Comments and Notes

Individual and Collective Bargaining in Australian Labour Law: The *CRA Weipa* case

1. *Introduction*

The bitter and protracted industrial dispute at Weipa in North Queensland recently gained national attention. The skirmish surrounded a move by one of Australia's largest companies to shift its employees from the collective system of awards to individual contracts. The company's strategy sparked a call to arms for the entire trade union movement. The media were attracted and the subsequent "showdown" between big business and big labour — involving no less than an ex-Prime Minister — became a cause célèbre. Amidst the fanfare and emotion, the Australian Industrial Relations Commission (the "Commission") produced one of its most important decisions to date.[1]

This note begins with a description of the imbroglio that unfolded at Weipa and its resolution by a Full Bench of the Commission. It then considers some of the philosophical impulses behind a contractualist approach to workplace relations, followed by a critique of their ideological implications. The concept of ideology is an indispensable tool for understanding labour law. The ideology of law consists of the concepts and beliefs, the values and assumptions, the practices and institutions through which it perpetuates itself and sustains relations of power. Ideology is therefore very powerful because largely unarticulated, hidden in areas of deeply held norms, attitudes and anxieties.[2] The note continues by examining the challenges posed to the practice of collective bargaining by individual contracts, bearing in mind the ongoing transformation of Australian industrial relations from a collective to a more individualistic basis. It concludes with a defence of the role of the Commission, given that its future ability to intervene in special cases like the *CRA Weipa* case is now under a cloud following the recent election of a new Federal Coalition Government in March 1996.

2. *Background*

The case involved large mining operations at Weipa conducted by Comalco Aluminium Limited, a subsidiary of the CRA group of companies. The company's activities in fact comprised distinct operations in bauxite and kaolin mining. Since 1982 the wages and conditions of employees at both operations (other than staff employees) had been regulated by a single award, the Weipa award. In 1992 the Weipa industrial site committee initiated negotiations with

1 *Australian Manufacturing Workers' Union v Alcoa of Australia Ltd* (1996) 63 IR 138 ("*CRA Weipa* case").

2 See Bennett, L, *Making Labour Law in Australia: Industrial Relations, Politics and Law* (1994) at 3–4; Atleson, J B, *Values and Assumptions in American Labor Law* (1983) at 1–16.

the company for the establishment of an enterprise agreement covering the kaolin operations. Discussions proved fruitless, and in August 1992 the company submitted its own draft agreement to the employees, the site committee and the unions with members at Weipa. The proposed agreement, which applied only in respect of the kaolin employees, embodied a number of the features which would later appear in the company's individual contracts including performance-based salaries and increased allowances. At a meeting in April 1993, the kaolin employees voted on and accepted the draft agreement. However, the document failed to receive the sanction of the unions and in October 1993 the company made its first offer of individual contracts.

The contracts put forward at this stage were aimed only at the kaolin employees and were structured by the company to reflect what had been accepted by those employees in the April ballot. Thus, they did not offer the full benefit of conditions enjoyed by staff. Some kaolin employees signed on to the contracts, but these employees were "few in number".[3] Union members at the plant objected to the company's introduction of personal contracts by striking for six days in November 1993. During the following month the company, fearing that its policy might create a "second class" salaried workforce, broadened its strategy by making full salaried staff contracts available to the kaolin employees. In early 1994 the same offer was presented to the rest of the Weipa workforce at the bauxite operations. All except one employee at the kaolin mine and some 76 employees at the bauxite mine entered into the contracts. In the meantime, despite a number of hearings before the Commission, the unions and the company remained at a deadlock in reaching an enterprise agreement.

In May 1994 the company announced that all new employees would only be offered employment under the staff contract system. The unions, now supported by the Australian Council of Trade Unions (ACTU), responded by applying to the Commission for an interim paid rates award. The principal effect of the proposed award would have been to extend the terms of the contracts to those employees who had chosen to stay under the award system. The Commission's ruling on the application was not given until mid-November 1995, by which time strike action had shut down the loading of ships at Weipa Harbour. In addition, the single Weipa award had now been replaced with two minimum rates, members only, federal awards (the Kaolin Operations Award and the Bauxite Operations Award) — awards that stipulated minimum terms and conditions and applied only in relation to employees who were members of the union parties to the award (the AWU, AMWU and CEPU). In its November decision, the Commission had little difficulty in determining that these present awards were not made as paid rates awards, that is, as awards that specified actual rather than minimum entitlements. More crucially the Full Bench also found, having regard to the recent decision of the Australian Industrial Relations Court in the *Bell Bay* case,[4] that the Weipa award was not a paid rates award. Accordingly, the Commission held that it was not possible to entertain the unions' application.[5]

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3 Above n1 at 147.

4 *Comalco Aluminium (Bell Bay) Ltd v O'Connor (No 2)* (1995) 61 IR 455.

5 *Amalgamated Metal Workers Union v Alcoa of Australia Ltd* (1995) ALLR 90–321.

The Commission's decision precipitated national strike action against CRA. The dispute rapidly spread beyond Weipa and enveloped many of the country's major mines, ports and wharves. With significant damage to Australia's international trading reputation looming from the shipping and waterfront stoppages, a Full Bench immediately intervened by directing that an 8 per cent pay rise backdated to 1 March 1994 be granted to the striking award employees at Weipa as part of an agreed settlement between the parties. In return for the company withdrawing its common law action against the striking workers, the unions and the ACTU pledged to cease all industrial action. In another attempt to overcome CRA's individual contract campaign, the unions and the ACTU applied to the Commission for an award equalising the wage rates and conditions of the award employees with those of the staff contract employees. The ACTU argued through its advocate, ex-Prime Minister Bob Hawke, that CRA's policy discriminated against those 76 or so workers who elected to remain collectively represented by a union under the award system. The discrimination was said to arise from the significantly improved pay and conditions given to the employees who signed individual contracts. The company asserted that the introduction of individual contracts at its aluminium smelting operations in New Zealand and Bell Bay had led to sizeable productivity improvements. Further, it contended that the efficiency gains demonstrated that a "two party" staff relationship was inherently more valuable to the company than a collective arrangement involving trade unions.

The Minister for Industrial Relations, leading employer organisations (the Australian Chamber of Commerce and Industry, the Business Council of Australia and the Chamber of Manufactures of New South Wales) and a host of mining companies (including BHP) intervened in the proceedings. The Minister submitted that the federal industrial relations framework emphasised a collective approach to workplace relations and encouraged the Commission to intervene where individual contracts were being devised to induce employees to give up their collective bargaining rights. The employer bodies, on the other hand, maintained that contracts had proven effective in a range of award-regulated industries over a considerable time and urged the Commission not to interfere with levels of over-award payment made by employers. The matter was heard by a Full Bench.

