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Australia's New Era: The Shift in Workplace Negotiating Power

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I. INTRODUCTION

Australia is embarking on a new era of industrial relations. Negotiating power traditionally held by unions is shifting to the individual worker, having great implications for a nation with a history of dismal productivity.[1] With recent historic reforms in its industrial relations, Australia now offers more flexible and efficient work agreements with the Workplace Relations Act of 1996.[2] This departure from a system largely influenced by trade unions sets the stage for Australia's emergence as an international competitor,[3] while attempting to stabilize its economic vitality.

A. The Problem: Australia's Dismal Productivity

Australia's labor productivity growth between 1979 and 1995 averaged only 1.4 percent.[4] Australia's economic vitality was hampered by an old industrial relations system[5] that left industries unable to satisfy demands for higher living standards[6] because of high unemployment. Unions were at the center of this old industrial relations system,[7] creating structural rigidness[8] and stifling economic growth.

To quell the power of trade unions and to become more internationally competitive,[9] the Australian government instituted a central wage determination

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1. *See Australia's Reith Promotes New Labor Laws To U.S. Investors*, Dow Jones News Serv., May 7, 1997, *available in* 1997 WL 11136337 (documenting statements made by Australia Industrial Relations Minister Peter Reith to U.S. investors).

2. The Act may be cited as the Workplace Relations and Other Legislation Amendment Act, 1996 (Austl.) [hereinafter Workplace Relations Act].

3. *See* Craig MacKenzie, *The New Industrial Relations in Australia*, 17 COMP. LAB. L.J. 594, 595 (1996) (Book Review).

4. *See Australia's Reith Promotes New Labor Laws To U.S. Investors*, *supra* note 1 (emphasizing Australia's "meager" year-on-year growth in labor productivity, stated by Australia Industrial Relations Minister Peter Reith, citing Organization for Economic Cooperation and Development figures).

5. *See generally* Richard Naughton, *Sailing Into Uncharted Seas: The Role of Unions Under The Workplace Relations Act*, 10 AUSTL. J. LAB. L. 112, 115 (1997) (noting unions have played a role in Australia's compulsory arbitration system since 1904, in which they have acted as the collective representative of workers in the dispute settlement and award-making process and have been guaranteed a level of organizational protection and security).

6. *See Australia Unveils Radical Labor-Relations Overhaul Government Bill Could Oust Unions From Workplace* [hereinafter *Australia Unveils Radical Labor-Relations Overhaul*], THE TORONTO STAR, May 24, 1996, at A21, *available in* 1996 WL 3367449 (describing weak commodity prices during the 1980s).

7. Naughton, *supra* note 5, at 115. Unions have been referred to as the "legitimate agents of the working class, partners in the economic and social process, and the joint regulators of Australian industry." *Id.*

8. *See Australia Unveils Radical Labor-Relations Overhaul*, *supra* note 6 (referring to structural rigidities in the labor market as a major contribution to Australia's sorry outcome); *see also* Martin Vranken, *Demise of the Australasian Model of Labour Law in the 1990s*, 16 COMP. LAB. L.J. 1, 7 (1994) (mentioning that political parties stress the need for removing rigidities for the sake of revitalizing the international competitiveness of Australia).

9. *See* MacKenzie, *supra* note 3, at 595 (maintaining Australia required more resources be directed at wage policy and required a shift from uniform wage outcomes toward productivity related wage outcomes in each particular industry).

system in the late 1970s and early 1980s.[10] This system implemented centralized wage-fixing guidelines with a uniform award structure,[11] guaranteeing uniform wages across each industry.[12] This centralized system[13] continued Australia's history of meager productivity[14] because the system could not take specific worker needs into account when setting uniform wages for an industry.

B. The Solution: Workplace Relations Act, 1996

Given the high unemployment rate, staggering productivity, and the increasing need for flexible work arrangements, Australia's industrial relations system was ripe for reform.[15] At the center of this historic industrial reform is the Workplace Relations Act of 1996.

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10. *See* MacKenzie, *supra* note 3, at 594-95 (considering the years 1975-1982 as generating significant industrial unrest between government employers and trade unions, as a result of the conservation government's efforts to reduce the power, significance, and role of unions by implementing centralized wage fixing guidelines through a uniform structure and high tariff protection); *see also* Linda Norman, *Working For Better Agreements: The Industrial-Relations System Is Increasingly Leaning Towards Individual Pacts*, CANBERRA TIMES, Oct. 16, 1997, at A13 (discussing Australia's history of centralized wages and how employers had little involvement in setting wages or in packaging awards); *see also* Michael P. Kidd & Michael Shannon, *The Gender Wage Gap: A Comparison of Australia and Canada*, 49 INDUS. & LAB. REL. REV. 729 (1996); *see also* Harry C. Katz, *The Decentralization of Collective Bargaining: A Literature Review and Comparative Analysis*, 47 INDUS. LAB. REL. REV. 3, 5-6 (1993).

11. *See* MacKenzie, *supra* note 3, at 594-95; *see also* Norman, *supra* note 10 (noting that the old workplace centralized system covered restrictive awards for whole industries and sometimes 1000 or more different employers); *see also* Kidd & Shannon, *supra* note 10, at 729 (stating "in Australia, the vast majority of workers are covered by an 'award system,' which specifies legally binding minimum working conditions"); *see also* Katz, *supra* note 10, at 5-6.

12. *See* MacKenzie, *supra* note 3, at 594-95; *see also* Katz, *supra* note 10, at 5-6.

13. Kidd & Shannon, *supra* note 10, at 731. The centralization is achieved by a number of factors within the system: (1) the award wage generally covers multiple employers within a given industry or occupation; (2) award coverage is independent of whether the individual belongs to a specific union; and (3) the well established concept of comparative wage justice forges links between distinct awards. *Id.* These "criterion ensure a flow-on of wage increases from one group to other groups, in an attempt to maintain existing wage ratios across occupations." *Id.*

14. *See Australia's Reith Promotes New Labor Laws To U.S. Investors*, *supra* note 1.

15. *See Australia Unveils Radical Labor-Relations Overhaul*, *supra* note 6 (discussing comments by Australia Industrial Relations Minister Peter Reith, "if anyone has any doubts about the need for genuine reform of our industrial relations institutions and arrangements, they need go no further than the latest statistics which show an intolerable rate of unemployment at 8.9%").

