MONASH University
Business and Economics

INDUSTRIAL RELATIONS AND THE LAW: THE NEW INDUSTRIAL RELATIONS (ISSUES)

Julian Teicher

Working Paper 38/04
July 2004

DEPARTMENT OF MANAGEMENT
WORKING PAPER SERIES
I S S N 1 3 2 7 – 5 2 1 6

Presidential Address Delivered to the 18th AIRAANZ Conference Noosa, Qld, 3-6 February 2004.

INDUSTRIAL RELATIONS AND THE LAW: THE NEW INDUSTRIAL RELATIONS (ISSUES)[1]

I appreciate the opportunity to present this address, yet I do so with some trepidation, because of those I follow and their insightful and scholarly reflections on the field of industrial relations. The challenge is to provide some novel insights, or, at the very least, to remind the community of scholars of some insights that have been lost as the 'baton passes' from one generation to the next. In keeping with previous addresses, my remarks include the theme of the state of industrial relations, but I also want to develop an argument about the relationship between industrial relations and the law.

The field of industrial relations has undergone rapid change since the 1980s. Much of this change has been driven by the increasing internationalisation of the economies of the world and the impact of new technologies. As the world has changed, so too has industrial relations, yet, there has been continuity. My central argument is that industrial relations is inherently legalistic, and, that as a practically oriented scholarship, it is critical that law is accorded its appropriate place. With these ideas in mind, I intend to reflect on the relationship between industrial relations and the law, and to provide some fresh insights into the paradoxical neglect of the law by industrial relations scholars

This paper is organised into four parts. In the first part, I review the changing conceptualisations of industrial relations in Australia, noting also the concerns over the future of industrial relations, which have been a persistent theme of previous presidential addresses. The second part then examines the evolution of industrial relations in Australia and argues that although the place of law has been neglected by industrial relations scholars, it has become increasingly relevant. Building on this discussion, a framework for classifying emerging legal issues in industrial relations is advanced in the third part of this address. This framework is illustrated by reference to the issues of privacy, redundancy and superannuation. Appropriately, the final part addresses the perennial issue of the future of industrial relations.

CHANGING CONCEPTUALISATIONS OF INDUSTRIAL RELATIONS

In Australia, the academic field of industrial relations emerged from law, particularly in the works of Higgins (1915) and Foenander (1959). Foenander for example, was a barrister and solicitor of the Supreme Court of Victoria, in addition to holding an academic position at the University of Melbourne. The centrality of law is highlighted in one of his seminal works, *Industrial Conciliation and Arbitration in Australia*. The book is divided into two major sections: the larger section dealt with the constitutional basis of conciliation and arbitration and the other section, with collective bargaining. This imbalance between the two sections should not be surprising, because law was central to the operation of the Commonwealth Court of Conciliation and Arbitration (CCCA), at least until the *Boilermakers'* case (Teicher & McKenzie 1992).

The centrality of law in industrial relations scholarship is underpinned by the core thesis advanced by Kahn-Freund, that:

> The main object of labour law has always been…to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship (Kahn-Freund 1972: 8).

Whilst industrial relations scholarship emerged from the law, its focus soon shifted to the province of economics, with industrial relations soon being subsumed within economics departments in Australian universities (Hancock 1981, 1984; Niland & Isaac 1984). Kingsley Laffer, the first professor of industrial relations at the University of Sydney, recognised the multi-disciplinary nature

[1] I am particularly indebted to Amanda Pyman and also to Anne O'Rourke in researching this paper, however, responsibility for any errors and omissions lies with me.

of the field, but for him, industrial relations was first and foremost a study in economics with law relegated to a subordinate position. Addressing the first national convention of the Industrial Relations Society of Australia, for example, he argued that:

> Higgins great vision of industrial relations as a 'new province for law and order' must now be rejected" because IR is a 'mixture of economic forces and human relations played out against a political background, with plenty of scope for honest brokers and independent arbitrators, but not for the traditional concept of justice according to the law and all that that implies (Laffer 1970: 1).

At the same time as the study of industrial relations was increasingly being driven by economics, discussions of the concept of an Industrial Relations System were prevalent in the academic literature (Dunlop 1958; Craig 1975). Indeed, in my days as a student there was a major debate over whether the Systems model amounted to an industrial relations theory and whether this was sufficient to establish industrial relations as a discipline, rather than a field of study. This framework gave greater cogency to the idea that the study of industrial relations is multi-disciplinary. For example, Kingsley Laffer described his first lectures at the University of Sydney as follows:

> the complex of factors affecting industrial relations include the economic background, the psychological foundations, the legal framework, management problems and policies and trade union functions and policies (Laffer 1981: 1).