3. *A "Special Case"*

The Full Bench's decision advanced on the footing that the award "safety net" provisions in the *Industrial Relations Act* 1988 (Cth) — in particular, section 90AA — did not preclude the Commission from making an award in the case before it. Although sections 90 and 90AA prescribed an obligation on the Commission (consistent with the objects contained in both section 3 and Part VI of the Act) to ensure, among other things, that awards act as a safety net of minimum wages and conditions necessary to underpin direct bargaining, the Commission observed that section 90AA does not impose a particular view as to the level of this safety net. Moreover, section 90AA(2) requires the Commission to "ensure, so far as it can, that the system of awards provides for secure, relevant and consistent wages and conditions of employment" and "has proper regard to the interests of the parties immediately concerned and the

Australian community as a whole".[6] In the Bench's opinion, these precepts could embrace the making of an award extending the benefits of an over-award scheme (such as CRA's staff contract system) to award employees in an appropriate case.

Furthermore, the five-member Bench, led by President O'Connor, did not regard the existing national wage fixing principles as thwarting its ability to arbitrate. In line with these principles, which were adumbrated by the Commission in the *Review of Wage Fixing Principles* case[7] and in the *Safety Net Adjustment and Review* case,[8] the Commission acknowledged that awards were intended to set minimum rates and not maximum or fixed rates; hence it should not allow arbitration above or below the safety net of existing award wages and conditions "except in a special case".[9] The Bench had no hesitation, however, in finding that the circumstances of the present case amounted to a "special case".[10] This was because of its ultimate conclusions concerning the discriminatory impact of the staff contract policy being advocated by CRA.

The Commission embarked on a comparison of the salary and employment conditions which applied between the staff contract and award employees at Weipa, and found clear evidence that the entitlements of those who accepted individual contracts were superior to the entitlements of those who declined them.[11] The Full Bench's survey disclosed that, even accounting for the agreed backpay which had been granted to the award employees in late 1995, the annual salaries obtained by contract employees were "considerably higher".[12] In the numerous examples provided to the Bench, staff contract employees earned $5–15 000 (or 10–30 per cent) more than their award counterparts. Greater discrepancies emerged in the context of employment conditions. For example, while award employees received an allowance which was fixed at a modest amount, staff contract employees acquired a "Weipa allowance" of 25 per cent of their base salary. It followed that a contract employee on even a low base salary could gain an allowance far in excess of that collected by an award employee.[13] Employees who consented to staff conditions also received more generous superannuation and travel entitlements,[14] and became eligible for the benefits of the company's medical assistance and insurance schemes, unavailable to award employees.

The Commission formed the inevitable impression that the explicit corporate policy of CRA, through its subsidiary Comalco, was "to treat award employees less favourably than those under staff contracts".[15] Moreover,

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6 Above n1 at 157.

7 *Review of Wage Fixing Principles case — August 1994* (1994) 55 IR 144.

8 *Safety Net Adjustments and Review case — September 1994* (1994) 56 IR 114.

9 Above n1 at 157.

10 Id at 158.

11 Id at 168–70.

12 Id at 169.

13 As an example, the Commission considered the case of a staff contract employee with an annual base salary range of $31 700–36 800, who would therefore be entitled to an allowance of $7920–9200. This compared to an allowance of only $1281 for an employee on the award: id at 169–70.

14 In the case of superannuation, an award employee contributed 2 per cent of their gross wage with the employer contributing 2 per cent of the gross wage plus 4 per cent of the base wage. By comparison, a staff contract employee contributed 4 per cent of base salary with the company contributing 11 per cent.

15 Id at 180. The company's managing director admitted under cross-examination by Bob

> This policy, we conclude, is unfair and discriminates against the award employees concerned based solely on their choice to enter into collective bargaining through their respective union, rather than "negotiate" one to one on the basis of the Company's two party staff system. A policy which holds that employees who are members of unions must, as a group, be discriminated against on the grounds that they wish to be represented by their union in collective bargaining, is inconsistent with the Act.[16]

Echoing statements delivered by the Commission in the *Bell Bay* case,[17] in which it was expressed that collective bargaining involving trade unions is at the core of the system established by the *Industrial Relations Act*, the Full Bench continued:

> The recent amendments made in the Reform Act have, as a central plank, a framework for collective bargaining between parties to an industrial dispute and, as we have already concluded [in *Bell Bay*], the "present Act is based on a system of collective regulation in which registered organisations of employers and employees acting as party principal are an integral part of the collective processes which operate under the Act".[18]

The Bench was thereby critical of CRA's refusal to acknowledge that unions should be allowed a direct role in negotiating pay and conditions. Indeed, the company's strategy of deunionising its workforce through individual contracts was "inconsistent with the central role that registered unions are given under the *IR Act* in the prevention and settlement of industrial disputes".[19] The Commission referred to its obligation under the Act to encourage registered organisations such as unions and facilitate their development.[20] Further, the company's anti-union actions were at odds with its implied obligation to bargain collectively in good faith. The Full Bench also considered that it had an obligation, by virtue of section 3(b)(ii) of the Act, to perform its functions to ensure that labour standards meet Australia's international obligations. The company, by discriminating against employees who desired to be represented by a union, was in breach of the ILO's Convention on the right of workers to collectively bargain.[21]

Pivotal to the Commission's decision was its rejection of CRA's submission that the differential treatment was justified on the ground that staff employees are necessarily more valuable than award employees. Although the Bench was satisfied by the company's claim that the improvements at CRA's New Zealand and Bell Bay smelting operations had resulted from the introduction of individual contracts,[22] it found that the productivity and efficiency

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Hawke that award employees (who thereby remained union members) were "in bulk" discriminated against in terms of reward: id at 179.

16 Ibid.

17 See *Re Aluminium Industry (Comalco Bell Bay Companies) Award 1983* (1994) 56 IR 403 at 442.

18 Above n1 at 180.

19 Id at 181.

20 Section 3(e) & (f).

21 Right to Organise and Collective Bargain, ILO Convention 98, 1949. The relevant obligations of the Convention are set out in Schedule 16 to the Act.

22 Above n1 at 170–4.

gains could also have been achieved through the bargaining mechanisms provided by the *Industrial Relations Act*. It pointed to the experience at CRA's Point Henry works in Victoria at which the outcomes managed there, under a process of collective bargaining involving unions, were at least equal to those reached at New Zealand and Bell Bay.[23] Accordingly, there was no basis for the company's contention that award employees represented by unions could never achieve the "same relative worth" as staff contract employees.