Australia's new conservative government overhauled the country's industrial relations system[16] with the Workplace Relations Act. The Act represents the fourth major change to Australian industrial federal law since 1987.[17]

The Workplace Relations Act dramatically changes the face of industrial relations in Australia, affecting various employment arrangements offered to foreign corporations with business interests in Australia. Foreign corporations have typically focused on trade unions to gain keen insight into the industrial relations system[18] due to the trade unions' control over negotiations and work arrangements at the federal, state, and local level.[19] However, negotiations[20] are no longer taking place between trade unions and employers. The Workplace Relations Act shifts the negotiations to the individual and the employer, thus sending Australia into a new era of industrial relations policy. Workers are less inclined to achieve their goals through collective action[21] because these new workplace agreements can be created to meet the needs and concerns of both employer and employee.[22]

One of the principle objectives of the Workplace Relations Act is to provide a framework of rights and responsibilities for employers and employees and their organizations in order to facilitate fair and effective agreement making and ensure that they abide by wages and agreements applying to them.[23] The system of

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16. *See Australia Unveils Radical Labor-Relations Overhaul, supra* note 6 (announcing Australia's new conservative government unveiling radical plans to end the role of trade unions and labor courts in the setting of Australian wages). *But cf.* Sandra Bull, *FED: Reith Foreshadows IR Reforms*, AAP Information Services, AAP NEWSFEED, Aug. 27, 1997, at Nationwide Gen. News, Austl. Gen. News (stating that the HR Nicholls Society, co-founded by federal Treasurer Peter Costello in 1985, said Mr. Reith's reforms had been watered down to appease the Australian Democrats); *cf.* Workplace Relations and Other Legislation Bill 1997, Bills Digest 14, 1997-98 (Austl.) *available at* <http:www.nla.gov.au/dir/reforms/menu.htms> (discussing how the Workplace Relations and Other Legislation Amendment Bill 1996 started out as a radical plan to deregulate Australia's industrial relations system only to be watered down in the Senate, and the changes passed have been seen by some as less radical than initially promised).

17. *See* W.J. Ford, *Recent Legislation: Reinventing the Contract of Employment—The Workplace Agreements Act 1993*, 9 AUSTL. J. LAB. L. 1, 2-3 (1996) (quoting Hansard, Legislative Assembly, 1994, p.1451). The three earlier federal measures were the Industrial Relations Bill of 1987, the Industrial Relations Act of 1988 accompanied by the Industrial Relations (Consequential Provisions) Act of 1988, and the Industrial Relations Reform Act of 1993. *Id.* Recent state law has also seen change as of 1993 when the Liberal/National Party Coalition Government enacted the Industrial Relations Amendment Act of 1993, the Minimum Conditions of Employment Act of 1993, and the Workplace Agreements Act of 1993 to provide core minimum conditions, new and greater opportunities for initiative, flexibility, co-operations and positive human relations with the workplace. *Id.*

18. *See* BRAHAM DABSCHECK & JOHN NILAND, INDUSTRIAL RELATIONS IN AUSTRALIA 16 (1981) (suggesting that most research and interest in industrial relations institutions have been directed towards trade unions).

19. *See id.* (defining a typical Australian union having members in various states and territories of Australia, having a federal office in the states where it had members, and containing an infrastructure at the local level).

20. *See generally id.* at 17 (examining how industrial relations consists of meetings, conferences, and discussions between representatives of various bodies).

21. *See id.* at 83 (finding that trade unions are continuous organizations formed by groups of workers who employ collective action to achieve their goal).

22. *See Australia: 1997 Investment Climate Statement*, INT'L MKT. INSIGHT REP., June 20, 1997, no. 58, *available in* 1997 WL 11136337.

23. *See* Workplace Relations Act, *supra* note 2, at Sched. 1(3)(e).

negotiating contracts has shifted to a more intimate system between an employer and employee.[24] Today, instead of all contracts for wages being based on a model contract, the Act allows for negotiations between an employer and an employee or group of employees to establish their own contract for salary and working conditions.[25]

II. BACKGROUND

A. Australia's Centralized Wage Determination System

Although the role of the centralized wage determination system has been altered by the Workplace Relations Act, some Australian wages continue to be determined by the Federal and State Industrial Relations Commission (IRCS), or the Australian Industrial Relations Commission.[26] The Federal and State IRCS determine the industry wages after hearing an industry case,[27] based on the minimum wage principle that should be paid to an adult worker.[28] The minimum wage principle protects the real value of the wages of unskilled workers.[29] Typically, one national wage case[30] is heard by the IRCS for an industry, which determines the prevailing wage for that particular industry.[31] The IRCS will take into account broad national industrial policy, social policy, and economic changes.[32]

Under this centralized wage determination system, the relevant trade union and a large company from the industry negotiate a contract that becomes the model for all other companies operating in that industry and then becomes the basis for salaries paid to employees in that industry.[33]

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24. *See Australia: 1997 Investment Climate Schedule*, *supra* note 22, no. 58.

25. *See* Workplace Relations Act, *supra* note 2, at § 170LK; *see also Australia: 1997 Investment Climate Statement*, *supra* note 22.

26. *See* Katz, *supra* note 10, at 5; *see also Australia: 1997 Investment Climate Statement*, *supra* note 22, no. 57; *see also* DABSCHECK & NILAND, *supra* note 18, at 305 (discussing the Australian wage determination system).

27. *See* Katz, *supra* note 10, at 5; *see also* DABSCHECK & NILAND, *supra* note 18, at 305.

28. *See* DABSCHECK & NILAND, *supra* note 18, at 307 (finding the intention of the basic wage to be "a living wage to enable the unskilled labourer and his family (of five) a life of 'frugal comfort'"); *see also id.* at 90 (stating the doctrine of living wage involves wages and employment conditions being determined on a needs basis and that the expectation that wages will be high enough to enable an efficient working life).

29. *Id.* at 307.

30. *Id.* at 324-25; *see also* Katz, *supra* note 10, at 5-6.

31. *See Australia: 1997 Investment Climate Statement*, *supra* note 22, no. 58; *see also* DABSCHECK & NILAND, *supra* note 18, at 324-25; *see also* Katz, *supra* note 10, at 5-6 (noting that although national wage cases determine wages for an industry, they also include issues related to the implementation of wage changes, and associated changes in work rules and work practices).

32. *See* DABSCHECK & NILAND, *supra* note 18, at 305-06 (noting that a major consideration of the full bench in national wage cases has been the condition of the economy and how to distribute the fruits of the economic growth on an equitable basis, paying regard to such macroeconomic variables as the level of inflation, productivity, investment, employment and the balance of payments).