Walker (1984) was also a major exponent of this multidisciplinary view. He argued that, until the 1950s, industrial relations was dominated by the discussion of the operation of tribunals. There was then an incipient shift from law to other disciplines, as the issues changed and the processes of industrial relations developed. This idea of the changing territory of industrial relations is implicit in Foenander's (1947) work. Whereas in 1947 he expressed the view that a chapter on the subject of women's wages was unnecessary, five years later, he explained that the increased entry of women workers into industry and the consideration of women's wages by the courts had changed the situation (Foenander 1952).

The notion that industrial relations is multidisciplinary is still widely accepted by industrial relations scholars, as they have been heavily influenced by analytical frameworks including history, sociology, organisational behaviour and public policy (Lansbury & Michelson 2003). Significantly, the dominant approaches to the field do not accord any special place to law in the study of industrial relations.

Another important source of instruction on the nature of industrial relations and the place of the law are past AIRAANZ presidential addresses. In 1989 for example, Plowman focused on the core challenges facing industrial relations scholarship. These included declining union membership, the small number of industrial relations academics, and the challenge from the emerging field of human resources management. However, Plowman's (1989) overriding concern was the threat to industrial relations from the deregulatory push and the associated impetus for the removal of protection and the rise of labour market flexibility. In the following year, Palmer (1990) challenged Plowman's pessimism, citing the reinvigoration of the arbitral system through award restructuring and the challenge of microeconomic reform under a re-elected Labour government as core issues. Palmer also focused on the relationship between industrial relations and human resource management, advocating employment relations as an integrated framework for the study of the employment relationship.

More than a decade later, the threat to industrial relations from human resource management remained prevalent in scholarly discussions. Kelly (2002: 3), for example, described human resource management as the 'great shot across the bows in the late 1980-1990s'. She concluded that the emergence and dominance of human resource management in universities and in the sphere of practice has forced industrial relations scholars to 'have debates and values we would

prefer to ignore'. More recently, Lansbury and Michelson (2003) also observed that cognate areas such as human resource management have posed disciplinary challenges to industrial relations and have had important implications for the field. Their outlook however is optimistic, and they point to the continual and positive evolution of the industrial relations discipline in practice.

Notably absent from these discussions of the nature of the field is any consideration of the place of the law or its overriding importance. In the Australian literature, human resource management is often portrayed as demonstrating a broader focus than industrial relations and, as a consequence, as being more able to address changing research and policy agendas. This is profoundly ironic, because the majority of the new and emerging workplace issues, for example, equal employment opportunity, drug testing, privacy and surveillance all have a legal complexion that draws them heavily into the domain of industrial relations.

THE EVOLUTION OF INDUSTRIAL RELATIONS IN AUSTRALIA: EMBEDDED LEGALISM

Whether the shifting emphasis away from law and the associated focus on economics as the core context of industrial relations was ever a correct characterisation of the field is doubtful, having regard to the emphasis on politics, and by implication, the role of the state. The state and the law are particularly important in interventionist systems, such as those that have operated in Australia and New Zealand for much of the last century. While we can disagree with the preoccupation of many scholars with the place of economics in industrial relations the kernel of truth remains: that the definition of industrial relations is not unchanging and will reflect the circumstances of the time.

The development of the industrial relations in Australia can be categorised into stages. The first reflects the emergence of industrial relations from law; as a field deeply embedded in the law as an institution of society. The second phase is characterised by an explicit focus on economics as the core context. This view was largely a reflection of the role of the Australian Industrial Relations Commission and its predecessors as instruments of anti-inflationary wages policy throughout most of the period since World War II. The preoccupation and emphasis on economics was also influenced by the rise of collective bargaining and the concerns of American labor economists of the 1960s. This is highlighted by classic works on the analysis of collective bargaining which were published in this period (for example: Cartter & Marshall 1972; Bloom & Northrup 1977).

The third phase of development traces the shift of industrial relations into management departments in universities, and the influence of psychology and organisational behaviour, or what Walker (1984) referred to as the growth of personnel management at the enterprise level. Walker (1984: 15,16) argued that this growth occurred during the long period of full employment following World War II, as a consequence of the vacuum at the enterprise level left by the conciliation and arbitration system; a system which was designed for industry regulation. This led Walker to foreshadow a fourth stage of development, in which the human resources and industrial relations aspects of all management decisions would be taken fully into account by management. Arguably this has now come to pass, with the industrial relations discipline being influenced by, and often perceived to be in competition with, human resource management.