Another difficulty for the Commission with the company's staff employment program was that it ignored important factors like performance, skill, qualifications and experience, such that an award employee who was doing a better job than a contract staff employee received less reward. The Commission's decision focused on a number of individual examples at Weipa in which the company's policy had discriminated against award employees where those employees had at least the same level of performance as staff contract employees.[24] One of the various illustrations concerned the only remaining award employee at the kaolin plant. In a performance review he was assessed as meeting or exceeding expectations, and commended for his professionalism and safety awareness. Yet he earned $10–20 000 less than his staff contract colleagues. Another case involved an award tradesperson responsible for training apprentices. The evidence revealed that he was receiving less than the apprentices he was supervising! The Full Bench affirmed that the many cases of individual discrimination at Weipa arose

> not because the award employee might be performing his or her work in a less efficient manner or not working to the same flexible working arrangements, but solely on the basis that he/she has chosen to remain a member of a union to be represented by that union in negotiating with the Company.[25]

In order to re-establish a "level playing field" at Weipa, the Commission made an interim order requiring CRA to extend the terms and conditions applicable to staff contract employees to those award employees who were prepared to work in accordance with the various requirements of the staff contracts. It also stressed that its decision "should not be interpreted as having any implications regarding the operation of staff contracts and/or performance based schemes which operate outside awards beyond Weipa".[26] The Commission said that it will only intervene where the operation of staff contracts produces an "identifiable unfairness" or the contracts are found to be inconsistent with the scheme of the Act.[27]

Despite these qualifications, the Commission firmly pronounced that, under the existing regime of federal industrial relations, it is not acceptable for an employer to systematically decollectivise its workplace (via individual contracts), by discriminating against those employees who wish to be collectively represented by a union. On a broader level, the Commission determined that the collective interest should prevail over individual advantages. In understanding

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23 Id at 174–7.
24 Id at 181–8.
25 Id at 188.
26 Id at 181.
27 Ibid.

the significance of this conclusion, it is necessary to examine some of the ideological forces and models at contest in this realm of labour law.

4. *The Philosophy of Individual Contracts*

Western liberal political philosophy has supported the notion that individuals should be free to utilise their abilities according to personal predilection. Classical liberal theorists like John Locke and Adam Smith argued, for example, that individuals had property in their own labour.[28] Common labourers were therefore at liberty to maximise this right of property in themselves in the same way that aristocrats could exploit their land or merchants trade their wares. Liberalism's emphasis on autonomy springs not just from a belief in individual liberty per se but also from the idea that it is the best way to bring about the good society. A chief exponent of this position in the 20th century has been F A Hayek, whose attacks on socialism and collectivism, sustained over a period of fifty years, have particularly far-reaching implications for contemporary labour law.[29] Inheriting the liberal political tradition of Hobbes, Locke and Hume, Hayek asserted in his classic text, *The Road to Serfdom*, that:

> individuals should be allowed, within defined limits, to follow their own values and preferences rather than somebody else's, that within these spheres the individual's system of ends should be supreme and not subject to any dictation by others.[30]

In virtue of the principle of individual autonomy, Hayek maintained that persons should be free from coercion by the arbitrary will of another. Central planning or legal coercion by the State was thus an anathema to Hayek's sense of human freedom and the value of the individual.[31]

Hayek's political insights are predicated upon a broad philosophical conception of how knowledge is fragmented and dispersed in social settings.[32] The "constitutional limitations of the individual mind," writes Hayek,[33] mean that it can never comprehend all the needs, interests and capacities of other men and women. Indeed, "no single mind can know more than a fraction of what is known to all individual minds".[34] "Social order" emerges, therefore,

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28 Locke, J, *Two Treatises of Government* (Goldie, M (ed), 1993) at 128; Smith, A, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Campbell, R H and Skinner, A S (eds), 1976) at 138.

29 For a brief introduction to Hayek's work, see Lord Wedderburn, "Freedom of Association and Philosophies of Labour Law" (1989) 18 *ILJ* 1 at 7–15. The learned author observes at 37 that "[t]he philosophy of Hayek and its importance for the new labour law has gone too long unemphasised ...". See generally "Economic Symposium: F A Hayek and Contemporary Legal Thought" (1994) 23 *Southwestern ULR* 429–569.

30 Hayek, F A, *The Road to Serfdom* (1944) at 61.

31 For example, see Hayek, F A, *The Constitution of Liberty* (1960) at 21: "Coercion is evil precisely because it thus eliminates an individual as a thinking and valuing person and makes him a bare tool in the achievement of the ends of another". Hayek's anti-authoritarian philosophy seems to be premised on an assumption that the machinery of State is all-powerful and a greater threat to individuals than they are to each other.

32 For an outline of Hayek's theory of knowledge, see Kukathas, C, *Hayek and Modern Liberalism* (1989) at 47–59.

33 Hayek, F A, *The Counter-Revolution of Science: Studies on the Abuse of Reason* (1952) at 91.

34 Id at 100. Hayek uses the term "synoptic delusion" to describe those who believe that all relevant facts can be known to some one person "and that it is possible to construct from

not so much from conscious direction as from the spontaneous interactions of autonomous, free-thinking individuals. The infinite variety and nuances of individual situations are simply beyond the ken of any central planning apparatus. In Hayek's words:

> The State should confine itself to establishing rules applying to general types of situations and should allow the individuals freedom in everything which depends on the circumstances of time and place, because only the individuals concerned in each instance can fully know these circumstances and adapt their actions to them.[35]

Given the problem of human knowledge, Hayek claims that it is the market economy that secures the best use of society's resources.[36] Only the market and not the State, Hayek insists, can accommodate the manifold fragmentation of economic, political and legal knowledge. The competitive market gathers and utilises the widely dispersed and constantly changing information which is available only to individuals in their particular local circumstances. Moreover, the market system constitutes a discovery process or "spontaneous order", in which individuals are free to pursue their ambitions according to their wisdom and skills.

Adherents of Hayekian liberalism, especially in the field of modern labour relations, have identified the key concept of law implied by this market model as "freedom of contract".[37] Historically, the slogan of freedom of contract reflects the atomistic individualism and laissez-faire philosophy of the market.[38] Moreover, as Atiyah elaborates,[39] the model of the market underpins the classical model of contract law which emerged from the late 18th century. The leitmotiv of this classical contract theory is voluntary exchange between the parties, the idea being that they will only strike an agreement if it is to their mutual benefit. According to classical theory, therefore, the fairness or otherwise of the bargain is simply legitimated by the parties' consent without the need for interference by the State. The role of the law is portrayed as purely facilitative and the function of the courts confined to enforcing obligations.[40] Modern theories of contract, echoing these principles of freedom of contract, also emphasise the ideals of trust, respect and autonomy embodied in contractual arrangements.[41]

Indeed, when it comes to the employer-employee relationship, there are attractive arguments in favour of the principles of freedom of contract.[42] The immediate participants in an enterprise will have best knowledge of their own

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this knowledge of the particulars a desirable social order.": see Hayek, F A, *Law, Legislation and Liberty*, vol 1 (1973) at 14.

35 Above n30 at 75.

36 See Kley, R, *Hayek's Social and Political Thought* (1994) at 50–7.

37 See eg Brook, P, *Freedom at Work: The Case for Reforming Labour Law in New Zealand* (1990) at 99; see also Garvey, G, *The Market for Employment* (1994) at 17–9.