33. *See Australia: 1997 Investment Climate Statement*, *supra* note 22, no. 56.

B. Decline of Trade Union Effectiveness

Unions in Australia have a long and dominant history within the centralized wage determination system.[34] Even through the industrial changes of the 1980s, unions continued to play a major role in the bargaining process through the system of compulsory unionism, which forced employees to belong to unions.[35] Justification for compulsory unionism is directly linked to the vital role of the worker's collective representative in the collective bargaining system.[36] But, as collective representation continues to decline in popularity, giving way to a less formal agreement between the employer and employee, the need for compulsory unionism is not as prevalent.[37] The role that unions once played in the bargaining system is now decentralizing.[38] A recent study indicates that union membership fell from twenty-four percent in 1990 to eighteen percent in 1995.[39] Factors contributing to the decline of unions include reduced public sector employment,[40] increased economic competition[41] and a decrease in manufacturing industries.[42] However, the unions' decreased membership does not necessarily reduce their influence over the bargaining system[43] because unions continue to participate in the bargaining system.

The decline of unions is exacerbated by the deregulation agenda[44] of the Australian government to emphasize contractual relationships between employers

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34. *See* DABSCHECK & NILAND, *supra* note 18, at 105 (setting forth that between 1891-1979, Australia's trade unions showed steady growth in numbers of members and numbers of unions); *see also* Vranken, *supra* note 8, at 11.

35. *See* Naughton, *supra* note 5, at 115-16 (finding the Federal Government cooperating with the union movement in the 1980s for the bargained decentralization of industrial relations); *see also* Vranken, *supra* note 8, at 11.

36. *See* Vranken, *supra* note 8, at 11.

37. *See generally* International Labour Organization (ILO) 1997 Press Releases-Tuesday 4 Nov. 1997, *ILO Highlights Global Challenge to Trade Unions* (visited Jan. 25, 1997) <http://www.ilo.org/public/english/235press/pr/1997/28.htm> [hereinafter ILO 1997 Press Release] (noting in the ILO's annual study of the world's labor market, trade union membership dropped during the last decade, falling to less than 20% of workers in 48 out of 92 countries surveyed).

38. *See* Vranken, *supra* note 8, at 12; *see also* Katz, *supra* note 10, at 6-7.

39. *See Reith Says ALP Should Server ACTU Ties,* AAP Information Serv., AAP NEWSFEED, Aug. 29, 1997, at Nationwide Gen. News, Finance Wire (discussing the results form the 1995 Australian Workplace Industrial Relations Survey of more than 2,000 workplaces); *see generally* ILO 1997 Press Release, *supra* note 36, at 1 (describing that only 14 of 92 countries surveyed had membership rates exceeding 50% of the national workforce and about 20 countries had membership levels decline during the last decade).

40. *See* ILO 1997 Press Release, *supra* note 37, at 1.

41. *Id.*

42. *Id.* Furthermore, the decrease in trade union membership has also been linked to major legislation overhauls in many countries and regions. *Id.*

43. *See generally id.* (suggesting that in spite of the negative trends, the drop in union numbers has not translated into a corresponding drop in influence).

44. *See id.* (mentioning some governments have adopted policies hindering union membership in the hope of attracting foreign investment); *see also* Naughton, *supra* note 5, at 116-17.

and employees.[45] The Workplace Relations Act creates new work agreements that may be made between the employer and the employee directly.[46] However, unions have not gone without recognition in this legislation. Under the Act, unions may still enter an employer's property to solicit members,[47] assist members in pursuing their interests[48] and ensure that employers are meeting their legal obligations under awards and industrial agreements.[49] Moreover, unions recently won a challenge in the Australian Industrial Relations Commission that deals a blow to the Workplace Relations Act.[50] The decision allows a union to change its rules so that workers signed up to be members automatically authorize the union to be their bargaining agent in any non-union agreement.[51]

III. THE AUSTRALIAN WORKPLACE AGREEMENT AND ITS NEW WATCHDOG

A. *Employment Agreements*

Individual rights are promoted by the creation of the Australian Workplace Agreement[52] (AWA) and certified agreements.[53] These two employment agreements completely depart from Australia's history of government-sponsored centralized wage determination. The Workplace Relations Act and Australia's current labor laws give a constitutional corporation[54] and its employees the choice to negotiate

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45. *See* Naughton, *supra* note 5, at 116-17 (emphasizing the Howard Government's agenda to exclude unions from direct relationship).

46. *See* Workplace Relations Act, *supra* note 2, at Sched. 1(3)(c).

47. Workplace Relations and Other Legislation Bill, Bills Digest 96, 1995-96 (Austl.), at Sched. 5(vi) (visited on Oct. 14, 1997) <http:www.nla.gov.au/gov.au/dir/reforms/menu.htm>.

48. *Id.*

49. *Id.*

50. *See* ILO 1997 Press Release, *supra* note 37, at 5. In addition to the IRCS decision, unions and employer organizations are developing new strategies: (1) new services, including supplementary social benefits, advisory services and job networks; (2) recruiting new members, especially woman, young people and the unemployed; (3) expansion of international cooperation. *Id.*

51. *See* Ilsa Colson, *VIC: Union Wins Right To Negotiate Non-Union Agreements*, AAP Information Serv., AAP NEWSFEED, Oct. 17, 1997, at Nationwide Gen. News, Austl. Gen. News. The Act removed a requirement that unions automatically represent their members in negotiations with employers for non-union work agreements. *Id.*

52. Workplace Relations Act, *supra* note 2, at Sched. 10.

53. *Id.* § 170LT.

54. *Id.* § 4 Interpretation (explaining that a constitutional corporation means: (a) a foreign corporation within the meaning of paragraph 51(xx) of the Constitution; or (b) a body corporate that is, for purposes of paragraph 51(xx) of the Constitution, a financial corporation formed within the limits of the Commonwealth; or (c) a body corporate that is, for the purposes of paragraph 51(xx) of the Constitution, a trading corporation formed within the limits of the Commonwealth; (d) a body corporate that is incorporated in a Territory; or (e) a Commonwealth Authority). Paragraph 51 of the Australian Constitution in relevant part says "[T]he Parliament shall, subject to this Constitution, have the power to make laws for peace, order, and good government of the Commonwealth with respect to: Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth." AUSTL. CONST. § 51(xx).

