "Cap": The New Framework for the Determination of Public Sector Wages and Conditions in New South Wales' (2012) 25(1) *Australian Journal of Labour Law* 65–75.

27 See H B Higgins, 'A New Province for Law and Order: Industrial Peace through Minimum Wage and Arbitration' (1915) 29(1) *Harvard Law Review* 13, 14.

28 The following summary is necessarily brief. For more comprehensive treatise see O De R Foenander, *Industrial Conciliation and Arbitration in Australia* (1959); J Isaac and S Macintyre (eds) *The New Province for Law and Order: 100 Years of Australian Conciliation and Arbitration* (2004); R Naughton, *The Shaping of Labour Law Legislation: Underlying Elements of Australia's Workplace Relations System* (2017); or for a more concise view, see M Kirby 'Industrial Conciliation and Arbitration in Australia—a Centenary Reflection' (2004) 17 *Australian Journal of Labour Law* 229.

A BRIEF HISTORY OF REGULATING WORK IN AUSTRALIA

1.07 Early constitutional foundations

Australia's system of labour laws pre-dates the establishment of the ILO in 1919. As a federation of former British colonies, Australia and its states inherited their first labour laws—and indeed the system of common law underpinning employment contract law and the law of torts—from Britain. However, by the time the Australian Commonwealth had formed under a new Constitution on 1 January 1901, a number of the former colonies had already enacted many of their own statutes regulating aspects of 'master and servant' law and trade union activity.[29] The first federal enactment in the field was the *Conciliation and Arbitration Act 1904* (Cth), relying on s 51(xxxv) of the Australian *Constitution*.

It is perhaps now a curious matter that the earliest federal legislation in this field was limited to the establishment of a system for the conciliation and arbitration of interstate industrial disputes by an administrative tribunal empowered to make compulsory awards of wages and conditions binding upon the parties to the disputes. This is because the Australian *Constitution* was negotiated at a time when crippling strikes in nationwide industries, including shearing, coal mining and stevedoring, threatened economic stability and were beyond the powers of any single state to manage. The states jealously maintained their powers to legislate directly to impose obligations on employers operating within their boundaries, but they conceded power to the newly formed Commonwealth legislature to deal with these destructive national industrial disputes. The states maintained their own arbitral tribunals to deal with intrastate industrial disputes.[30]

The Commonwealth's ability to directly legislate to influence working conditions was restricted by adherence to the limitations imposed by s 51(xxxv) (the labour power), which empowered the Commonwealth to make laws 'for the peace, order, and good government of the Commonwealth with respect to … conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State'.

The labour power framed the shape of federal industrial relations law in Australia for almost 90 years. The necessity for a 'dispute' to trigger the jurisdiction of the federal tribunal justified federal laws providing for the registration of trade unions, who were treated as primary parties to these industrial disputes and not merely 'bargaining representatives' for their members, as they are treated today.[31] A trade union could create a dispute by serving a log of claims on named employers in an industry, and in more than one state (to meet

29 See M Quinlan, '"Pre-arbitral" labour legislation in Australia and its implications for the introduction of compulsory arbitration' in S Macintyre and R Mitchell, *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration 1890–1914* (1989), 25–49, for a detailed account of the early history of the industrial laws of the colonies.

30 See T Rowse, 'Elusive Middle Ground: A Political History' in J Isaac and S Macintyre (eds), above n 28, 17 for a view of the political history of the *Conciliation and Arbitration Act 1904* (Cth).

31 See *Jumbunna Coal Mine NL v Victorian Coal Miners Association* (1908) 6 CLR 309.

the requirement for an interstate dispute). If employers rejected the claim, a dispute would be notified to the Conciliation and Arbitration Commission, which would seek to conciliate the claim by encouraging an agreed settlement, or if that failed, by arbitrating the matter to impose a binding award on the parties. Awards dealt with wages and a wide range of working conditions. Federal awards could include clauses dealing with 'industrial matters', which came to mean matters pertaining to 'the relation of an employer as employer with an employee as employee'.[32] Awards proliferated. In the early days the system was used mainly by trade unions in manual 'blue collar' occupations in the private sector. Over time, however, as a consequence of High Court decisions broadening the understanding of what constituted an 'industrial' dispute, the jurisdiction of the Commission expanded to include clerical and public sector employees.[33] The requirement for an interstate dimension to bring a dispute within the jurisdiction of the federal tribunal meant that the state systems, also producing awards, operated alongside the federal system.

1.08 Impetus for change

Pressure for change came with the opening up of the Australian economy to international influences in the 1970s and 1980s, particularly after deregulation of the financial system.[34] Some of the criticism levelled at the federal industrial relations system was that the industry-wide nature of industrial award-making did not encourage competition among employing enterprises, nor commitment from trade unions to cooperate in generating the productivity improvements necessary to enable Australian industry to compete effectively in global markets.[35] If every workshop and factory must pay the same minimum wages and meet the same conditions, where is the scope for productive innovation? The so-called 'flow-on effect', whereby award improvements secured by the strong trade unions (particularly in the metals trades), would be gradually passed through the system to other industries, regardless of the productivity of those industries, was criticised as one of the clogs on the system.

When the Hawke Labor government was elected in 1983 on a promise of establishing a productive 'Accord' between business, trade unions and government, one of the earliest innovations was the establishment of a two-tiered system of wage increases.[36] The first

32 *R v Kelly; Ex parte Victoria* (1950) 81 CLR 64, 84.