38 Horwitz, M J, *The Transformation of American Law 1870–1960* (1992) at 33, 194.

39 Atiyah, P S, *The Rise and Fall of Freedom of Contract* (1979) at 398–405.

40 Id at 404, 408.

41 For example, Fried, C, *Contract as Promise: A Theory of Contractual Obligation* (1981) at 8, 16–7.

42 See eg Garvey, above n37 at 19; Epstein, R A, *Liberating Labour: The Case for Freedom of Contract in Labour Relations* (1991) at 2–6.

specific and unique circumstances. Employers and employees are in the best position to know what is in their interests and can be expected to agree upon pay and conditions that best suit their day-to-day activities. In a centralised system of workplace regulation, it is simply not possible to take account of individual knowledge and preferences. Awards formulated at a national and/or industry level cannot cope with the informational permutations affecting individual employment situations. Where unions bargain collectively on behalf of employees, for instance, they will normally have to represent the averaged interest of their members so that, as Brook explains, "the bargaining position of workers who differ from the average in skills or abilities or preferences will inevitably be compromised".[43] Individual bargaining permits employers and employees to strike mutually beneficial agreements, by adapting their relationship to the constantly changing market environment. Bargaining one on one also allows the parties to realise their wishes and priorities. Further, the policy of freedom of contract requires employers and employees to take direct responsibility for forming and maintaining their relationship, thereby enhancing communication, co-operation and trust.

Many of these arguments are borne out in the *CRA Weipa* case by the company's teleological belief in individual contracts. The company's basic philosophy was spelt out to the Commission by an organisational psychologist from the UK acting as a consultant to CRA.[44] He contended that a staff contract amounted to a declaration of trust between the parties which placed the employment relationship on a more mature, co-operative footing. The act of signing a contract demonstrated loyalty to the company (ahead of allegiance to a union), and gave decision-making power back to individual employees. The "essential component" of a staff relationship was "direct individual judgment"[45] — that is, staff contract employment created a working relationship where a person's individual performance was judged, not by somebody outside of the immediate enterprise (for example, an industrial tribunal), but by a company manager who was in the best position to know. Moreover, the presence of a "third party", such as a union, was said to be inimical to the development of trust between management and staff because a three party relationship was based on an assumption of conflict:

> [A] mediated relationship is essentially adversarial. It assumes that a group has to be represented by a third party if the members are to be treated fairly. It is, therefore, a relationship which necessarily assumes an absence of trust. It assumes that neither side can be trusted not to exploit the other. It results from a fundamental assumption that capital and labour have contrary interests.[46]

According to the consultant/psychologist, the staff employment program was essential for improved flexibility and competitiveness as it shifted work-

43 Brook, above n37 at 52. See also Brook, P, "Reform of the Labour Market" in Walker, S (ed), *Rogernomics: Reshaping New Zealand's Economy* (1989) at 198–9, 202.

44 Above n1 at 170–2. See also the statements made by the company's managing director at 178–9.

45 Id at 171–2.

46 Id at 171. It was also suggested that negotiations involving unions introduced an inefficiency — namely, "the need for sets of rules and regulations to curtail the discretion of the leadership": ibid. This was said to make individual agreements with workers inherently more cost effective to the company over time.

place relations from a conflict-oriented approach to a more cooperation-based system.

The individual contract campaign pursued by CRA at Weipa and other sites mirrors deunionisation strategies frequently adopted by managers in other industrialised countries, particularly the United States. The paradigm model of an industrial relations system based on individual contracts of employment is New Zealand.[47] There, the evidence to date seems to suggest that contract-making has in fact led to greater productivity and flexibility as well as employment growth.[48] It is no coincidence that the decision by members of senior management to implement the staff contract system at Weipa followed precisely a visit by them to CRA's operations in New Zealand, a point noted by the Commission.[49] Despite its conclusion that CRA had discriminated against the 76 or so "maverick" workers who declined the staff contracts, the Commission acknowledged that the contracts did not disadvantage those employees who accepted them.[50] Indeed, the Bench appreciated that there was "widespread acceptance and support among the employees for the staff contract system".[51] The Commission further endorsed CRA's controversial "Personal Effectiveness Review (PER)" scheme which was used by company managers to assess rewards for the personal performance of staff employees.[52] The Commission was also somewhat critical of the unions for having been reluctant to recognise the need for greater flexibility in the workplace.[53]

Part of the theory behind individual bargaining involves a rejection of collective bargaining and, in particular, trade unionism. Free-market economics posits, for example, that unions are an unjustifiable impediment to competition since they act as cartels in the supply of labour. By taking labour out of competition, union power prevents employers from milking a cheaper source. However, as with other forms of monopoly, unions are said to have an ultimately detrimental effect on the market. In forcing up the price of labour, unions deprive other workers of opportunities, even denying them entry into the employment market altogether.[54]

A broader social phenomenon often to be depicted is the sense of exclusion or alienation of the ordinary worker from trade unions and the collective bargaining process generally.[55] Here, modern unions tend to be perceived as remote, self-serving, unwieldy and bureaucratic. Rather than exerting a democratising influence which enables employees to participate in the shaping of their work environment, unions are seen as another instrument of control

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47 *Employment Contracts Act* 1991 (NZ).

48 Kasper, W, *Free to Work: The Liberalisation of New Zealand's Labour Markets* (1996) at 43–52.

49 Above n1 at 149.

50 Id at 166.

51 Ibid.

52 Id at 168.

53 Id at 149.

54 See eg Hayek, F A, "The Trade Unions and Britain's Economic Decline" in McCarthy, W E J (ed), *Trade Unions: Selected Readings* (2nd edn, 1985) at 357–64; Friedman, M and Friedman, R, *Free to Choose* (1980) at 228–47; Brook, above n37 at 71.

55 See eg Aronowitz, S, *False Promises: The Shaping of American Working Class Consciousness* (1973), especially "Trade Unions: Illusion and Reality" at 214–63.

over workers' lives, a kind of "secondary management".[56] Furthermore, the system of collective bargaining is said to be characterised by "extraordinary bitterness, divisiveness, and conflict".[57] On this view, the process of group representation, in which professional trade union officials negotiate in abstract and formal terms about everyday matters affecting members/workers on the shop floor, only sharpens the sense of employee isolation and impotence.

Disenchantment with union representation appeared to be a significant factor in the decision by many employees to join the ranks of staff at Weipa. One worker said that he entered an individual contract in order "to break away from the union": "I was annoyed that I was forced to join the union and did not have the freedom of choice to do what I wanted".[58] Another employee remarked:

> I accepted a staff contract to better my career prospects within, to work in a much better system of employment, to be treated as an individual and an equal, to not lose work on strike related issues of the Unions, to be able to contribute more in the workplace and to be able to direct my career myself and not to have it directed by the Unions. Money is certainly an incentive but it is not everything. What is important to me is what I get out of my job.[59]

Yet another employee at Weipa commented that he preferred to negotiate his own salary because he had found that union decisions at previous work sites had conflicted with his best interests, the best interests of his colleagues and the best interests of his employer.[60] Another not insubstantial cause of the worker dissatisfaction appeared to be the fact that the unions (in particular, the AWU and CFMEU) had been struggling with each other over coverage of the Weipa plant, thereby allowing the company to capitalise on the discord and "get the jump" on the unions.[61] Along with the inter-union rivalry, the disillusionment amongst Weipa workers was exacerbated by the unions' failure to finalise an enterprise agreement with CRA.