The development of Australian industrial relations over four stages is illustrative of the evolving character of the field. Whether or not scholars choose to emphasise the law is a matter of fashion, and the changing emphasis on law and economics illustrates tensions at various points of time. It is my argument that law, as an institution of society, is the centrepiece of industrial relations, embedded in the employment relationship and its various legal, economic and social dimensions and its dual features of cooperation and control (Hyman 1975; Dufty & Fells 1989).

Aside from the importance of the employment relationship, industrial relations is also about political power. Governments have significant discretion in determining how the workplace is regulated, and, consequently, industrial relations is one area where the state can exert significant influence: on the balance of power between labour and management; the forms of procedural and/or

substantive regulation; and the subject matter of regulation (Kirby 2002). This is not to neglect the influence of the courts in interpreting legislation and applying the common law.

While the role of the state is not the focus of this discussion, it should be noted that in Australia and New Zealand, the courts are no mere cipher for the views of the government of the day. In an array of noteworthy cases pertaining to the former *Employment Contracts Act 1991 (NZ)* and the *Workplace Relations Act 1996 (Cth.)*, the will of governments has been frustrated where their intentions have not been sufficiently carefully articulated in legislation. In Australia, an emblematic example is the use of the freedom of association provisions to challenge a range of actions and behaviours including the anti-union strategies of employers, corporate restructuring and outsourcing. In 1998, the freedom of association provisions in the *Workplace Relations Act* were successfully invoked in both the Federal Court and the High Court by the Maritime Union of Australia (MUA) in order to protect the employment of workers against an employer who was manifestly assisting the government of the day in implementing its anti-union reform agenda (Griffin & Svensen 1998).

The establishment of a system of compulsory conciliation and arbitration under the auspices of the *Conciliation and Arbitration Act* in Australia in 1904 represented a highly regulated, interventionist approach by the state. The fact that the Conciliation and Arbitration Court derived its legal authority from the Constitution also meant legalism was inherent in its functioning and the operation of the system. In 1904, the *Conciliation and Arbitration Act* comprised 92 sections and 2 schedules. By 1987, the legislation had been amended more than 80 times and had grown to 341 sections with 210 regulations. Legislative amendments to this point represented incremental change, in effect a fine tuning of the system in accordance with the predilections of the government of the day. Despite the ever increasing length and complexity of the legislation, the most significant changes stemmed from High Court interpretations, not statutory amendments, and these changes have only served to further embed the inherently legal nature of industrial relations. Over this period two key turning points stand out.

The first is the *Boilermaker's case in 1956*, in which the High Court held that one tribunal could not exercise both arbitral and judicial powers. In underscoring the constitutional separation between the executive, the judiciary and the legislature, as the basis for its decision, the High Court ensured that the Commonwealth Conciliation and Arbitration Commission (CCAC) would hold an inferior status to its predecessor, the Commonwealth Court of Conciliation and Arbitration. In part, the Commission would be regarded as an instrument of economic regulation, rather than a court embedded in a legal discipline. The *Boilermaker's* case cannot be separated from the rise of collective bargaining (mostly over award), which was referred to in the previous part. In the 1960s and 1970s, the CCAC attempted to keep a lid on industrial action, but the transformation from a court to a commission amounted to a downgrading of its role and status which undermined its authority from the outset. The availability of injunctions and penalties at the end of a separate judicial process did not alter this.

The second turning point also related to a decision of the High Court - the *Australian Social Welfare Union* Case. This decision resulted in a significant broadening of the Commission's jurisdiction, following the High Court's ruling that industrial disputes should not be defined in a technical or legal manner, but rather should adopt the meaning that 'a person in the street' would give them. The significance of this case is twofold. On the one hand, it rendered irrelevant decades of jurisprudence which had operated to define and articulate the jurisdiction of the Commission. On the other hand, it extended the scope and subject matter of the issues subject to regulation within the industrial relations system. This is particularly relevant to the argument that is advanced below.

THE DECLINING RELEVANCE OF LAW? EXPLORING THE PARADOX

Lansbury and Michelson (2001; 2003) have argued that, in recent years, the traditional dominance of law and economics on industrial relations scholarship has begun to wane. They argue that the decentralisation of the Australian system has played a major role and given rise to a new range of industrial relations issues in work and employment. These include: declining trade unionism; changes in work organisation; non-union workplaces; performance related pay; changes to regulatory processes; individual contracts; and, non-standard employment. This observation seems to resonate with Walker's (1984) consideration of a fourth phase in Australian industrial relations.