an AWA,[55] negotiate a certified agreement[56] with the participation of labor unions, sign an individual work contract,[57] or remain in an awards structure.[58] Today, employees and employers have the flexibility to package wage outcomes in ways more suited to their businesses' or their employees' needs.[59] For example, a public sector business may have difficulty attracting and retaining highly skilled employees with a generic pay scale under its award structure.[60] This is because a uniform awards structure does not consider a worker's unique needs or time constraints. The AWA gives businesses the flexibility to establish individual agreements with one or more of the prospective employees to offer a pay schedule more consistent with individual and industry expectations.[61] Alternatively, AWAs may also be beneficial to workers with child care concerns and workers who need to work flexible hours.[62]

1. Australian Workplace Agreements[63]

One of the most significant aspects[64] of the Workplace Relations Act is the creation of the Australian Workplace Agreement.[65] Employees and employers in the federal jurisdiction will be able to formalize an individual or group workplace agreement into an AWA to govern the terms and conditions of employment.[66] The same vehicle for individual flexibility is now available to employees and employers traditionally covered by awards and allows them to come to an arrangement to suit

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55. *See id.* § 170VF (making an AWA); *see also* Workplace Relations and Other Legislation Bill, Bills Digest 96, *supra* note 47, at Sched. 11.

56. *See id.* § 170LT (certifying an agreement).

57. *See id.* at § 298A(a) (stating that independent contractors have the option of signing an individual work contract.

58. *See Australia's Reith Promotes New Labor Laws To U.S. Investors*, *supra* note 1.

59. *See* Norman, *supra* note 10.

60. *Id.*

61. *Id.*

62. *See id.* (suggesting another example of AWA's flexibility where an employer's busiest time occurs over the weekend, the AWAs allow the needs of both employee and employer to be met with little or no additional cost to either party).

63. For a full discussion on forming an AWA according to the Workplace Relations Act of 1996, see Ronald C. McCallum, *Australian Workplace Agreements—An Analysis*, 10 AUSTL. J. LAB. L. 50 (1997).

64. *See* McCallum, *supra* note 63, at 50. *But see* Norman, *supra* note 10 (noting that the introduction of AWAs in January 1997 under the Federal Government's new industrial relations system initially received mixed response).

65. *See* Workplace Relations Act, *supra* note 2, § 170VF (explaining that an employer and employee may make a written agreement that deals with matters pertaining to the relationship between an employer and employee called an Australian Workplace Agreement and which may be made before commencement of the employment).

66. *See* McCallum, *supra* note 63, at 50; *see also* Workplace Relations and Other Legislations Amendment Bill, Austl. House of Representatives Hansard for May 23, 1996, at 7 (1996) (Austl.) (visited Oct. 16, 1997) <http://demos.anu.edu.au:7007/cgi-bin/pastimepub/article.pl?dir=years/1996/may/23/hansard/reps&art=48> (discussing the expanded options under the Act and how the AWA is designed to meet the objectives of placing the primary responsibility for industrial relations with employers and employees at the workplace, and reducing the complexities imposed by the current system).

both of their needs.[67] A majority of private employers will be able to enter into AWAs unless they are bound by a federal award structure.[68]

Employers that choose to enter into AWAs must receive approval by the Employment Advocate to have the agreements formalized.[69] The AWAs are formalized by filing them with the Employment Advocate at which point the Employment Advocate will help interpret statutory complexities and answer questions.[70] Among its advantages, AWAs displace federal and state awards, they are made with individual employees,[71] and the termination of an AWA must be approved by the Employment Advocate.[72] Furthermore, if an employee of an AWA becomes an employee of a new employer that is a successor to the whole or any part of the previous employer's business or undertaking, the new employer is bound by the previous AWA.[73] As of September 30, 1997, 113 employers were covered by an AWA, while eighty such deals, covering twenty-one employers, had been refused.[74]

2. *Certified Agreements*

An alternative to the AWA, which may make the bargaining process more efficient, is the certified agreement.[75] Certified agreements cover the wages, conditions, and benefits of multiple employees. The process of certifying an agreement begins by submitting an application[76] to the IRCS[77] for its review, which ultimately

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67. *See* Norman, *supra* note 10, at A13.

68. *See* McCallum, *supra* note 63, at 52. Although these employers cannot enter into AWAs, they may choose to enter into state employment agreements subject to a few provisions: the agreements must be made between an employer and either trade unions or employees, and they must be approved by a state industrial authority which has the capacity to determine whether or not the agreement is disadvantageous to the employees concerned. *Id.*

69. *See* Workplace Relations Act, *supra* note 2, § 170VM; *see also* McCallum, *supra* note 63, at 52; *see also infra* Part III.B (discussing the creation of the Employment Advocate and its responsibilities).

70. *See* Workplace Relations and Other Legislations Amendment Bill, May 23, 1996, *supra* note 66, at 8; *see generally* McCallum, *supra* note 63 (describing how the Employment Advocate will assist workers in forming AWAs).

71. *See* McCallum, *supra* note 63, at 60.

72. *Id.* at 58.

73. *See* Workplace Relations Act, *supra* note 2, § 170VS (succeeding new employers to the AWA are bound if they are: (a) a constitutional corporation, (b) the Commonwealth, (c) the employee's primary workplace is in a territory, (d) a waterside employer and the employee is a waterside worker and the employee's employment is in connection with constitutional trade, (e) the employee is a maritime employee, or (f) the employee is a flight crew officer).

74. *See Howard Sends In The Heavy*, CANBERRA TIMES, Oct. 9, 1997, at A10. The statistics were figures gathered by the Office of the Employment Advocate which also referred 194 AWAs covering 6 employers to the Australian Industrial Relations Commission. *Id.*; *see also* Bull, *supra* note 16 (suggesting that about 1,000 AWAs had been approved and approximately 1,800 were in the pipeline since the Act was implemented about eight months ago).

75. Workplace Relations Act, *supra* note 2, § 170LT.

76. *See id.* at § 170LM (listing the steps required to make the application for certification). The application for the Commission to certify must state that it is made under this division [Certified Agreements Division]. *Id.* Additionally, the application must be made no later than 21 days after an agreement has been reached with the

becomes a certified agreement.[78] During this stage, the Commission can examine the agreement for fairness to the employees and ensure that is it in the public's best interest.[79] However, before the agreement is reviewed by the Commission to become certified, it must be approved by a majority of the workers who will be subject to the agreement and be employed when the agreement is formed.[80] The application must be a written agreement about matters relating to the relationship between an employer[81] and its workers.[82] Unlike AWAs, a certified agreement can be made with employee organizations such as unions.[83]

The Act provides some qualifications for agreements between organizations and employers.[84] For instance, each organization that is represented by the agreement must have at least one worker in its organization subject to the agreement, and that organization must be authorized to represent the industrial interests of the workers in relation to the work that will be subject to the agreement.[85] Further, the Act protects the workers by mandating that employers give all of the workers who are subject to the agreement a reasonable[86] opportunity to decide whether they want to make the agreement.[87] Certified agreements make bargaining more efficient because the agreement is made between more than one employee and the employer. This is unlike an AWA, which is between a single employee and the employer.[88]

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organizations representing the workers and the employers or after the workers approved the agreement. *Id.*

77. *See id.* at § 170LA (outlining the functions of the commission which consist of performing its functions in a way that furthers the objects of the Act).