Overall, then, the philosophy of individual contracts refracts the world view, embedded in Western liberal discourse, that the basic unit of social life is the individual and that the State should leave as much of her or his daily existence free from interference as possible. However, as the next section shows, the appeal to individual freedom in the workplace is largely mythical because it overlooks the immense and powerful industrial forces besetting single workers. Moreover, it is a dangerous illusion to maintain because it may in fact promote and legitimate worker subordination.

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56 Hunter, I, "Individual and Collective Rights in Canadian Labour Law" (1993) 22 *Manitoba LJ* 145.
57 Epstein, above n42 at 6.
58 Above n1 at 165.
59 Id at 164.
60 Id at 164–5.
61 "At the End of the Day," *4 Corners* program, ABC, Monday 6 May 1996.

5. *The Myth of Individual Autonomy*

A contract is an instrument of power. However, the acquiescence of the parties ensures that any domination or subordination created by the contractual instrument is effectively legitimated. From the standpoint of distributive justice, the outcome is fair enough: each individual has freely consented to her or his plight. Indeed, the theory works well within most commercial frames of reference. For example, if a buyer is not satisfied with the price being asked for a car, then the assumption is that each party can go elsewhere and find a better deal.[62] But, as a number of writers have highlighted, the analogy breaks down in the context of the employment relationship where typically the employee is economically dependent upon the employer.[63] Put simply, the single employee generally needs the employer's job more than the employer needs the employee's labour.[64] Freedom of/in/to contract is therefore a will-o'-the-wisp for most individual employees, whose only real alternatives to accepting the job on the employer's terms are either looking for other work, relying on the State for welfare or starving. The parties do not contract on an equal footing. And, as Sir Otto Kahn-Freund has pointed out,[65] the submission and subordination that is entailed by this inequality of bargaining power may then be disguised under the cloak of freely-entered contracts of employment.

The asymmetry of bargaining power inherent in the employer-employee relationship points to another fundamental contradiction between free contract theory and the reality of individual bargaining. The philosophy of individual contracts assumes a relationship between equals, in which one individual (the employee) negotiates face to face with another individual (the employer). However, as the *CRA Weipa* case starkly illustrates, the truth is more likely to be that the individual worker is contracting with a collective — a company, or mega-corporation like CRA, with not only vastly superior financial resources but greater access to information and advice via legal counsel, consultants and human resource managers.[66] The doctrine of freedom of con-tract-con-sent obfuscates the operation of these differences in the social, legal and economic status of the parties. In the context of this disequilibrium between individuals equipped with only limited means and firms representing huge aggregations of shareholder wealth and knowledge, the ordinary worker cannot hope to negotiate favourable terms and conditions on her or his own. Rather, the obvious course for employees is to band together and present a unified front to management,

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62 See Weiler, P, *Reconcilable Differences: New Directions in Canadian Labour Law* (1980) at 65.

63 See eg ibid; Selznick, P, *Law, Society and Industrial Justice* (2nd edn, 1980) at 144.

64 See Atleson, above n2 at 179: "The worker has to sell his labour power to live whereas the employer is not similarly constrained to buy labour".

65 Kahn-Freund, O, *Labour and the Law* (1972) at 8. See also Kahn-Freund, O, "Introduction" in Renner, K, *The Institutions of Private Law and Their Social Functions* (1949) at 28: the contract of employment "is a command under the guise of an agreement".

66 See Bennett, above n2 at 248; Walsh, P, "The Employment Contracts Act" in Boston, J and Dalziel, P (eds), *The Decent Society?: Essays in Response to National's Economic and Social Policies* (1992) at 66. Interestingly, the contracts offered by CRA at Weipa were, as the Commission discovered, drawn up exclusively by the company and were generally not even the subject of any negotiation with individual employees: see above n1 at 163.

thereby acting as a powerful counterpoise to the natural economic advantages wielded by employers.

Some individual workers will possess sufficient bargaining leverage on their own to gain concessions from employers, in particular those workers with special skills and attributes considered vital to the employer's enterprise. But for the average employee, whose efforts and abilities are basically fungible, the result may be exploitative and the quest for autonomy paradoxically constraining. Certainly the preliminary data from New Zealand appears to indicate that individual contracts of employment, while perhaps promoting improvements in the national economy, have also been devices for keeping down the wages and conditions of ordinary workers.[67] Moreover, the prevailing contractualism in the New Zealand labour market has seen the gap between the upper and lower sectors of the workforce widen — between those who have done well for themselves and those with average skills and abilities who have become worse off. As two New Zealand commentators write:

> ... New Zealand has been through a period of social Darwinism wherein the stronger have got stronger, the weak weaker, the rich richer, and the poor poorer, the advantaged have become more so and so have the disadvantaged. Almost any schism in society that existed has widened and become more overt. ... The Employment Contracts Act has been an integral part of the causal forces creating these schisms ...[68]

Inevitably, a system of individual bargaining creates a "large pool of unprotected, unorganised employees"[69] which in turn opens up fertile ground for oppressive arrangements to be struck. For this reason also, free-market contractualism is likely to encourage more aggressive, and even predatory labour practices by managers and firms. The Commission touched upon these concerns in the *CRA Weipa* case by discussing the vulnerable position that outsider groups such as youth workers and workers from non-English speaking backgrounds are placed in if they cannot be represented in direct negotiations with management:

> A policy which prevents an individual from being represented in matters associated with a staff contract can place an individual at a disadvantage. For example, ... it would be unfair to prevent a person whose first language is not English, and who has a difficulty in communicating his or

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67 For example, average real wages in New Zealand have actually fallen 0.5 per cent since the introduction of the *Employment Contracts Act*: above n48 at 47 and source cited therein. See also Kelsey, J, *Economic Fundamentalism: The New Zealand Experiment — A World Model for Structural Adjustment?* (1995) at 182–3.

68 Hince, K and Harbridge, R, "The Employment Contracts Act: An Interim Assessment" (1994) 19(3) *NZJIR* 235 at 252. Kelsey's more general overview is equally arresting: "By 1995, after a decade of radical structural change, New Zealand had become a highly unstable and polarised society. Its underskilled, under-employed, low wage, low inflation, high exchange rate, export-driven economy was totally exposed to international economic forces. The victims of the market were forced to depend on a shrinking welfare safety net or private charity. What were once basic priorities — collective responsibility, redistribution of resources and power, social stability, democratic participation and the belief that human beings were entitled to live and work in security and dignity — seemed to have been left far behind". See Kelsey id at 350.