Implicit in most discussions of the decentralisation of the industrial relations system is a diminishing role for law. However, decentralisation is a subset of a larger process which is often paradoxically labelled 'deregulation'. In the abstract, deregulation implies a diminishing role for law and many intended deregulation to presage a 'return to contract' by shifting the locus of regulation to the enterprise level. For a time, this occurred in New Zealand, but, not in Australia Despite reforms since the early 1990s being heralded under the banner of deregulation, the reality is that these changes represent a process of juridification or re-regulation (Mitchell 1998; Gahan & Harcourt 1999). In an international context, Ewing (2003: 138) has also observed that the workplace of the twenty-first century is much more highly regulated by law than at any time in the past, with both employers and unions subject to detailed legal restrictions.

While this is not the place for a detailed account of recent legislative reforms, it is important to emphasise that the period from 1988-2004 is unprecedented in relation to the increased size of the principal legislation regulating industrial relations and in the increased legalism of the system. Changes introduced by the Keating Labor government in 1993 represented a radical shift from a system premised on conciliation and arbitration to one based on direct bargaining at the enterprise level. Certified agreements represented the centrepiece of workplace regulation and, for the first time, non-union agreements were made available. A key change implemented in the *Industrial Relations Reform Act 1993 (Cth.)* was the enactment of a set of minimum standards modelled on ILO conventions. Collectively, these amendments were significant in curtailing the role of the Commission in the industrial relations system, particularly in dispute resolution. In turn, this led to a proliferation of legal issues, as has been noted elsewhere by Senior Deputy President Boulton (1999).

This process of juridification continued under the *Workplace Relations Act* with its careful downgrading of the role and function of the Commission and trade unions in the federal system. Creighton (2003) refers to this as the modernisation of labour law through individualisation and enterprise bargaining. Like the fabled 'return to contract', recent amendments to federal law have raised the importance of courts and the law in industrial relations. The trend to juridification is also evident in the number of Bills before the federal parliament which seek to amend the *Workplace Relations Act)*, for example, the: *Building and Construction Industry Improvement Bill 2003*; *Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2004*; *Workplace Relations Amendment (Award Simplification) Bill 2002*; *Workplace Relations Amendment (Better Bargaining) Bill 2003*; *Workplace Relations Amendment (Choice in Award Coverage) Bill 2002*; Workplace Relations Amendment (Codifying Contempt Offences) Bill 2003; *Workplace Relations Amendment (Compliance with Court and Tribunal Orders) Bill 2003*; *Workplace Relations Amendment (Fair Dismissal) Bill 2004*; *Workplace Relations Amendment (Protecting the Low Paid) Bill 2003*; *Workplace Relations Amendment (Protecting Small Business Employment) Bill 2004; Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002; Workplace Relations Amendment (Simplifying Agreement-making) Bill 2004; and, the Workplace Relations Amendment (Termination of Employment) Bill 2002*.

It is also clear that the last two decades have witnessed a proliferation of new issues falling within the purview of industrial relations. Two important features of these new issues are:

i. they do not inevitably involve the exercise of the jurisdiction of the Australian Industrial Relations Commission (many fall in the realm of collective labour law) and

ii. consistent with the thesis of this address, most have an immediately or ultimately legal character.

In my view, the argument that the law is of diminishing relevance to industrial relations is erroneous and at best reflects a fashion in scholarship. In practice, law has always been pivotal to industrial relations and over time has come to exert an influence over an increasing number of industrial relations issues. As I have argued above, industrial relations is inherently legalistic. This is particularly the case in Australia and New Zealand, where, in common with continental Europe, there has been comprehensive regulation of the employment relationship, and the focus of this regulation has been collective. The origins of the Australian system are twofold: first, in laws that oppressed workers and limited their freedoms, and second, in laws that failed to provide adequate protection. In some cases, the remedial laws have built upon earlier regulation and, in other cases, the laws have filled a regulatory vacuum. In this discussion, I am more concerned with the latter.

Extending the argument a little further, almost any issue, which can be considered as impinging on the field of industrial relations has a legal character. For this reason, it is critical to the future practical scholarship that labour law is accorded its proper place in relation to industrial relations. In order to assist this process, a preliminary classification of issues is attempted here. As a starting point, I suggest that a broad distinction can be made between core, non-core and quasi-core industrial relations issues.