78. *Id.* at § 170L.

79. *Id.* at § 111AAA. In determining the public's interest, the IRCS must give consideration to the views of the employees and the employer. *Id.* § 111AAA(2).

80. *Id.* at § 170LE. A valid majority of workers is required to decide the expiration date of the agreement, any variation of in the agreement, and to terminate the agreement. *Id.*

81. *See* Workplace Relations Act, *supra* note 2, § 170LI(a) (specifying an employer who is a constitutional corporation or the Commonwealth).

82. *See id.* at § 170LI(b) (describing the relationship between all persons who, at the time when the agreement is in operation, are employed in a single business, or a part of a single business, of the employer and whose employment is subject to the agreement).

83. *Id.* at § 170LJ.

84. *Id.* at § 170LJ(1).

85. *Id.* at § 170LJ(1)(a)-(b).

86. *See id.* at § 170LJ(3) (stating that the employer must take reasonable steps to ensure that at least 14 days before any approval is given, all the workers either have, or have ready access to, the agreement, in writing, and the terms of the agreement are explained to all of the workers).

87. Workplace Relations Act, *supra* note 2, § 170LE(c).

88. *Id.* at § 170LE.

B. *The Employment Advocate*

The Employment Advocate was created under the Workplace Relations Act of 1996[89] to provide assistance and advice to employees and employers about their rights and obligations under the Act and under any AWA that the employee has formed.[90] The Employment Advocate also functions in an investigatory manner by looking into alleged breaches of AWAs,[91] as well as providing free legal representation to a party in certain proceedings.[92] When the Employment Advocate is performing its functions, it must give high regard to the needs of workers in a disadvantaged bargaining position, assist workers in balancing work and family responsibilities, and promote better work and management practices through Australian Workplace Agreements.[93] The underlying purpose of the Employment Advocate is to prevent discrimination against workers and contractors and to protect workers and contractors from being victimized for joining or not joining a union.[94]

IV. THE OTHER "AWA," ALTERNATIVE WORK ARRANGEMENT

A. *Independent Contractors: Protection under the Workplace Relations Act*

As more flexible work arrangements emerge under the Workplace Relations Act, greater protection is necessary for independent contractors who are not considered employees.[95] The Workplace Relations Act affords greater protection for independent contractors from industrial associations and employers.[96] Today, a greater emphasis is placed on the individual's rights,[97] such as greater protection for

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89. *See* Norman, *supra* note 10. The Employment Advocate is headed by a statutory office holder appointed for a renewable term of five years and staffed from within the Department of Industrial Relations (DIR). *Id.* The Employment Advocate will largely mirror the role currently played by the awards management area of DIR, with respect to AWAs. *Id. See also* Workplace Relations and Other Legislation Bill, Bills Digest 96, *supra* note 47, at Sched. 3.

90. Workplace Relations Act, *supra* note 2, at Part IV.A, Div. 1, § 83BA-BB.

91. *Id.* at Part IV.A, Div. 1, § 83BB.

92. *See id.* at Part IV.A, Div. 1, § 83BB (describing free legal representation to proceedings under Part VI.D or Part X.A if the Employment Advocate determines this would promote the enforcement of the provisions of those parts).

93. *Id.* at Part IV.A, Div. 1, § 83BB(2).

94. *Id. But see Different Views On Workers' Interests*, CANBERRA TIMES, Oct. 22, 1997, at A10 (arguing the Employment Advocate appears to have pursued only one side of the equation by pursuing closed-shop arrangements ahead of investigating complaints about victimization of union members).

95. *See* Workplace Relations Act, *supra* note 2, § 298S.

96. *Id.*

97. Workplace Relations and Other Legislation Bill, Bills Digest 96, *supra* note 47, § (a). *See generally* Workplace Relations and Other Legislations Amendment Bill, Austl. House of Representatives Hansard for Dec. 5, 1996, (1996) (Austl.) (visited Oct. 24, 1997) <http://demos.anu.edu.au:7007/cgi-bin/pastimepub/ article.pl?dir=years/ 1996/dec/5/hansard/sen&art=39> (describing a speech read by Sen. Campbell (W. Austl.--Parliamentary Sec. to the Treasurer) who was commenting on how the Workplace Relations Act marks a transition in a new phase in state and federal cooperation, allowing easier access to the federal system).

independent contractors.[98] Independent contractors are similarly situated in Australia as they are in the United States. They are a by-product of evolving work arrangements brought on by changes in the economy[99] and serve as self-employed providers of products or services, typically to another business.[100] This self-employed status, however, generally means that the independent contractor will not be covered under a company's benefit package.[101] In Australia, independent contractors are not employees by definition and are, therefore, not capable of being covered by an award, a certified agreement or a collective bargaining agreement.[102] Since they are separate from the traditional bargaining process,[103] independent contractors pose different problems for union-competing ideological beliefs[104] and can cause genuine hostility toward unions.[105] Independent contractors view themselves as entrepreneurs rather than employees, thus, relating more closely to the employers rather than the employees.[106] Independent contractors are self-employed and, unlike employees, are not under the day-to-day supervision of an employer.[107] Further, unions typically do not favor independent contractors because they usually do not belong to trade unions.[108] As flexible work arrangements continue to evolve and independent contractors become more prevalent, the Workplace Relations Act gives independent contractors more leverage in negotiating their work arrangements than they had prior to the Act.[109]

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98. *See* Workplace Relations Act, *supra* note 2, § 298S.

99. *See* Lisa Stansky, *Changing Shifts*, ABA J., June 1997, at 54.

100. *Id.* at 56.