69 Hince and Harbridge, ibid.

her concern over an aspect of the staff contract, from having a person present to assist or represent them in any discussion with management.[70]

Contractualism has been subjected to the most intense criticism in the United States where critical legal scholars such as Karl Klare and Katherine Stone have argued that the "contract" between capital and labour, while appearing to embody the ideals of democratic self-government, employee participation and mutual consent, has actually reinforced management control over workers. The argument put by the Crits alludes to the concept of hegemony propounded in the work of Marxist Antonio Gramsci.[71] By "hegemony" Gramsci meant an ideology — or "entire system of values, attitudes, beliefs, morality, etc."[72] — which circulated throughout society and justified the power of the entrenched ruling class. Law, along with other social institutions such as art, education, fashion, commerce and media, was part of the totalising mechanism through which the ruling capitalist class maintained its interests and hegemony in society. The function of law was not only to articulate the ideology of the dominant elites, but also to *mask* it as ideology, to make hierarchy and power arrangements among the classes seem natural, or else, part of the "common sense" order of things. In this way, the ruling "capitalist class obtains the consent of the ruled to their ongoing exploitation and oppression".[73] Transferred to labour relations, this theory holds that the hegemonic culture of Western corporate capitalism induces a belief in the inevitability of managerial domination and authority, and that the law helps to shape, maintain and reproduce this conception.[74]

Klare contends, for example, that labour law "articulates an ideology that aims to legitimate and justify unnecessary and destructive hierarchy and domination in the workplace".[75] Buttressing the ideology is a complex "institutional architecture"[76] which renders the power relations within the enterprise invisible. Klare identifies contractualism as the centrepiece of this institutional structure. The contract is the "institutional form by which organised employees consent to their own domination in the workplace".[77] The law of contract compels workers to repress their own industrial discontent (through, for example, no-strike clauses), co-opts them into undertaking certain managerial tasks and functions, and neutralises any pressure for change. The "alluring rhetoric"[78] of freedom of con-tract-con-sent then makes this subordination

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70 Above n1 at 160.

71 Gramsci, A, *Selections from the Prison Notebooks* (Hoare, Q and Smith, G (eds), 1971).

72 Boggs, C, *Gramsci's Marxism* (1976) at 39.

73 Greer, E, "Antonio Gramsci and 'Legal Hegemony'" in Kairys, D (ed), *The Politics of Law: A Progressive Critique* (1982) at 305.

74 See eg Swidorski, C, "Constituting the Modern State: The Supreme Court, Labor Law, and the Contradictions of Legitimation" in Caudill, D S and Gold, S J (eds), *Radical Philosophy of Law: Contemporary Challenges to Mainstream Legal Theory and Practice* (1995) at 162–78.

75 Klare, K, "Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law" (1981) 4 *IRLJ* 450 at 452.

76 Ibid.

77 Klare, K, "Critical Theory and Labor Relations Law" in Kairys, above n73 (2nd edn, 1990) at 76.

78 Id at 74. Self-repression is perhaps the most insidious form of subjection, as the oppression is absorbed and internalised by the labour force itself.

seem as though a product of the employees' own free will. Contractualism produces results both "oppressive and morally defective".[79] It allows capitalist industrialists to exploit workers through the uneven division of profit, that is, by only giving back to employees (in the form of wages) a fraction of what they themselves have produced. Further, the employer-employee relationship is more than just purely legal:

> It establishes an entire system of social relations in the workplace whereby the employer is entitled to control the worker's actions and choices during the major portion of his waking hours. Thus, labor contractualism functions as the institutional basis of domination in the workplace.[80]

The deconstruction (or "trashing"[81]) of contractualism by Klare and others forms part of a broader attack on Western liberalism and its mythical appeal to atomistic individual autonomy. Critical legal scholars have uncovered a series of binary distinctions which:

> ... taken together, constitute the liberal way of thinking about the social world. Those distinctions are state/society, public/private, individual/group, right/ power, property/sovereignty, contract/tort, law/policy, legislature/judiciary, objective/subjective, reason/fiat, freedom/coercion ...[82]

These dualities are said to permeate the law and make contingent social and political hierarchies seem just, natural and legitimate. They inhibit the possibility of cultural change by denying the arbitrary nature of human concepts and values. However, as the Crits also suggest, the internal inconsistency and incoherence of these paired oppositions always renders them likely to "undo" themselves — hence the need for their continual reinforcement in legal discourse. Among the most important of these categories in the area of labour law is the public/private distinction. By conceiving the employment relationship as a "private" sphere of activity in which the parties govern themselves, liberalism seeks to guarantee individual autonomy or freedom. Moreover, it fosters a belief in the neutrality of law towards these "private" parties and a view of public power (the State) as merely facilitative. But, as Klare explains:

> There is no "public/private distinction". What does exist is a series of ways of thinking about public and private that are constantly undergoing revision, reformulation and refinement. The law contains a set of imageries and metaphors, more or less coherent, more or less prone to conscious manipulation, designed to organise judicial thinking according to recurrent, value-laden patterns. The public/private distinction

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79 Klare, K, "Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941" (1978) 62 *Minnesota LR* 265 at 297.

80 Ibid.

81 "Trashing" is the term often used to describe the mode of critical legal studies, with its emphasis on demystifying and unmasking the latent political structures underlying legal doctrines and thought. See generally Kelman, M, "Trashing" (1984) 36 *Stanford LR* 293.

82 Kennedy, D, "The Stages of the Decline of the Public/Private Distinction" (1982) 130 *U of Pennsylvania LR* 1349. See also R M Unger's seminal analysis of liberalism in *Knowledge and Politics* (1975).

> poses as an analytical tool in labor law, but it functions more as a form of political rhetoric used to justify particular results.[83]

In other words, the liberal classical image(ry) of the neutrality and disinterestedness of labour law principles is a chimera. What it conceals is the institutional bias of the law toward the protection of private property rights including ownership of capital. The common law contract of employment is skewed in favour of management and its prerogatives. In the first place, the contract assigns control of the production process to management through a unilateral power to direct the work-effort of employees. Systems of contract simultaneously enable managers to reassert their discretion and control over more contentious areas of the employment relationship like performance appraisal, staff disciplining and grievance handling — exemplified at Weipa, for instance, in the company's PER scheme and internal "Fair Treatment Process". Second, the contract incorporates remnants of the old master/servant paradigm in the form of implied duties owed by employees to the employer.[84] Bennett observes that

> [t]hrough the fiction of implied terms the courts convert the economic imperative to obey the commands of the employer into legal subordination. At the same time they impose a series of further legal obligations on workers. These expand the employer's property rights and protect her or his commercial interests.[85]

The overarching legal and social consequence is to enhance entrepreneurial hegemony and consolidate the cultural logic of late industrial capitalism.

Confronted by this power imbalance the logical tack for workers is, as already noted, to coalesce and organise. However, a key and subtle point about individual bargaining is that it not only increases the scope for inequitable outcomes, it also saps and undermines the position of those workers who prefer to join together and bargain collectively with their employer. This was implicitly recognised by the Commission in the *CRA Weipa* case through its finding that the company's staff contract system had disadvantaged those award employees who chose to remain collectively represented by a union. It is a point deserving further attention, as it may be yet another way in which individual bargaining promotes managerial authority and control.

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83 Klare, K, "The Public/Private Distinction in Labor Law" (1982) 130 *U of Pennsylvania LR* 1358 at 1361. From an historico-political perspective, Horwitz has traced the breakdown of the public/private distinction to the late 19th century when, after the Industrial Revolution, "large-scale corporate concentration became the norm". He points out that the line between public and private power became irretrievably blurred as private institutions began to wield the kind of coercive influence which had previously been exerted only by the State. See Horwitz, M J, "The History of the Public/Private Distinction" (1982) 130 *U of Pennsylvania LR* 1423 at 1428. The rise of multinationals — like CRA — is a notable 20th century example of this historical trend. In December 1995, CRA merged with British mining giant RTZ to form the world's largest mining conglomerate.