Core Industrial Relations issues

These go to the heart of the employment relationship. In the period of the formation and development of unions in various countries, typically, these issues are the first to be disputed and also give rise to judicial proceedings; for example, wages, hours, the right to unionise and health and safety. In view of the ameliorative role played by labour law, these issues are most likely to have been regulated by statute.

Non-core Industrial Relations issues

These have their origins in developments in the wider society, but come to impinge on the workplace. Often such developments are associated with the enactment of legislation outside the realm of labour law and industrial relations, due to the evolving practical context within which labour law operates (Vranken 2003). Ewing (2003) makes a similar point, arguing that the employment relationship is now required to accommodate wider interests and considerations such as human rights, which in the past, might have been treated as external to the workplace.

The growth of the information age is a primary example of a non-core industrial relations issue that has given rise to a range of concerns regarding workplace privacy, monitoring and surveillance. Indeed, an early illustration of this point was provided by Judge Macken in considering whether the NSW Industrial Relations Commission had the power to prescribe security guidelines in the retail industry. He stated:

> Worker privacy regulation comes from general legislation, most of which does not expressly concern governance of the workplace, as well as general principles which must be tentatively extrapolated from existing legal and arbitral holdings in cognate areas (*re Security Arrangements in Retail Stores* 1979: 79).

Defining privacy is an inherently difficult task, because the concept invokes a boundary, yet, the boundary is subjective and may vary widely (Victorian Law Reform Commission 2002). In the workplace, privacy typically refers to a right or interest in protection. This could be protection from

things like video surveillance; voicemail; telephone and computer surveillance; email monitoring; and, workplace drug and alcohol testing.

While there are longstanding provisions in health and safety and in industrial relations legislation which protect workers' privacy, the issue of workplace privacy initially developed as a wider societal issue. It has then made the transition to the workplace. Significantly, the information revolution has made surveillance, collection, collation and transmission of personal information relatively simple and inexpensive. This has led to increasing pressure being placed on governments to legislate to protect the privacy of citizens in relation to both the state and civil society.

Rising community concern has led to the enactment of a range of privacy laws, and significantly, this has given rise to a widely held view that there is a 'right to privacy'. Until very recently there was no common law right of privacy in Australia. However, in *Grosse v Purvis* (2003), Judge Skoien held that an individual person can pursue a civil action for damages based on the actionable right to privacy. Despite the significance of this case, it is not binding on interstate jurisdictions and is likely to be appealed. Should the High Court uphold *Grosse v Purvis*, it is possible that a tort of privacy will eventually be broadened to cover breaches of privacy in the workplace as is illustrated in other areas of the law. For example, industrial relations legislation now overlaps with requirements under a number of state and federal statutes dealing with privacy, equal employment opportunity, racial vilification and provisions in corporations and criminal law. Thus, I argue that the regulation of privacy is a non-core issue which is not traditionally part of industrial relations, but which has assumed increasing importance and permeated the employment context, whereby legal enactment and the intervention of industrial tribunals are in the process of filling a legal vacuum.

A case in point is legislation in Victoria and NSW which places restrictions on electronic surveillance in the workplace. Under the *Surveillance Devices Act 1999 (Vic.)*, employers are permitted to use audio or visual surveillance or tracking devices, to monitor employees' activities at work, provided that surveillance occurs in public areas that are accessible to other employees. The legislation also imposes restrictions on employers in relation to the communication and publication of records of private conversations and activities obtained via the use of surveillance.

Arup's (2001) characterisation of bullying and workplace privacy as emerging 'new quality of working life issues' supports the argument that privacy is a non-core industrial relations issue. Arup (2001) highlights various privacy concerns in the modern workplace including data sharing by corporations and the use of genetic information by employers. These concerns raise broader issues relating to the potential for workplace discrimination and unethical behaviour, and, how employment relationships operate under the new 'panoptic' workplace paradigm. For instance, new workplace surveillance technologies are often viewed as an invisible, rather than a coercive, control system. However, as Sempill (2001) points out, electronic surveillance is established by the fundamental norms of the contract of employment.

Core and non-core industrial relations issues represent ideal types. There are also a series of issues which do not fall neatly into either category which I refer to as ***quasi core***. These issues have the appearance of being core industrial relations issues though they are partly, if not wholly, addressed through existing legislation in areas outside labour law. The increasing resort to *Corporations Law* in situations of redundancy is a case in point.

Strictly speaking, redundancy is part of the broader issue of employment security; protecting workers from arbitrary dismissal. In this manner, it has been a concern of unions from their earliest operation, albeit of secondary important (Deery, Brooks & Morris 1985). In a legal sense, until the *Australian Social Welfare Union* case, matters between the employer and employee following termination were not considered industrial (Creighton & Stewart 2000), and could only be negotiated at the discretion of employers.