101. *Id.*

102. Breen Creighton, *Employment Security and Atypical Work in Australia*, 16 COMP. LAB. L.J. 285, 299 (1995).

103. *See generally* DABSCHECK & NILAND, *supra* note 18, at 17 (discussing collective bargaining or negotiating that takes place between the numerous institutions involved). The traditional bargaining process is one where the employee is represented by a union. *Id.* This is a narrow and restricted definition which presumes that bargaining only occurs between unions and employers. *Id.*

104. Creighton, *supra* note 102, at 290. *See* Norman, *supra* note 10 (finding by the Director of Employee Relations for the ACT Region Chamber of Commerce and Industry that employees are keen to enter AWAs because they can play a major role in the agreement-making process without the interference of unions who may traditionally pursue a political or idealistic agenda).

105. *See* Creighton, *supra* note 102, at 290.

106. *Id.*

107. *Id.*

108. *See* Stansky, *supra* note 99, at 56 (commenting how independent contractors may hinder union organizing efforts). *See generally Different Views On Worker's Interests*, *supra* note 93 (expounding that when possible, unions seek to ensure that 100 percent of workers are unionized in a workplace). *But see* Creighton, *supra* note 102, at 285 (suggesting some independent contractors are union members in the transport and construction industry).

109. *See* Stansky, *supra* note 99, at 56 (discussing the attractions of becoming an independent contractor).

1. Conduct by Employers

The Workplace Relations Act prohibits employers from terminating a contract for services that is entered into with an independent contractor[110] for prohibited reasons, such as refusing to hire an independent contractor because he or she does not belong to a union.[111] Further, an employer can neither injure the independent contractor regarding the terms of the contract[112] nor discriminate against another person regarding the terms of the contract for any of the prohibited reasons.[113] Last, an employer cannot alter the position of an independent contractor to his or her disadvantage based on a prohibited reason.[114] Not only is an employer prohibited from doing these actions, but the employer cannot *threaten*[115] (emphasis added) to act on these illegal actions.[116]

Employers may not use these prohibited reasons against an independent contractor for conduct that has occurred or conduct that is proposed.[117] Employers may not prevent an independent contractor from joining an industrial association[118] or force an independent contractor to join an industrial association.[119] If an independent contractor is a member, employers may not force any payments to the industrial association[120] or force a vote in favor of making an agreement.[121] Additionally, employers may not prohibit the participation by independent contractors in complying with industrial law, such as participating in a secret ballot,[122] filing a complaint,[123] providing evidence in a proceeding,[124] or participating in a proceeding.[125]

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110. *See* Workplace Relations Act, *supra* note 2, § 298N (stating that many of the prohibited acts and prohibited reasons apply equally to independent contractors to keep them from ceasing their work against employers). The prohibited conduct applies equally to employees. *Id.* § 298K(1)(a)-(e); *see also id.* (providing "an employer must not, for a prohibited reason, or for reasons that include a prohibited reason, do or threaten to do any of the following [regarding an employee or independent contractor in union participation or lack thereof]: (a) dismiss an employee; (b) injure an employee in his or her employment; (c) alter the position of an employee to the employee's prejudice; (d) refuse to employ another person; (e) discriminate against another person in the terms or conditions on which the employer offers to employ the other person").

111. *Id.* at § 298K(2).

112. *Id.* at § 298K(2)(b). *See Different Views On Workers' Interests*, *supra* note 94.

113. *See* Workplace Relations Act, *supra* note 2, at § 298K(2)(e); *see also Different Views On Workers' Interests*, *supra* note 94.

114. *See* Workplace Relations Act, *supra* note 2, at § 298K(2)(c).

115. *See id.* at § 298L(2)(c) (describing that the threat must be made with the intent of dissuading or preventing the person from doing the act, or coercing the persons to do the act).

116. *Id.* at § 298K(2).

117. *Id.* at § 298L.

118. *Id.* at § 298L(1)(a).

119. *Id.* at § 298L(1)(b).

120. Workplace Relations Act, *supra* note 2, at § 298L(1)(c)(ii).

121. *Id.* at § 298L(1)(e).

122. *Id.* at § 298L(1)(g).

123. *Id.* at § 298L(1)(h)(I).

124. *Id.* at § 298L(1)(k).

125. *Id.* at § 298L(1)(j).

2. *Industrial Associations Acting Against Independent Contractors*[126]

An industrial association may neither discriminate nor take discriminatory action[127] against a person who joins an association if that person is an employee.[128] Industrial action, defined as "a failure or refusal by persons to attend for work or a failure or refusal to perform any work at all by persons who attend to work,"[129] cannot be used to threaten or coerce a person because the eligible person is not a member of a union.[130] There is a variation of this definition that applies to some other sections of the Act, mainly the sections discussing AWAs. However, most types of industrial action threatened would apply to either definition; hence, any problem is unlikely to appear.[131]

3. *Remedies for Prohibited Actions*

Applications for relief may be made to the Federal Courts of Australia for prohibited action against independent contractors by employers or industrial associations as long as the independent contractor has been engaged by a constitutional corporation, and the conduct affects the applicant in that capacity.[132] The provisions of the Workplace Relations Act allow the Federal Courts to review a contract for the performance of work by an independent contractor on the grounds that it is harsh or unfair.[133] However, the one limitation for relief is that there must be jurisdiction[134] under state law.

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126. *Different Views On Workers' Interests*, *supra* note 94. It is an unwritten law in some workplaces that new workers, employees or independent contractors are not welcome until they possess proof of appropriate trade-union membership. *Id.*

127. Workplace Relations Act, *supra* note 2, § 298S(1)(a)-(b). "Discriminatory action" means: "(a) a refusal to make use of, or to agree to make use of, services offered by the eligible person; or (b) a refusal to supply, or to agree to supply, goods or services to the eligible person." *Id.*

128. *Id.* "Eligible person" means "a person who is not an employee, but who: (a) is eligible to join an industrial association; or (b) would be eligible to join an industrial association if he or she were an employee." *Id.*

129. *See* Greg McCarry, *Industrial Action Under the Workplace Relations Act 1996*, 10 AUSTL. J. LAB. L. 133, 135 (1997).

130. Workplace Relations Act, *supra* note 2, § 298S(2)(c); *see* McCarry, *supra* note 129, at 135.

131. *See* McCarry, *supra* note 129, at 135 (describing in Part VI.D, Div. 8, variations to the definition of "industrial action" applying to sections dealing with Australian Workplace Agreements such as lock-outs, AWA industrial action, and general industrial action). Part X.A defines "industrial action" as conduct carried out with a purpose or intent relating to a person's participation or non-participation in industrial action within the meaning of subsection 4(1). *Id.*

132. Workplace Relations Act, *supra* note 2, § 298T. Section 298T allows an application to be made under § 298U [orders that the Federal Court may make] in respect to conduct in contravention of this Part. *Id.* The application may be made by: § 298T(2)(c) in the case of a contravention of this Part by virtue of the operation of § 298G (Constitutional corporations); § 298T(2)(d) the Employment Advocate; or § 298T(2)(e) any other person prescribed by the regulations. *Id.* Persons under § 298T(2)(e) may limit their application to specified circumstances. *Id.* at Div. 6, § 298T.