84 These include the implied duties of fidelity, loyalty and (possibly) co-operation. Importantly, there are no corresponding duties imposed upon the employer toward the employees.

85 Bennett, above n2 at 168-9.

6. *The Challenge to Collectivism*

The ideal of solidarity amongst workers is, of course, a very old one. It is perhaps best captured in the Gilded Age motto of the Holy and Noble Order of the American Knights of Labor: "An injury to one is the concern of all".[86] The ideal is intended to reflect the notion that unionism gives security in numbers for individual workers. The bargaining power which employees are able to amass through collective organisation is, indeed, essential for them to compete fairly with employers, especially given the ever-expanding domination of employment markets by large pyramidal corporate groups and transnational capital. In particular, worker collectivism "den[ies] to the employer the ability to strike a cheaper deal with individual timid souls: to divide and rule the work force, and thus to undercut the credibility of the union's posture at the bargaining table".[87]

The concern about the potential for individual contracts to seriously compromise the practice of collective bargaining underpins the Commission's strong declaration in the *CRA Weipa* decision that unions should be allowed a central role in negotiations with employers. It was a concern elaborated upon by the United States Supreme Court in *J I Case Co v NLRB*.[88] That case similarly involved a company offering individual contracts of employment to its workers. In determining that the individual advantages provided by the contracts should not eclipse the collective interest, the Court said:

> The practice and philosophy of collective bargaining looks with suspicion on such individual advantages ... advantages to individuals may prove as disruptive of industrial peace as disadvantages. They are a fruitful way of interfering with organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of the group as a whole.[89]

The Supreme Court highlights the valuable point that the appeal to short-term material gain made through individual contracts may well be at the expense of workers' long-term interests. Although it may seem quite rational for single workers to pursue their narrow self-interest by signing individual contracts, this course of action may in fact yield a weakened labour force in the long run. To this extent the Court's statement finds resonance in social choice theory, which posits that rational short-term choices often beget a long-term irrationality.[90]

By running counter to the ideal of collective solidarity, individual contracts are potent devices for management to "divide and conquer" a labour force. The great attraction of an individual bargaining system from an employer's perspective is "strategic": "[i]t divides a workforce previously employed under [an

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86 Cited in Levinson, E, *Labor on the March* (2nd edn, 1995) at 297.
87 Above n62 at 126.
88 321 US 332 (1944).
89 Id at 338–9.
90 See eg Rogers, J, "Divide and Conquer: Further 'Reflections on the Distinctive Character of American Labour Laws'" (1990) 1 *Wisconsin LR* 1.

award] and thereby weakens them industrially".[91] Individual contracts are, then, a sort of "Trojan horse" infiltrating the rank and file with over-award sweeteners, and seducing them into abandoning their collective bargaining rights. The fear is that sometime in the future, once the bewitching hour has passed and the role of unions eliminated, the employer will have a free hand to reduce terms and conditions. Certainly, there can be little doubt about the effectiveness of individual contracts in marginalising trade unions. Following the introduction of staff contracts at Weipa, for example, union membership dwindled to about 10 per cent of the workforce.[92] A parallel decline occurred at CRA's Bell Bay operations once personal contracts were implemented.[93] Most dramatic, though, was the case of all 2000 workers at CRA's New Zealand smelter leaving their union.[94] This reflects a nationwide trend in New Zealand where union density has virtually halved since the onset of individual bargaining in 1991.[95] By December 1994, around only one in five New Zealand workers was still a union member, with many of the best known unions having collapsed.[96]

The inexorable path of contractualism toward the dis-member-ment of unions and the establishment of an individualistic labour market inevitably places those workers who wish to remain part of a collective on shaky ground. An individualistic market also gives rise to the classic problem of the public good. Many of the benefits achieved by trade unions are public or collective goods — for example, higher wages, shorter hours, better working conditions, favourable industrial laws.[97] However, the market alone is incapable of supplying these because a prisoners' dilemma sets in.[98] Every worker would prefer to have these collective goods provided and would be prepared to make whatever sacrifice in compensation is needed to pay for them. But fearing that other workers might avoid undertaking the same sacrifice while nevertheless enjoying the benefits, nobody contributes, and the good is never realised. Furthermore, in the event that there are enough employees willing to pay their share so that the good can be provided, another problem then emerges — the problem of the notorious "free rider". Stated baldly, the self-interest of some individual workers will dictate that they refrain from making a contribution to union aims and objectives, allowing other workers to bear the cost while they still take the benefits. The "free rider" hence poses a considerable threat to collectivism because it undermines the incentive for trade union members to maintain their membership. At Weipa, for example, concern over staff contract employees enjoying the fruits of union activism but bearing none of the burden was prevalent among the remaining union members.[99] The remedy to

91 Walsh, above n66 at 66.
92 Above n61.
93 Above n17 at 419.
94 Above n48 at 31.
95 Union membership in New Zealand has fallen from 675 000 in 1990 to 345 000 in mid-1995: ibid.
96 Kelsey, above n67 at 184.
97 Olson, M, *The Logic of Collective Action: Public Goods and the Theory of Groups* (1965) at 67, 74.
98 For an account of this dilemma, de Jasay, A, *Social Contract, Free Ride: A Study of the Public Goods Problem* (1989) at 60–6.
99 Above n61.

this variety of problems will often lie in some sort of intervention by the State. However, by engendering an industrial landscape made up of competing, isolated self-interested individuals, contractualism precludes the kind of network-building and group consciousness vital for workers to influence the mainstream political process, and thereby bring about the necessary change.

There is one sense in which collective bargaining is really beyond challenge — namely, its ability to enhance workplace flexibility leading to greater efficiency and productivity. Yet it is precisely in this regard that collective bargaining is most often pilloried by employer representatives, economic rationalists, conservative commentators and politicians. In the *CRA Weipa* case, of course, the company's contention was that collective bargaining involving unions failed to deliver the requisite flexibility and outcomes for international competitiveness that a "two party" staff relationship could provide. In support of its claim, the company presented evidence showing how its aluminium smelters in New Zealand and Bell Bay had been rejuvenated through a system of individual contracts — improving productivity, lowering costs and guaranteeing the long-term viability of the plants. The Full Bench of the Commission accepted CRA's evidence. But it also found that the mostly union-driven reform of work practices at Alcoa's aluminium works in Point Henry, Victoria had achieved productivity gains at least equal to those accomplished at Bell Bay and New Zealand:

> [T]he outcomes achieved at Point Henry, we believe, represent achievements comparable to those which the Company has achieved under its staff contract system. The difference is that the outcomes achieved at Point Henry have been achieved under a three party relationship in which the Unions are an active participant in the changes.[100]

The Commission went further and noted how the "Alcoa Values" being fashioned at Point Henry through collective bargaining — integrity, quality, excellence, profitability, safety and health, people, environment, accountability — bore "close resemblance" to the values CRA was seeking to enshrine:

> The objectives [at Point Henry] ... concerning the development of world class teams, the need to change traditional structures and develop trust and support amongst "teams," new remuneration systems, involvement and participation, are very similar to the objectives Comalco have sought to develop through the staff contract system.[101]

Thus, the Commission dispelled the notion that individual contracts are the only way to bring about workplace reform, and strikingly reaffirmed the value of collective bargaining in harnessing both long-term productivity gains for employers and greater participation/rewards for employees. The Point Henry experience demonstrates that the best results "all round" are achieved where the parties exercise an equivalence of bargaining strength and where unions are prepared to take a lead role in facilitating workplace change.