33 See *R v Coldham; Ex parte Australian Social Welfare Union (CYSS Case)* (1983) 153 CLR 297; *Re Australian Education Union; ex parte Victoria* (1995) 184 CLR 188, 236.

34 For a comprehensive study of the evolution of the Australian federal industrial relations system see R Naughton, *The Shaping of Labour Law Legislation: Underlying Elements of Australia's Workplace Relations System* (2017).

35 For an overview of the criticisms of the system and counter arguments, see C Mulvey, 'Alternatives to arbitration: overview of the debate' in R Blandy and J Niland, *Alternatives to Arbitration* (1986) 11–28. See also J Niland, *Collective Bargaining and Compulsory Arbitration in Australia* (1978).

36 See Australian Labor Party and Australian Council of Trade Unions, *Statement of Accord by the Australian Labor Party and the Australian Council of Trade Unions Regarding Economic Policy*, ACTU/ALP, Canberra 1983.

tier was a minimum wage increase for all in the industry, and the second was an additional payment conditional upon the negotiation of productivity improvements at enterprise level.[37] This still-centralised system of wage fixing was quickly followed by demands (particularly from the Business Council of Australia) for a major overhaul of the system of conciliation and arbitration in favour of a North American–style system based on enterprise bargaining.[38] Enterprise bargaining, unlike industry-wide bargaining, restricts the group of employees who can engage in bargaining to those employed in a particular enterprise, and they may bargain only with their own employer. A debate about the benefits of industry-wide bargaining over enterprise bargaining has re-emerged in recent years, driven largely by trade unions, which have seen little benefit from enterprise bargaining and would prefer to see a return to an ability to bargain on behalf of all employees working in a particular industrial sector together, not piece-meal, one enterprise at a time (see [7.07]).

The first legislated steps towards introducing enterprise bargaining in the federal jurisdiction were taken by the *Industrial Relations Reform Act 1993* (Cth), introduced by the Keating Labor government.[39] The *Industrial Relations Reform Act* established that the system of industry-wide awards should remain, but only to provide a minimum safety net of wages and conditions. Employers and unions were encouraged to bargain at enterprise level to make certified agreements that provided for improved wages, and conditions of work tailored to the needs of the particular enterprise. Parties were permitted to take industrial action (such as strikes by employees, and lockouts by employers) in support of their bargaining claims, so long as the action complied with certain requirements. In this respect, the *Industrial Relations Reform Act* recognised the rights to freedom of association and collective bargaining supported by ILO Convention C87 and ILO Convention C98, and in fact included extracts of those Conventions in Schedules 15 and 16 of the *Industrial Relations Act 1988* (Cth). In the main, the system of bargaining introduced by this legislation assumed the continued role of trade unions as parties to these agreements, but it also permitted the making of non-union enterprise agreements, called 'enterprise flexibility agreements', in a concession to the reality that many enterprises, particularly in new industries, did not have strong trade union membership. The new system needed a means of ensuring that employers in enterprises where workers were not union members could also engage in collective bargaining. The provisions supporting non-union bargaining included some protections to ensure that these non-union workers would not be duped into accepting conditions below their award entitlements: a 'no disadvantage' test; a range of procedural protections to ensure employees were given adequate information about the proposed bargain; and approval rules that required the vote of a special majority.[40]

37 J Isaac, 'The Deregulation of the Australian Labour Market' in J Isaac and R D Lansbury, *Labour Market Deregulation: Rewriting the Rules* (2005), 1, 7.

38 Isaac (above n 37), 7. See F Hilmer et al, *Enterprise Based Bargaining Units: A Better Way of Working* (1989).

39 See Naughton (above n 34), 123–45.

40 See *Industrial Relations Act 1988* (Cth) Pt VIB, inserted by the *Industrial Relations Reform Act 1993* (Cth), now repealed.

1.09 New constitutional foundations

How could this Commonwealth legislation permitting employers and workers in individual enterprises to make their own industrial agreements be constitutionally valid? This legislation relied in the main on the corporations power in the *Constitution*, s 51(xx). The High Court had already determined in *Actors and Announcers Equity Association v Fontana Films Pty Ltd*[41] that the secondary boycott provisions in the *Trade Practices Act 1974* (Cth), s 45D were a valid exercise of the Commonwealth's power to make laws with respect to trading and financial corporations. In that case Mason J interpreted broadly the activities of a corporation that might validly be governed by federal legislation,[42] and Murphy J expressly stated that s 51(xx) extended to 'laws dealing with industrial relations', so that the Commonwealth 'may legislate directly about the wages and conditions of employees and other industrial matters'.[43] These views were confirmed in *Victoria v Commonwealth*,[44] which (largely) upheld the validity of the *Industrial Relations Reform Act*—which relied on the corporations power—following a challenge by the Kennett government in Victoria. Subsequent iterations of the federal legislation continued to rely on the corporations power to cover all incorporated employers. The concept of a 'constitutional corporation' was adopted to extend coverage to employers in the Australian Capital Territory and the Northern Territory (relying on the territories power in *Constitution* s 122); and to unincorporated employers engaged in international trade and commerce (relying on the trade and commerce power in the *Constitution* s 51(i)).

1.10 External affairs power and a human rights approach

The *Industrial Relations Reform Act* also relied on the external affairs power in the *Constitution* s 51(xxix) for some of its innovations, notably the introduction of the first federal provisions dealing with unfair dismissal.[45] Several ILO Conventions and Recommendations (and a section of the ICESCR)[46] were imported into *the Industrial Relations Act 1988* (Cth) to support provisions dealing with individual human rights issues: equal remuneration for men and women;[47] parental leave entitlements;[48] a freedom from dismissal for taking industrial

41 (1982) 150 CLR 169.