Broader environmental and economic changes in the late 1970s and early 1980s, particularly in manufacturing, led to an increased focus on redundancy by unions (Deery *et al.* 1985). Since the *Termination, Change and Redundancy* case in 1984, redundancy situations have been regulated both by legislation and decisions of industrial tribunals. More recently, a string of high profile corporate collapses (e.g. One Tel, Ansett Airlines, National Textiles and HIH) have led to the enactment of legislation which falls outside the traditional boundaries of industrial relations. Specifically, these collapses led to the establishment of a national entitlements scheme in various different guises since the late 1990s: first as the Employee Entitlements Scheme and, more recently, as the General Employee Entitlements Scheme.

A second example of a quasi-core issue is superannuation. While unions have had a longstanding concern with income security for their members, retirement incomes have not traditionally been seen as an industrial issue, but rather a matter of managerial prerogative (Plowman & Weaven 1988). However, on the industrial front, unions began to exhibit interest in superannuation in the late 1970s. In 1978 the Storeman and Packers Union established a superannuation fund for its members – the Labour Union Cooperative Retirement Fund (LUCRF). The following year the Storeman and Packers Union launched industrial action against major retailers in an effort to secure employer contributions to LUCRF. In 1979, the Australian Council of Trade Unions (ACTU) Congress also resolved that unions should campaign among their members on the issue of superannuation.

Until the late 1970s, it could be argued that full employment and the existence of a universal pension scheme underpinned employer resistance to treating superannuation as an industrial issue. In the 1980s, however, the spread of neo-liberal economic and political ideas led Australian governments to conclude that, having regard for changing demographic patterns, the nation could no longer 'afford' a universal pension scheme.

This concern for a national retirement scheme was underpinned by the negotiation of successive Accords between the ACTU and the federal Government. While Accord Mark I in 1983 gave passing recognition to the need for a national superannuation scheme, specific provisions pertaining to superannuation became a feature of subsequent agreements beginning with Accord Mark 2 in 1985. These agreements gave rise to a process of standard setting through the Commission which commenced with the *National Wage Case* decision in June 1986. While refusing a claim requiring employers to pass on productivity increases to employees in the form of superannuation contributions, the Commission adopted a wage fixing principle enabling it to approve agreements and make consent awards requiring employers to make contributions to approved superannuation schemes.

Subsequently, the Commission has continued to regulate superannuation in awards and agreements through a series of *National Wage Case* decisions and a *Test Case* in 1994 (Creighton & Stewart 2000). Further, in the *Superannuation Guarantee (Administration) Act 1992 (Cth.)* the government confirmed the Commission's jurisdiction to arbitrate on superannuation matters, and, in the *Workplace Relations Act 1996*, superannuation was included as an allowable matter for the purposes of making awards. From a government perspective, superannuation is also a social welfare issue, but for employers, unions, and employees this complex legal framework is pivotal to industrial relations.

As with redundancy, the process of regulatory reform is incomplete. Problems which continue to beset superannuation include: corporate insolvency; the adequacy of current employer contributions in providing for a retirement income; the establishment of industry superannuation funds; and socially responsible and ethical investment. Significantly, these issues are pivotal to the regulation of the employment relationship, particularly with an ageing workforce.

THE FUTURE OF INDUSTRIAL RELATIONS

It is exactly 100 years since the enactment of the *Conciliation and Arbitration Act 1904* and in that time the volume of industrial relations legislation has grown more or less continuously, and, paradoxically, most prodigiously in the era of deregulation. Justice Michael Kirby addressed this point as recently as 2002. Considering the future of industrial relations law, he advanced two key arguments. First, he argued that a return to contract was unlikely and that the Australian Industrial Relations Commission would remain central to dispute resolution: a firefighter is needed and the ordinary courts are not equipped to fulfil this role (Kirby 2002: 2). Second, in the process of highlighting changing international standards in employment practices, he argued that the future of industrial relations law was likely to be dominated by labour standards, as the most convenient mechanism to translate changing international standards into Australian employment practice. Central to the argument advanced by Justice Kirby, and consistent with the theme of this address, is that the field of industrial relations is in continuous flux. Referring to the work of Kingsley Laffer, as I did above, he observed:

> After all his discipline was an intensely practical one. It always responded to the changing moods of politics. And in the end it was always about securing the best possible outcomes to the struggle between economic profit and industrial justice (Kirby 2002: 16).