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100 Above n1 at 177. Among the reforms made at Point Henry through collective bargaining were: the removal of restrictive practices and union demarcation barriers, a no-strike deal, workers operating as unsupervised and self-directing teams, and the abandonment of paid overtime: see Hince and Harbridge, above n68 at 249.

101 Above n1 at 177.

Collective bargaining furnishes the most reliable framework for at once meeting managerial concerns over outputs and balance sheets whilst ensuring the security and the dignity of ordinary workers.

7. *Conclusion: The Future Role of the Commission*

One of the strategic advantages of individual bargaining for employers is that it fences off the employer-employee relationship from all external bodies. Individual contracts of employment exclude not only involvement by trade unions but also intervention by the Commission. From the point of view of Hayekian neo-classical liberalism, the marginalisation of industrial tribunals is faithful to the general precept that individual employers and employees are the best judges of their own interests and desires.[102] To use Hayek's term, it is pure "synoptic delusion" to believe that an industrial relations commissioner can know what is in the best interests of the parties. Employers and employees should be allowed to make whatever bargain they please, free from paternalistic interference by labour tribunals or other arms of the State. The free market, and the free market alone, is the best arbiter of individual needs and abilities.

The industrial relations reforms proposed by the new Federal Coalition Government embody many of these arguments.[103] The Howard Government's reform package is designed not only to enhance direct bargaining between individual employers and individual workers but to remove any jurisdiction of the Commission over this area. The Commission will have no power to vet individual agreements. Nor will it have power to certify their legal force. Rather, all individual agreements will be secretly filed with a new "Office of the Employment Advocate (OEA)", with unfiled agreements presumably taking effect as contracts of employment at common law. Unlike the Commission, the OEA will not exercise arbitral functions: for example, it will be unable to compel the parties to keep their bargain or to guarantee that agreements satisfy minimum conditions. Instead, these will become matters for the courts, along with the paraphernalia of lawyers, professional negotiators, bargaining agents and other "hired guns".

The Coalition Government's contractualist regime clearly encourages a more litigious approach to labour relations. Individual workers, in particular those who occupy a weak labour market position, are precisely those likely to be disadvantaged as they generally lack the resources to initiate and sustain expensive legal action.[104] The "freeing up" of workplace arrangements beyond the scope of any intervention by the Commission creates many pitfalls for the average employee. Despite its apparent affinity for individual freedom and equality of opportunity, the competitive market constitutes a hierarchy of power and wealth. Indeed, few power structures are able to conceal their hierarchical nature as effectively as the "free" market.[105] The problem is, as George Orwell expressed it in his review of Hayek's *The Road to Serfdom*:

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102 See eg Lindsay, G, "Foreword" in Garvey, above n37 at vii.

103 *Workplace Relations and Other Legislation Amendment Bill* 1996 (Cth). The Bill was introduced into Parliament on 23 May 1996.

104 Bennett, above n2 at 236–7.

105 Kahn-Freund, O, "Introduction" in Renner, above n65 at 7.

> ... that a return to 'free' competition means for the great mass of people a tyranny probably worse, because more irresponsible, than that of the State. The trouble with competitions is that somebody wins them.[106]

In the realm of "free" labour markets, that "somebody" will invariably be the party in the dominant social and economic position: namely, managers and firms. Ordinary workers will hence require State assistance, from time to time, to equalise the bargaining power between themselves and employers. In addition, what the market often focuses upon are short-term advantages. It will therefore be important to ensure, on occasions, that the long-term interests of the parties, and of the community as a whole, are not compromised by these short-term market-driven gains. Finally, there will always be a need to temper market outcomes through the application of equity and social justice considerations. As Orwell would suggest, it is simply not enough to rely upon trust in market forces, leaving individual workers to fend for themselves.

The decisions made by the Commission have a symbolic and legitimating effect on Australian labour law that transcends the outcome of any given case. Not surprisingly, then, the debate over the future role of the Commission reflects that tribunal's highly political nature, a point recognised by the High Court:

> The Commission's powers are political in the sense that the Commission exercises large powers over the relationship of labour and capital, the economy and industrial organisations according to its view of the national economy, the national interest and what is reasonable, desirable or industrially expedient. The decisions of the Commission, especially its economic decisions, both affect and are affected by the policies of government. The performance by the Commission of its function is a matter in which the Parliament, whose legislation maintains the Commission in its prescribed form and with its prescribed powers, has a continuing interest.[107]

The argument for preserving, or indeed extending, the powers of the Commission with respect to workplace bargaining is twofold. First, given the illusory nature of economic freedom for most workers, individual agreements should be vetted by the tribunal to ensure that they are not exploitative. The Commission has an important role to play here as a bulwark against the dangers of decentralised non-union bargaining, especially for vulnerable groups of workers like women, casuals and youth. The Commission is also needed to maintain a strong "no disadvantage" test so that agreements do not lead to a deterioration in award-based terms and conditions. Second, where a system of industrial relations facilitates both individual and collective bargaining, it is necessary to ensure that those workers who choose to bargain collectively are not discriminated against solely as a consequence of that choice. The *CRA Weipa* case could be merely the "thin edge of the wedge" were the Commission's jurisdiction in this area to be gutted. The Commission stands as a *via media* between capital and labour and serves as the neutral umpire of a level playing field. In performing its functions, therefore, the Commission represents a vital safeguard against large employers (like CRA) being able to play unionists and non-unionists off against each other.

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106 Orwell, G, *Collected Essays, Journalism and Letters*, vol III (1970) at 118.
107 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 46 per Brennan J.

The alternative, as the Liberal/National Government would have it, is to leave the resolution of these matters to the common law courts. However, the inadequacies of courts are well known ever since Dickens' famous invention of *Jarndyce v Jarndyce* in *Bleak House*. Moreover, the enduring strengths of the Commission are its accessibility, its specialist knowledge, its ability to determine cases with less formality and cost and, above all, its independence from the parties and government. The *CRA Weipa* case was celebrated as a great victory for the trade union movement. But it is worth remembering that the neutral umpire did not find it all the unions' way. The Commission rejected an argument by the ACTU that CRA's staff contract system breached the principle of "equal pay for work of equal value".[108] Further, the benefits of the Bench's interim award only applied to those award workers who were prepared to work in accordance with the requirements of the staff contracts. Thus, the decision upheld the right of employers to implement staff employment through individual contracts so long as the award safety net remained in place and the strategy was not an overt deunionisation tactic.

MATT MOIR*

108 Above n1 at 160–1.

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