42 Ibid, 207.

43 Ibid, 212.

44 (1996) 187 CLR 353.

45 See Chapter 8.

46 The Preamble and Parts II and II of the *International Covenant on Economic, Social and Cultural Rights* was inserted as Schedule 8 of the *Industrial Relations Act 1988* (Cth).

47 ILO Convention C100 and Recommendation No 90 *Concerning Equal Remuneration of Men and Women Workers for Work of Equal Value*, 1951, inserted as Schedules 6 and 7 of the *Industrial Relations Act 1988* (Cth).

48 ILO Convention C156 and Recommendation No 165 *Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities,* 1981, inserted as Schedules 12 and 13 of the *Industrial Relations Act 1988* (Cth).

action;[49] and broad protections from termination of employment for discriminatory reasons.[50] It was the first time that Australian legislation had expressly adopted ILO instruments. This innovation was short-lived, although some of the provisions supported by these international instruments remained in subsequent iterations of federal industrial legislation. These schedules were all excised by the *Workplace Relations and Other Legislation Amendment Act 2006* (Cth) (see [1.11]).

One aspect of these individual rights measures did fail the Victorian challenge. The unfair dismissal provisions were held to exceed Commonwealth power. The provisions related to unlawful dismissal for discriminatory reasons (such as reasons related to one's gender, family responsibilities, or industrial activities) were supported by ILO Convention C158, but a dismissal that was merely 'unfair' was held to go beyond the parameters of the Convention.[51] This finding ultimately led to the separation, in federal legislation, of 'unlawful' and 'unfair' dismissal. The unfair dismissal provisions were instead supported by a combination of the labour power and the extended corporations power (see [10.14]).

1.11 'Deregulation' by the Workplace Relations reforms

The Keating Labor Government's success in grounding its *Industrial Relations Reform Act* in the corporations power paved the way for the next wave of industrial relations reform, this time by the newly elected Howard Coalition government. The *Workplace Relations Act 1996* (Cth) was the first major initiative of this government after its election in 1996, and its reforms might have been even more radical, had the initial Bill not been substantially amended in the Senate.[52] The *Workplace Relations Act* stripped back awards to 20 allowable matters, maintained collective bargaining in two streams (one involving unions, and the other not), and introduced a new statutory instrument called the Australian Workplace Agreement (AWA).[53] These agreements could be made between employers and individual employees. Once made, an AWA would override any award covering the employee. The *Workplace Relations Act* included several provisions designed to weaken the influence of trade unions, notably the prohibition of union preference clauses in awards, and an express freedom 'not to associate' (see [9.04]).

49 ILO Convention C087 *Concerning Freedom of Association and Protection of the Right to Organise*, 1948, inserted as Schedule 15 and ILO Convention C098 *Concerning the Principles of the Right to Organise and Bargain Collectively*, 1949, inserted as Schedule 16 of the *Industrial Relations Act 1988* (Cth). These Conventions supported the enactment of *Industrial Relations Act 1988* (Cth) s 334A (repealed).

50 ILO Convention C158 and Recommendation No 166 *Concerning Termination of Employment at the Initiative of the Employer*, 1982, inserted as Schedules 10 and 11 of the *Industrial Relations Act 1988* (Cth).

51 *Victoria v Commonwealth* (1996) 187 CLR 416, 517–18.

52 The Senate Economic References Committee received 1431 submissions on the Bill and produced a 400-page report: Australian Senate Economic Legislation Committee Report on the Workplace Relations and Other Legislation Amendment Bill 1996, August 1996. For a guide to this legislation see J Riley, *Workplace Relations: A Guide to the 1996 Changes* (1997).

53 See R C McCallum, 'Australian Workplace Agreements – An Analysis' (1997) 10 *Australian Journal of Labour Law* 50.

After the Howard government won control of the Senate in 2004, it was emboldened to revisit the measures it had failed to secure in 1996. The *Workplace Relations (Work Choices) Act 2006* (Cth) ('*Work Choices*') purported to abolish industry-wide awards entirely—but with a transitional period to avoid serious disruption to business and industry. *Work Choices* introduced a set of minimum Australian Fair Pay and Conditions Standards to apply to all national system employers and employees, and established a new body, the Australian Fair Pay Commission, to determine minimum wages. Wages and conditions above these minima could be bargained for by making workplace agreements. All collective workplace agreements had to be made with employees directly. Trade unions could play a role as bargaining agents but were no longer primary parties to any kind of agreement. The 'no disadvantage' test and many of the procedural protections applying to AWAs were abandoned. *Work Choices* also restricted access to unfair dismissal protection to employees of businesses with 100 or more employees. The most radical of its reforms, however, was the decision to override state systems in respect of all enterprises covered by the federal system. This meant that state awards and agreements were also affected by the legislation and would be phased out over the transitional period. It also meant that the state industrial systems covered very few employers, mainly public sector and unincorporated employers who could not be legitimately covered by legislation supported by the corporations power.[54]

The decision to take the benefit of s 109 of the *Constitution* (which provides that a valid federal law will prevail over any inconsistent state law dealing with the same subject matter), was highly contentious, and subject to a High Court challenge.[55] A majority of the court (Kirby and Callinan JJ dissenting) held that reliance on the corporations power provided a sound basis for a radically different approach to federal industrial relations. The labour power (s 51(xxxv)) now had very little work to do. Consequently, the system no longer needed to be predicated on the existence of interstate industrial disputes, nor did it need to rely on the processes of conciliation and arbitration. Consequently, the powers of the industrial relations tribunal were diminished.