133. Workplace Relations and Other Legislation Bill, Bills Digest 96, *supra* note 47, at Sched. 6.

134. Workplace Relations Act, *supra* note 2, at Div. 6, § 298T(4).

When the Federal Courts are prepared to make an order against a violation of the prohibited conduct, it may consider under all the circumstances of the case to make one or more of the following orders: an order of a penalty on a corporate body of US$10,000 to US$20,000, an order requiring re-engaging an independent contractor, an order for compensation, an order not allowing the threat to occur, an order for an injunction, or an order for any other consequential matters.[135]

B. Independent Contractors: Australian or American?

One factor present in both American[136] and Australian[137] economies is a dynamic workplace environment. Both economies are quickly moving away from traditional employment.[138] The new environment is characterized by flexible staffing,[139] flexible scheduling,[140] and flexible choices of where to actually do the work.[141] This phenomenon in the United States represents the same change in Australia. There is an increasing recognition in Australia that the typical worker—an adult male, with children, who works from 8:00 a.m. to 5:00 p.m. at a fixed location—is slowly becoming atypical.[142]

The growth in quantity of independent contractors is the result of increased flexibility and the decreased cost of hiring.[143] An independent contractor has the option of which company to contract his or her services, is likely to be outside of the strictures of office regulations,[144] and arguably, most important, is away from the glare of a prying boss.[145] For the employer, the use of independent contractors may free companies from some of the financial burdens of employees.[146] With the

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135. *Id.* at § 298U. "Orders that the Federal Court may make in respect of conduct in contravention of this Part, the court may, if the court considers it appropriate in all the circumstances of the case, make one or more of the following orders: (a) an order imposing on a person or industrial association whose conduct contravened or is contravening the provision in question a penalty of not more than: (I) in the case of a corporate body-US$10,000; or (ii) in an other case US$2,000; (b) an order requiring the person or industrial association to reinstate an employee, or to re-engage an independent contractor; (c) an order requiring the person or industrial association to pay to . . . an independent contractor, compensation of such amount as the Court thinks appropriate; (d) an order requiring the person or industrial association not to carry out a threat made by the person or association, or not to make any further threat; (e) injunctions; (f) any other consequential orders." *Id.* § 298U.

136. *See generally* Stansky, *supra* note 99, at 56 (discussing independent contractors in America).

137. *See generally* Creighton, *supra* note 102, at 291-92 (discussing independent contractors in Australia).

138. *See supra* notes 137-38 and accompanying text (discussing independent contractors in Australia and and the United States).

139. Stansky, *supra* note 99, at 55.

140. *Id.*

141. *Id.*

142. Creighton, *supra* note 102, at 285.

143. *See* Stansky, *supra* note 99, at 56; *see also* Creighton, *supra* note 99, at 285.

144. *See* Stansky, *supra* note 99, at 56.

145. *Id.* at 56.

146. *Id.*

rising cost of insurance and other employment benefits, employers look to contract out services traditionally left for employees.[147]

The United States and Australia have experienced many challenges from this new, economically attractive working arrangement.[148] In the United States, there have been serious challenges to the traditional legal perception of the employer-employee relationship.[149] There are two principle characteristics that apply to independent contractors: (a) independent contractors are less supervised than typical employees and have more control over their own work, and (b) independent contractors generally have a higher degree of investment in their work.[150] These two broadly noted characteristics become confusing when an attorney is comparing the relationship between independent contractors and employees, according to the Internal Revenue Service's 20-factor test.[151] Because simply labeling a person as an employee or an independent contractor is not dispositive, the factors take into account whether the employer has enough control over the details and methods for the employee's work to constitute an employee as opposed to an independent contractor.[152] The distinction is important because some of the employer's obligations include withholding income taxes, withholding and contributing to Social Security, contributing to the Federal Unemployment Tax Act, and filing quarterly income taxes.[153]

In Australia, difficult economic circumstances make employers reluctant to incur the costs associated with recruiting full-time, permanent workers.[154] The fact that independent contractors are not covered under any of the employment agreements, because they are not employees, raises a logical question as to why one would want to be an independent contractor. Flexibility is the primary motivation,

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147. *Id.*

148. *See* Creighton, *supra* note 102, at 293 (noting the Australian legislators' and courts' problem in distinguishing between employees and independent contractors on a consistent basis); *see also* Stansky, *supra* note 99, at 55 (quoting Frank C. Morris Jr. who predicts "[U]ltimately there will be a tremendous amount of litigation"); *see also* Melinda Guzman-Moore, *Contractor or Employee? Mistaken Identity Can Be Costly*, SACRAMENTO BEE, June 8, 1997, at G2.

149. *See* Stansky, *supra* note 99, at 55 (discussing these challenges).

150. *Id.* at 56; *see also* Guzman-Moore, *supra* note 148.

151. Some of the factors used to determine whether a person is an independent contractor or an employee include an evaluation of instructions and training; who controls details of the work to be performed; whether the work constitutes an integral part of the business; whether the services can be delegated by the worker; whether the employer pays, supervises and trains any assistants; whether the worker is a full-time worker and/or can work for other companies; how the worker is paid; where the work is done; and whether the employer has the right to fire the worker and the worker has the right to quit. *See* Guzman-Moore, *supra* note 148; *see also* Stansky, *supra* note 99, at 56.

152. *See* Guzman-Moore, *supra* note 148.