Rightly, there has also been a concern about a return to contract, as this is viewed as part of a neo-liberal agenda to stop, or even reverse, the ameliorative effects of labour law. This perhaps overlooks the fact that the resort to non-industrial relations legislation is also a reflection of the changing and inherently legalistic nature of the field. As I have explained above, there are three categories of industrial relations issues: those issues that are inherent in the employment relationship and attract some form of regulation (whether they are legal or informal); those that arise in wider society and over time attach to the employment relationship; and those issues that have the appearance of core issues, yet, are partly, if not wholly, addressed through existing legislation that falls outside labour law. Due to the peculiarities of the Australian system and the omnibus character of the *Workplace Relations Act*, these new forms of regulation tend to operate at least partly through the dominant statute.

In concluding, I wish to emphasise three points. First, the practice of industrial relations since 1945 became preoccupied with the ideas of non-legal or quasi-legal dispute resolution. Later the preoccupations shifted to the tension between industrial relations and human resource management, and this too was a distraction in the field. Second, the field of industrial relations has an inherently legal character. This has however been overshadowed by debates about the multidisciplinary character of industrial relations. Third, the period of deregulation has paradoxically fostered greater resort to formal regulation by statute. This reinforces the inherently legal character of the field, but also illustrates that the prominence of legal changes as new issues and challenges emerge. As Biagi recognised recently:

> Work organisation is changing profoundly and at a speed unknown in the past. Labour law has a unique opportunity to regulate the new economic context. It depends on how quickly it will be able to take on the new challenges (Biagi 2001: 321).

REFERENCES

Arup (2001) 'Labour Law as Regulation: Promise and Pitfalls', *Australian Journal of Labour Law,* 14(3): 23.

Biagi, M. (2001) "Job Creation and Labour Law: From Protection towards Pro-Action " in R. Blanpain & C. Engels (eds.) *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, 7th revised ed, The Hague: Kluwer Law International: 285-338.

Bloom, G.F. & Northrup, H.R. (1977) *Economics of Labor Relations*, 8th edition, Homewood: Richard D Irwin.

Boulton, A.J. (1999) '*The Changing Role of the Commission*', Paper delivered to the Industrial Relations Society of Australia 1999 National Convention, The Challenge of the Workplace, Fremantle, 21-23 October.

Cartter, A.M. & Marshall, F.R. (1972) 'The Employer's Bargaining Preferences', in R. Marshall & R. Perlman (eds.) *An Anthology of Labor Economics: Readings and Commentary*, New York: John Wiley & Sons: 557-564.

Craig, A. (1975) 'A Framework for the Analysis of Industrial Relations Systems', in B. Barrett, E. Rhodes & J. Beishon (eds.) *Industrial Relations and the Wider Society*, London: Collier Macmillan: 8-20.

Creighton, B. (2003) 'Modernising Australian Labour Law: Individualisation and the Shift From "Compulsory Conciliation and Arbitration to Enterprise Bargaining', in R. Blanpain & M. Weiss (eds.) *Changing Industrial Relations and Modernisation of Labour Law. Liber Amicorum in Honour of Professor Marco Biagi*, The Hague: Kluwer Law International.

Creighton, B. & Stewart, A. (2000) '*Labour Law: An Introduction*', Sydney, The Federation Press.

Deery, S., Brooks, R. & Morris, A. (1985) '*Redundancy and Public Policy in Australia*', Working Paper No. 15, Labour Studies Programme, Faculty of Economics and Commerce, University of Melbourne, February.

Dufty, N.E. & Fells, R.E. (1989) *Dynamics of Industrial Relations in Australia,* Australia, Prentice Hall.

Dunlop, J.T. (1958) *Industrial Relations Systems*, New York, Holt.

Ewing, K. (2003) 'Labour Law and Industrial Relations', in P. Ackers & A. Wilkinson (eds.) *Understanding Work and Employment: Industrial Relations in Transition*, Oxford: Oxford University Press.

Foenander, O. (1947) '*Industrial Regulation in Australia: A Study of Awards, Method of Remuneration Fixation and the Status of Trade Unions under the Australian Regulative System*', Melbourne, Melbourne University Press.

Foenander, O. (1952) '*Australian Labour Law and Relations*', Melbourne, Melbourne University Press.

Foenander, O. (1959) '*Industrial Conciliation and Arbitration in Australia*', Sydney, Law Book Co. of Australia.