Although *Work Choices* survived this legal challenge, it remained deeply unpopular, and is generally believed to have been the single most important cause of the Howard government losing the 2007 federal election, and John Howard himself losing his seat in Parliament. The new Rudd ALP government promised to wind back the most unpopular elements of *Work Choices*, and the *Fair Work Act 2009* (Cth) did reinstate unfair dismissal protection for all employees of national system employers and abolish AWAs entirely. Nevertheless, the Fair Work system retained most of the architectural elements of the *Work Choices* system. Fair Work is a national system that overrides state industrial laws; it provides a mandatory set of minimum conditions of employment, now called the National Employment Standards (NES) (see [5.10]); collective agreements can be made, with or without bargaining, directly with

54 For a guide to this legislation see J Riley and K Peterson, *Work Choices: A Guide to the 2005 Changes* (2006).

55 *New South Wales v Commonwealth* (2006) 229 CLR 1; [2006] HCA 52. For extensive commentary on the case see S Evans et al, *Work Choices: The High Court Challenge* (2007). See also A Stewart and G Williams, *Work Choices: What the High Court Said* (2007).

employees; and unions play a role as bargaining representatives (see [6.15]).[56] Although Fair Work restored industry-wide awards (in the form of a reduced number of modern awards made in 2010), awards are no longer made or amended to arbitrate industrial disputes (see [5.27]). And although the tribunal—now called the Fair Work Commission—performs many functions in the system, its dispute resolution role is very different from that of the earliest Conciliation and Arbitration Commission (see [11.02]–[11.05]). It does play an important role in administering the system for considering applications for unfair dismissal from those employees who are entitled to access that system (see [10.22]), and that function involves the exercise of arbitral powers, but on the whole, its powers of compulsory arbitration are limited.

1.12 Referral of matters from the states

Following the enactment of the *Fair Work Act*, all states except Western Australia referred industrial matters to the Commonwealth under the *Constitution* s 51(xxxvii). Victoria had already referred its powers over industrial matters to the Commonwealth in 1997, after the enactment of the *Workplace Relations Act 1996* (Cth), when a Liberal government (under Premier Jeff Kennett) was in power in Victoria.[57] Now other states followed suit with text-based referrals of their powers.[58] These referrals had the effect that unincorporated private sector employers in those states are also classified as national system employers and are bound by the NES, modern awards, and all other provisions of the Fair Work legislation.[59] Western Australia's decision not to refer has created some confusion in that state for local government employers. Even though local councils may be incorporated, they are not necessarily 'trading or financial' corporations. That will depend upon the activities the council undertakes, and that may vary from year to year.[60] For example, in *Bysterveld v Shire of Cue*[61] a caravan park manager working for a local council in a small remote community in Western Australia brought an unfair dismissal complaint under the *Industrial Relations Act 1979* (WA) s 29, but her employer sought to have the application dismissed on the basis that the *Workplace Relations Act* (enacted after *Work Choices*) provisions applied. In deciding whether the Shire

56 See A Forsyth and A Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (2009) for a set of essays explaining the changes from *Work Choices* to *Fair Work*.

57 *Commonwealth Powers (Industrial Relations) Act 1996* (Vic); *Workplace Relations and Other Legislation Amendment Act (No 2) 1996* (Cth).

58 See *Fair Work Act 2009* (Cth) ss 30A-30S; *Industrial Relations (Commonwealth Powers) Act 2009* (NSW); *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (Qld); *Fair Work (Commonwealth Powers) Act 2009* (SA); *Industrial Relations (Commonwealth Powers) Act 2009* (Tas). Text-based referral was recommended by the *Williams Report* commissioned by the NSW government: see G Williams, *Working Together: An Inquiry into Options for a New National Industrial Relations System* (2007).

59 See R Owens, 'Unfinished Constitutional Business: Building a National System to Regulate Work' (2009) 22 (3) *Australian Journal of Labour Law* 258, 279–82.

60 See *R v Federal Court of Australia; Ex parte The Western Australian National Football League (Inc) (Adamson's case)* (1979) 143 CLR 190.

61 [2007] WAIRComm 941 (20 July 2007).

of Cue was in fact a trading corporation, the Commission examined its budget closely to determine whether it engaged in sufficient trading activities to qualify for federal coverage and held that the council was primarily engaged in community service activities, and that its trading activities were not of a sufficiently significant scale.[62] In a different year, when the council was engaged in more significant commercial projects and activities, it might have been a trading corporation. Ms Bysterfeld was therefore able to bring her unfair dismissal claim under the Western Australian legislation and was found to have been unfairly dismissed.[63]

1.13 A national system?

When the Fair Work system was first mooted, much was made of a claim that the new system would set up a 'one stop shop' to simplify labour law compliance for employers. The *Fair Work Act* is not, however, the only source of work-related laws that employers must observe. The *Fair Work Act* itself preserves the operation of certain state laws for national system employers.[64] These include the discrimination statutes of each of the states and territories[65] and statutes dealing with workers' compensation and rehabilitation, occupational health and safety, outworkers, child labour, training arrangements, long service leave entitlements, workplace surveillance and business trading hours. There are also other federal laws imposing work-related obligations on employers, including a range of federal discrimination statutes,[66] superannuation and taxation statutes, and privacy laws. Many of these laws apply only to the engagement of employees, not all workers. (The distinction between employment and other forms of workforce engagement is explained in Chapter 2.) Employers engaging workers who are not classified as employees should be mindful of the *Independent Contractors Act 2006* (Cth), and any of the statutory schemes that apply to special kinds of work, for example the regimes applying in the transport industry to owner-drivers.[67] Public service work is also governed by special statutory schemes and instruments.[68]

Increasingly, laws dealing with corporate social responsibility also aim to influence decisions enterprises make when engaging and managing labour. The *Corporations Act 2001* (Cth) s 596AB, for example, makes it an offence to engage in transactions with the deliberate

62 Ibid, [90]–[91].

63 *Bysterveld v Shire of Cue* [2007] WAIRComm 1159 (12 October 2007).