153. *Id.*

154. *See* Creighton, *supra* note 102, at 290 (noting that the deep and prolonged recession that affected the Australian economy in the early 1990s, with attendant high levels of unemployment, undoubtedly provided a further impetus for the shift to "atypical" employment arrangements).

but reducing one's tax burden is also important.[155] This is accomplished because independent contractors may divide the income among their family members in order to reduce taxable income.[156]

The Workplace Relations Act provides protection against industrial associations'[157] discriminatory action against independent contractors.[158] Similar to the United States, Australia's courts have looked to a range of factors to distinguish the employment relationship.[159] The preferred approach is the "modified control" test that emphasizes the existence of a residual right to control rather than the actual exercise of that right.[160] The traditional approach looked at the what, how and when of a job, but this was not sufficient enough to cover modern employment categories.[161] It has been difficult for Australian courts and the Parliament to come to terms with independent contractor's legal status.[162] In addition to legal challenges, this new employment arrangement poses many disadvantages that may outweigh the benefits.[163] The disadvantages could include higher unemployment, reduced job security and limited career prospects.[164]

V. THE NEW BARGAINING PROCESS

A. Impact on U.S. Companies

As of 1990, Australia had a Gross Domestic Product (GDP) of US$296 billion, compared to the U.S., which had a GDP of US$5.340 billion.[165] Australia exported approximately US$38.911 million and imported US$39.137 million of goods, compared to the U.S. which exported about US$393.106 million and imported US$517.020 million of goods.[166] The total amount exported to Australia from the

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155. *Employees Pedalling Away From PAYE Australia: Employees Seek Ways To Become Independent Contractors To Reduce Their Burdens From Pay-As-You-Earn Tax Base,* AUSTL. FIN. REV. 7, Sept. 8, 1997, *available in* WL 8484068.

156. *Id.*

157. *See* Workplace Relations Act, *supra* note 2, § 4 (suggesting that industrial associations revolve around any business, trade, manufacture, undertaking or calling of employers; any calling, service, employment, handicraft, industrial occupation or vocation of employees; and a branch of an industry and a group of industries).

158. *See id.* at § 298S (explaining industrial associations actions against independent contractors).

159. *See* Creighton, *supra* note 102, at 292 (stating that the courts have flirted with a number of so-called "tests" by which they have endeavored to categorize a range of increasingly diverse and complex employment relationships).

160. *Id.*

161. *Id.* The traditional approach is inadequate because it was geared toward the pre-industrial society such as domestic or farm servants, skilled artisans, and other independent contractors of that era. *Id.*

162. *Id.*

163. *See* ILO 1997 Press Release, *supra* note 37.

164. *Id.*

165. *See* THE CHALLENGE OF NAFTA: NORTH AMERICA, AUSTRALIA, NEW ZEALAND AND THE WORLD TRADE REGIME 212 (Robert G. Cushing, et. al eds., 1993).

166. *Id.*

United Sates is only 2.2 percent or about US$8.5 million, and the total amount imported from Australia by the U.S. is 0.9 percent, or US$4.653 million.[167] These statistics indicate that the amount of goods traded is not substantial. However, the Workplace Relations Act will provide the basis for a more consistent supply of Australian exports to the U.S.[168] and a more flexible and productive output for U.S.-owned plants in Australia.[169]

Specifically, the laws will provide the basis for an increased supply of Australian raw materials and agricultural and manufactured exports to the U.S.,[170] more efficient delivery of U.S. manufactured exports to Australia,[171] and more flexible and productive operations in U.S.-owned Australian manufacturing plants.[172] The new labor law is aimed at improving what has historically been a dismal productivity performance by Australia.[173]

B. Possible Convention Violation

The Workplace Relations Act is being challenged as a violation of the International Labour Organization (ILO) Convention 98,[174] an international convention.[175] The ILO adopted Convention 98 on January 7, 1949,[176] which came into force July 18, 1951.[177] Convention 98 was decided upon by certain proposals concerning the application of the principles of the right to organize and to bargain collectively.[178] Australia ratified the ILO convention February 2, 1973.[179] It is believed that the Australian government breaches Convention 98 by placing greater importance on individual work contracts than collective bargaining.[180]

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167. *Id.*

168. *See Australia Reith Promotes New Labor Laws To U.S. Investors, supra* note 1.

169. *Id.* Australia Industrial Relations Minister Peter Reith said the laws "promote a climate of much greater industrial certainty" for all companies operating in Australia in a speech to the American Chamber of Commerce in Sydney. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *See ACTU Asks ILO To Examine Aust Labour* Laws, AAP Information Serv., AAP NEWSFEED, Aug. 7, 1997, at Nationwide Gen. News, Finance Wire (maintaining that the Workplace Relations Act introduced a number of new areas of non-compliance most notably in its failure to promote collective bargaining as required by Article 4 of ILO Convention 98).

175. *Id.*

176. International Labour Organization (ILO), *Convention 98: Right to Organize and Collective Bargaining Convention, 1949*, at 1 (visited Jan. 25, 1997) <http://ilolex.ilo.ch:1567/public/50normes...vention%3DC98&highlight+on&querytype=bool> [hereinafter ILO Convention 98].

177. *Id.*

178. *Id.*

179. *Id.*

180. *ACTU Asks ILO To Examine Aust Labour Laws, supra* note 174. ACTU president, Jennie George, said the Federal Government's Workplace Relations Act may breech Convention 98 because it placed greater importance on individual work contracts, like the Australian Workplace Agreements, than collective bargaining.

Convention 98 is based on the notion that workers should enjoy adequate protection against acts of anti-union discrimination in respect of their employment.[181] Further, workers should be protected against acts of interference by each other and their respective agents within their industry.[182]

VI. CONCLUSION

A cooperative framework has been provided in the Workplace Relations Act to promote economic prosperity and welfare for the people of Australia.[183] The goal of the Act is to encourage high employment,[184] improve living standards,[185] reduce inflation and increase international competitiveness through higher productivity and a flexible and fair labor market.[186] The success of this legislation will depend upon how effective and efficient Australians utilize the new bargaining arrangements in order to choose the most appropriate form of agreement for their particular circumstances. United States investors would be wise to take notice of the effects of doing business in Australia without the control of unions in the bargaining process with AWAs and independent contractors. However, investors should consider how unions may react to companies using non-union agreements.

The Australian Workplace Act marks a pivotal juncture in Australia's history of labor relations. The Act sets the stage for a new era, shifting the negotiating power from unions to the individual, having great implications for a nation with a history of dismal productivity.[187] The days of low productivity and power in numbers have given way to the days of increased productivity and individual labor negotiating power.

Id.

181. *See* ILO Convention 98, *supra* note 176, art. 1.

182. *See id.* art. 2 (emphasizing that acts which are designed to promote the establishment of workers' organizations under employers' domination or the organizations' domination with the object of placing such organization under the control of employers shall be deemed to constitute acts of interference within the meaning of this article).

183. *See* Workplace Relations Act, *supra* note 2, at Sched. 1.

184. *Id.*

185. *Id.*

186. *Id.*

187. *See* ILO 1997 Press Release, *supra* note 37 (describing an emerging industrial relations systems which is driven by capital mobility, new methods of production and communication and new approaches to human resource development compared with traditional collective labor relationships).