Gahan, P. & Harcourt, T. (1999) 'Australian Labour Market Institutions, 'Deregulation' and the Open Economy', *Economic and Labour Relations Review* 10(2): 296-318.

Griffin, G. and Svensen, S. (1998) 'The Industrial Relations Implications of the Australian Waterfront Dispute', *Australian Bulletin of Labour*, 20(3): 181-193.

Hancock, K. (1981) '*Incomes Policy in Australia*' Sydney, Harcourt Brace.

Hancock, K. (1984) '*Understanding Labour Markets in Australia*', Melbourne, George Allen & Unwin.

Higgins, H.B. (1915) 'A New Province for Law and Order', *Harvard Law Review*, 29(15).

Hyman, R. (1975) *Industrial Relations: A Marxist Introduction*, London: Macmillan.

Kahn-Freund, O. (1972) *Labour and the Law*, London: Stevens and Sons.

Kelly, D. (2002) '*Academic Industrial Relations – Interdisciplinary Scholars in an Arid Environment*', Presidential Address delivered to the 17th AIRAANZ Conference, Queenstown, New Zealand, 4 February.

Kirby, Justice M. (2002) '*Human Rights and Industrial Relations*', Kingsley Laffer Industrial Relations Memorial Lecture, University of Sydney: 23rd April.

Laffer, K. (1970) '*Industrial Relations in Australia in the 1970s*', Address to the First National Convention of the Industrial Relations Society: 1-29.

Laffer, K. (1981) '*The Development of Industrial Relations School at the University of Sydney 1953-1973*', Occasional Papers in Industrial Relations, No.1., Faculty of Economics, University of Sydney.

Lansbury, R.D. & Michelson, G. (2001) 'Industrial Relations in Australia: The State of a Discipline', in D. Kelly (ed.) *Crossing Borders: Employment, Work, Markets and Social Justice Across Time, Discipline and Place - Proceedings of the 15th AIRAANZ Conference*, University of Wollongong, 31 January – 3 February, Wollongong NSW.

Lansbury, R.D. & Michelson, G. (2003) 'Industrial Relations in Australia', in P. Ackers & A. Wilkinson (eds.) *Understanding Work and Employment: Industrial Relations in Transition*, Oxford, Oxford University Press.

Mitchell, R. (1998) 'Juridification and Labour Law: A Legal Response to the Flexibility Debate in Australia', *The International Journal of Comparative Labour Law and Industrial Relations* 14(2): 113-135.

Niland, J. & Isaac, J. (1975) Australian Labour Economics: Readings', Melbourne: Sun Books.

Palmer, G. (1990) '*Challenge and Opportunity for Industrial Relations: A Personal View*', Presidential Address delivered to 5th AIRAANZ Conference, University of Melbourne, 4-7 July.

Plowman, D. & Weaven, G. (1988) 'Superannuation: A Union Perspective', School of Industrial Relations and Organisational Behaviour Working Paper, University of NSW, April.

Plowman, D. (1989) '*Industrial Relations Teaching and Research: Trends, Pressures, Strategies*', Presidential Address delivered to 4th Biennial AIRAANZ Conference, University of Wollongong, 1-4 February.

Sempill, J. (2001) 'Under the Lens: Electronic Workplace Surveillance', *Australian Journal of Labour Law*, 14.

Teicher, J. & McKenzie, D. (1992) 'Penalties and Award Enforcement Provisions in Australian Industrial Relations', in B. Dabscheck, G. Griffin & J. Teicher (eds.) *Contemporary Australian Industrial Relations*, Melbourne: Longman Chesire: 127-152.

Victorian Law Reform Commission (2002) '*Workplace Privacy Issues Paper*', National Library of Australia.

Vranken, M. (2003) 'Book Review - Labour Law as an Academic Discipline: Can there be a Future?', *Australian Journal of Labour Law*, 16, November.

Walker, K. (1984) 'The Development of Australian Industrial Relations in International Perspective' in W. Howard (ed.) *Perspectives on Australian Industrial Relations: Essays in Honour of Kingsley Laffer*, Melbourne, Longman Chesire: 1-19.

List of Cases

Grosse v Purvis (2003) QDC 151 16th June.

National Wage Case June (1986) 14 IR 187.

Queen v Kirby; ex parte Boilermaker's Society of Australia (1956) 94 CLR 254.

R v Coldham; Ex parte Australian Social Welfare Union (1983) 153 CLR 297.

re Security Arrangement in Retail Stores (1979), Nos 107 and 350 of 1978, ARJ.

Superannuation Test Case September (1994).

Termination Change and Redundancy Case (TCR) (1984).