64 See *Fair Work Act* s 27.

65 *Anti-Discrimination Act 1977* (NSW); *Equal Opportunity Act 2010* (Vic); *Anti-discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (WA); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (Tas); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act* (NT).

66 *Race Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth); *Workplace Gender Equality Act 2012* (Cth). The *Australian Human Rights Commission Act 1986* (Cth) makes the institutional arrangements for enforcement of these Acts. At the time of writing, the Commonwealth had considered but postponed the enactment of a Religious Discrimination Bill.

67 *Industrial Relations Act 1996* (NSW) Ch 6; *Owner Drivers and Forestry Contractors Act 2005* (Vic); *Owner Drivers (Contracts and Disputes) Act 2007* (WA).

68 See for example the *Government Sector Employment Act 2013* (NSW). This book will not deal in any detail with public sector employment legislation.

aim of avoiding payment of employee entitlements. Most recently, the *Modern Slavery Act 2018* (Cth) has imposed obligations upon large corporations to monitor their supply chains for the risk of a range of abuses of workers including slavery, forced labour, debt bondage and human trafficking.

The common law also plays a fundamental role in regulating matters relating to work. Arrangements under which work is performed for some consideration will generally qualify as common law contracts. The *Fair Work Act* expressly preserves the state courts' role in dealing with 'claims for the enforcement of contracts of employment'.[69] The common law dealing with civil liability (tort) and a range of equitable doctrines also governs aspects of work relations. The law relating to work is as complex as the many ways in which one person can exploit the labour of others.

SOURCES OF LABOUR LAW

1.14 Contemporary sources of labour law and how they interact

We will shortly turn from broad themes and general context, to a closer inspection of particular aspects of Australian labour laws. In doing that, we will engage with various sources of law, including the common law, legislation (both federal and state), and statutory instruments such as awards and enterprise agreements.

While many of the terms and conditions of employment for a large sector of the workforce are now regulated by legislated standards, modern awards, and enterprise agreements, the common law remains important. Managerial employees who are not covered by awards or enterprise agreements rely entirely on common law contracts to determine their employment conditions, and even those 'ordinary' workers who have the benefit of awards and enterprise agreements will be subject to many of the principles of the common law, which continue to inform some of the most significant obligations in employment.

1.15 Common law of contract

The common law is judge-made law, derived from the corpus of judicial decisions determining particular cases and developing over time to form a body of precedent.[70] Contract law is the body of common law principles governing voluntarily made bargains. Classical contract law developed in the eighteenth and nineteenth centuries in England to deal with the emerging commercial practices of merchants.[71] A contract is formed when one party accepts an offer that

69 *Fair Work Act* s 27(2)(o).

70 A W B Simpson, 'Common Law' in P Cane & J Conaghan (eds) *The New Oxford Companion to Law*, 166 (2008).

71 See P S Atiyah, *An Introduction to the Law of Contract* 5th edn (1995), 7.

is made on sufficiently certain terms and provides consideration for the promises contained in that offer, in circumstances where the parties intend their bargain to be legally binding.

The requirement of consideration simply means that there must be some *quid pro quo* for the promise—that is, something valuable in return. This is easy to find in the case of a contract of employment. The bargain involving a promise to pay wages in exchange for work is clearly supported by consideration. However, the requirement for an 'intention to create legal relations' is sometimes challenged in cases of voluntary work involving charitable or religious organisations, or in domestic/family arrangements (for example, where a family member agrees to help out in a business).

The terms of the contract are fixed at the time of entry into the contract (unless varied with consent afterwards), and parties can be compelled by law to make good their promises (at least in monetary terms) on the basis that the court enforcing a contract is doing no more than holding the parties to their own bargain.

Although today we readily think of employment as a contractual relationship—a 'work for wages' bargain voluntarily made between an employer and worker—it was not always so. The concept of the employment contract is relatively recent, born out of the 'Fordist' model of productive enterprise in the early twentieth century.[72] This model of production involved the engagement of permanent full-time workers on an exclusive basis, in the expectation that they would develop firm specific skills and remain loyal to the enterprise for a lifelong career. It may be that this twentieth-century model is already being dismantled under pressure from the 'vertical disintegration' of large enterprises into networks of smaller businesses.[73] Prior to the development of employment contract law, a variety of different laws applied to the engagement of workers, depending upon whether they were domestic servants, agricultural labourers, factory hands, artisans or clerical workers. For example, far from being parties to 'voluntary bargains', agricultural workers bound by the *Statutes of Labourers* of 1349 and 1350 could be compelled to work for prescribed wages and could be punished by imprisonment for deserting a master.[74] Factories and Shops legislation in the early days of the industrial revolution imposed similarly oppressive burdens on workers. The classical liberal notion of the freely negotiated contract was a creature of the eighteenth and nineteenth centuries, and did not come to characterise most work relationships until the early twentieth century.[75]

Now, however, all arrangements under which work is performed for reward are treated as contracts, so principles of contract law apply to construe and interpret the terms of

72 See K V W Stone, 'The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law' (2001) 48 *UCLA Law Review* 519, 529–39.

73 See H Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10 *Oxford Journal of Legal Studies* 35.

74 See R Johnstone and R Mitchell, 'Regulating Work' in C Parker et al (eds) *Regulating Law* (2004).

75 See A Merritt, 'The Historical Role of Law in the Regulation of Employment – Abstentionist or Interventionist?' (1982) 1 *Australian Journal of Legal Studies* 56; S Deakin 'The Many Futures of the Employment Contract' in J Conaghan, M Fischl and K Klare (eds), *Labour Law in an Era of Globalisation: Transformative Practices and Possibilities* (2002), 193; J Howe and R Mitchell, 'The Evolution of the Contract of Employment in Australia: A Discussion' (1999) 12 *Australian Journal of Labour Law* 113.

those arrangements and to determine the consequences of breach or termination of the arrangement. Chapters 3 and 4 deal with the regulation of work relationships by contract law.

1.16 Tort law

The relationships between employers and their employees—and indeed the relationship between principals and their agents—also give rise to duties in tort (the law of civil wrongs). Employers owe duties of care to their employees (see [4.18]) and are also held to be vicariously liable for torts committed by their employees in the course of their employment (see [4.20]). A range of economic torts—for example, interference in trade by unlawful means, inducing breach of contract, and intimidation—occasionally arise in the context of labour disputes, where a trade union engages in boycotts of an employer's business (see [7.01]). Tort law operates alongside many statutory schemes such as work health and safety (WHS) regulation, workers' compensation schemes, and statutory immunities from suit for industrial activity. Nevertheless, the common law principles are often called into service to resolve matters not comprehensively covered by statute.

1.17 Equitable doctrines

Working relationships also frequently give rise to obligations recognised in the exclusive jurisdiction of the old courts of Chancery, now known in Australia as the equitable jurisdiction. Two equitable doctrines in particular regularly arise in disputes over property or valuable information created in the course of employment. One is the doctrine of breach of confidence, which is regularly called in aid of an employer seeking to restrain a departing employee from taking commercially valuable information about business techniques, supplier reliability, or customer preferences with them to a new job. The other is the concept of fiduciary obligation, whereby one person (the fiduciary) is subject to a duty to act exclusively for the benefit of the other. Fiduciary obligations are frequently asserted in cases where employers seek to obtain the equitable remedy of an account of profits from an employee who has operated a competing business or made some unauthorised gain from their employment. These principles are discussed, along with the contractual duties of loyalty and fidelity, in Chapter 4 (see [4.05]–[4.06]).

1.18 Coherence between common law and statute

As we have seen, Australian labour law is also heavily regulated by a range of statutes and statutory instruments, not the least being the *Fair Work Act* and the awards and enterprise agreements made under its authority.

In Chapter 5, we examine the federal safety net, which comprises the legislated NES, other legislated rights, and a system of modern awards creating industry or occupation-specific minimum standards. The *Fair Work Act* also enables the making of collective enterprise agreements to provide terms and conditions that are better (overall) than the minimum

safety net. Enterprise bargains are explained in Chapter 6, and the right (such as it is) to take protected industrial action in pursuit of an enterprise bargain is discussed in Chapter 7.

While Parliament is responsible for legislated standards, the Fair Work Commission (FWC) is responsible for making modern awards and keeping them in good repair. Once made, modern awards have the force of statute and are binding on any employer of employees to whom the award applies. Outside the special exemptions for high-income and managerial staff (see [5.34]), an employer cannot escape these obligations by relying on the terms of an individual common law contract. Enterprise bargains made under the *Fair Work Act* also create binding obligations with the force of statute. In theory, the industrial parties themselves (employers, employees, and unions) are responsible for making their own enterprise agreements, and the FWC's role in the bargaining system is largely supervisory, to ensure that the rules of bargaining are followed. Once made and approved however, enterprise bargains are also binding, and employers cannot contract out of those obligations on an individual basis. Despite their apparently contractual nature, enterprise bargains operate according to the terms of the statute, not as common law contracts.[76]

The multiplicity of sources of law applying to employment raises the question of which laws apply when common law principles and statutory provisions and instruments appear to deal with the same matters. Although laws made by parliaments prevail over the judge-made law, so that common law principles give way to contrary provisions enacted in a valid and applicable statute, it falls to the judiciary to determine these questions according to a canon of statutory interpretation principles. These include an assumption that statutes do not intend to overturn fundamental common law principles without 'unmistakable and unambiguous language'.[77] 'It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness'.[78]

At the same time, when called upon to adjudicate a novel question under the common law, courts will often look to statutory law for guidance,[79] and will be careful to avoid any interpretation that would be incoherent with legislation. Hence, statutes may to serve as either a 'catalyst' or a 'constraint' on judicial development of the common law.[80] A statute is a catalyst when courts look to the underpinning policy of the statute when developing the common law, and it acts as a constraint when a court decides to avoid any common law incursion into a field already colonised by statute. The development in the United Kingdom of

76 See A Stewart and J Riley, 'Working around *Work Choices*: Collective Bargaining and Common Law' (2007) 31 *Melbourne University Law Review* 903.

77 *Electrolux Home Products Pty Limited v Australian Workers Union* (2004) 221 CLR 309; [2004] HCA 40, [118] (McHugh J, citing *Coco v The Queen* (1994) 179 CLR 427, 437 per Mason CJ, Brennan, Gaudron and McHugh JJ; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476, 492; [2003] HCA 2, [30] (Gleeson CJ).

78 O'Connor J in *Potter v Minahan* (1908) 7 CLR 277, [21], cited in M Sanson, *Statutory Interpretation* (2nd edn 2016), 247. *See* also *R v Home Secretary; Ex parte Pierson* [1998] AC 539, 587, 589 (Lord Steyn).

79 R Pound, 'Common Law and Legislation' (1908) 21 *Harvard Law Review* 383, 385–6.

80 *See* D Brodie, 'Mutual Trust and Confidence: Catalysts, Constraints and Commonality' (2008) 37 *Industrial Law Journal* 329; D Brodie, 'The Dynamics of Common Law Development' (2016) 32(1) *International Journal of Comparative Labour Law and Industrial Relations* 45, 47.

the mutual duty of trust and confidence in employment (see [4.23]), and its outright rejection by the Australian High Court in *Commonwealth Bank of Australia v Barker*[81] (see [4.25]), are good examples of statute providing in the first instance a catalyst, and in the second, a constraint, on common law development.

Finally, when legislation adopts terminology used by judges in prior cases, the principles of statutory interpretation will assume that Parliament 'intended the words to bear the meaning already judicially attributed to them'.[82]

It is also possible in the field of labour law that common law and statutory provisions will operate in parallel, so that an employer and employee may have rights and obligations under both common law and statute simultaneously. This was confirmed by the High Court of Australia in *Byrne v Australian Airlines Ltd*.[83] In that case, the court determined that a clause in an industrial award should not be implied as a term in the employees' employment contracts, notwithstanding that the clause was binding upon the employer. The court held that the award operated separately from the employment contract, so that breach of the award gave rise only to the remedies provided by the statute (in this case, a fine) and not to any common law remedies for breach of contract. The common law of contract provides remedies appropriate to the enforcement of voluntary bargains, so breach of contract would justifiably give rise to an award of damages based on the obligation to fulfil one's own promises. However, an award made under statute imposes obligations upon the parties regardless of their own consent. Mandatory impositions of this nature ought to attract only the sanctions determined by the legislation itself.

1.19 Administrative law

The regulation of working relationships is not always limited to private law principles. Whenever the employer is a public authority, principles of administrative law also arise. Administrative law assumes that state power (such as the power wielded by a senior officer in a government department who is managing staff) must be exercised according to the principles of public law: rationally, for proper purposes, and with regard to procedural fairness. For example, in *Jarratt v Commissioner of Police for New South Wales*[84] the High Court of Australia held that a senior public servant must be afforded procedural fairness in any decision to dismiss him, notwithstanding that the statute governing his employment described his appointment as being 'at the pleasure' of the Crown. Professor Hugh Collins has argued persuasively that large public corporations, upon whom the state has conferred considerable privileges as a consequence of the benefit of incorporation, also exercise a great deal of bureaucratic power, so should be subject to similar public law principles in their dealings with staff.[85]

81 (2014) 253 CLR 169; [2014] HCA 32.

82 *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing & Engineering Employees* (1994) 181 CLR 96, [20].

83 (1995) 185 CLR 410.

84 (2005) 224 CLR 44; 79 ALJR 1581; [2005] HCA 50.

85 See H Collins, 'Market Power, Bureaucratic Power and the Contract of Employment' (1986) 15 *Industrial Law Journal* 1.

Administrative law principles are also engaged in labour law when FWC decisions are challenged. The FWC is not a court but an administrative body. Its decisions are subject to judicial review on the ground of jurisdictional error.

1.20 This book

As we have seen, a study of labour law engages a wide spectrum of sources of law. It can be like a jigsaw puzzle with many interlocking pieces, all of which are needed to create a picture of the whole. It can be difficult to know where best to begin in piecing the puzzle together, and different books take different approaches. This book follows a pattern that the author has found useful in explaining the subject to university students—undergraduate law students taking Labour Law as an elective in their LLB or JD studies as well as Masters students coming to law without a prior legal qualification—to help them understand our system of labour laws for careers in union advocacy, human resources management, or government service.

The general pattern of the book imagines a typical worker, and the various layers of regulation that affect their working life. Given that Australian federal labour laws predicate the application of many work entitlements upon status as an 'employee', we first examine the bedrock relationship upon which labour laws are founded: the employment relationship and its regulation by the common law. This explains why we begin with a chapter explaining the common law notion of employment (Chapter 2) and then deal with the essential common law principles governing the regulation of that individual relationship. Chapter 3 explains the formation and construction of employment contracts, and Chapter 4 examines many of the most important duties that arise under the employment contract, complemented by a number of equitable obligations. In Chapter 5 we move on to consider the statutory safety net that applies to all national system employees, and the system of modern awards that creates occupation-specific standards for workers in specific industries. The means of making enterprise bargains for better-than-award conditions is explained in Chapter 6, followed by Chapter 7 dealing with the laws regulating the kinds of industrial action that employees and their unions may take in pursuing these bargains. In Chapter 8 we consider another major interest of all workers that is regulated by both common law and statute—the right to a safe workplace. Chapter 8 provides an opportunity to reflect on different regulatory approaches and compares the prophylactic approach of WHS legislation—which attempts to *prevent* harm—with workers' compensation and common law approaches to dealing with harm when it has occurred.

We now have a picture of the many layers of regulation that may create a person's terms and conditions of work. Imagine a nurse, for instance. We will give our nurse the gender-neutral name, 'Lee'. Lee enters into an agreement to take up employment at a health facility. Lee and the employer are now subject to the principles of the common law of employment. Because the employer is a national system employer, the employment is also governed by the NES and other conditions set out in the *Fair Work Act 2009* (Cth). As a nurse, Lee is covered by the *Nurses Award 2010*, and this will apply to Lee's employment (and set wages and conditions of employment in addition to the NES) unless Lee's employer has made an enterprise agreement with all employees. While an enterprise agreement is on foot, it will apply instead of the modern award. It may be that there are particular personal circumstances

here that warrant flexibility in some aspects of Lee's working arrangements. Perhaps Lee wants to work a different range of ordinary hours to accommodate caring responsibilities. If so, Lee and the employer may make an 'individual flexibility arrangement' within the parameters set out in the enterprise agreement, to modify the application of the agreement in Lee's case.

Now we move on to consider how the law regulates problems in employment. Chapter 9 considers the General Protections of workplace rights that come into play if an employee suffers some kind of adverse action as a result of exercising one or more of a range of workplace rights. This chapter considers a number of issues together that have been dealt with very differently in other books.[86] Freedom of association, which concerns employees' rights to act collectively, is considered in the same chapter as the right to be free of discrimination at work on the grounds of age, gender, disability, race or a range of other personal characteristic. We discuss these matters together because they are now regulated in the same way, each providing a general right to protection from 'adverse action' on certain grounds, with a common process for complaint. 'Adverse action' encompasses dismissal, so the General Protections also deal with termination of employment, where termination is unlawful for one or more of these reasons. Termination of employment more generally is addressed in Chapter 10, which considers both the common law and statutory regulation of the termination of employment. In Chapter 10 we consider the range of remedies available, for both employees and employers, upon termination of the employment relationship.

Chapter 11 deals with dispute resolution and enforcement of workplace laws. Some information on the enforcement of particular workplace rights is included in each chapter, but further discussion is reserved for Chapter 11 as a means of illustrating the common features shared by the various aspects of our system of workplace laws, particularly when it comes to the institutions and procedures involved in enforcement and dispute resolution.

A brief final chapter reflects on some of the contemporary challenges facing the regulation of work in the twenty-first century. In particular, this final chapter reflects on whether our present laws are adequate to protect the interests of a new army of workers who perform 'on demand' work. Are Uber drivers and food delivery cyclists adequately covered by our system of labour laws? The COVID-19 pandemic also raised some challenges. Are our labour laws flexible enough to allow enterprises and workers to 'pivot' (a favourite word during the crisis) quickly enough to manage the challenges imposed by mandated social distancing? The rise of remote work, often in workers' own private homes, created a new geography of work, and raised questions about the responsibilities of employers for workplace safety when work is undertaken in a private space away from easy monitoring.

The highly political nature of the subject means that labour laws are regularly subject to reform. The project of 'deregulation' in Australia in recent decades has created even more extensive statutes, as successive governments seek to undo past practices and channel employer, union and worker behaviour in new directions. This creates a particular challenge for a book providing an introduction to the law of work: the detail of the law is subject to

86 For example, Owens and Riley, in *The Law of Work* (2007), offered distinct chapters on freedom of association, and equality at work.

regular amendment. A snapshot taken at a particular point in time will rapidly lose currency if we focus too narrowly on the 'labyrinth of minutiae'[87] that makes up the law in our field. So, rather than burying ourselves in technical rules, we shall take a broader view, seeking to uncover the underlying policy and purpose of our laws. After all, where is the benefit in learning in excruciating detail a pile of statutory provisions that are likely to change within the year? It is better to appreciate the general architecture of our system of labour regulation, and the way in which certain legal techniques are used to achieve particular policy objectives. In this way, we prepare ourselves to understand and critique the next generation of legal reform, and the generation after that. While the ensuing chapters will necessarily identify particular statutory provisions to illustrate aspects of our system of labour laws, readers are warned to check those provisions for currency with primary sources before relying on them for specific purposes.[88] Common law principles are less susceptible to radical change, but nevertheless, it is wise to check whether a case has been overturned on appeal before depending upon its findings. With those disclaimers, we are ready to consider the threshold question for many of the laws applying to work: *Is the worker an employee?*

FURTHER READING

For readable reflections on the trajectory of Australian industrial relations laws, see:

Kirby, Hon Justice Michael, 'Industrial Conciliation in Australia—A Centenary Reflection' (2004) 17 *Australian Journal of Labour Law* 229.

McCallum, Ronald, 'Collective Labour Law, Citizenship and the Future' (1998) 24 *Melbourne University Law Review* 41.

McCallum, Ronald, 'The Internationalisation of Australian Industrial Law: The *Industrial Relations Reform Act 1993*' (1994) 16 *Sydney Law Review* 122.

Peetz, David, *The Realities and Futures of Work* (ANU Press, 2019 (available to download for free at anupress@anu.edu.au).

DISCUSSION QUESTIONS

1 Can you imagine a contemporary system of labour law for Australia, based on the labour power in the *Constitution* s 51(xxxv)? What features and limitations would such a system possess?

2 How relevant is the ILO as an influence in global labour relations 100 years after its establishment?

3 To what extent has the Australian system of labour relations law changed under pressure from economic, technological and social forces? What further changes do you envisage as the world of work evolves in a digital age?

87 O Kahn-Freund, 'Comparative Law as an Academic Subject' [1966] *Law Quarterly Review* 40, 40.

88 To this end, the Commonwealth government provides current authorised versions of its legislation on the Federal Register of Legislation at <www.legislation.gov.au>.