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CHANGING EMPLOYMENT PROTECTION SYSTEMS: THE COMPARATIVE EVOLUTION OF LABOUR STANDARDS IN AUSTRALIA AND ITALY 1979 TO 2000

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ABSTRACT

The primary objective of this thesis is to compare the evolution of labour standards in Australia and Italy over the period 1979 to 2000 and to capture and explain key shifts in the legal protection accorded to employees in these countries. In order to achieve this aim, non-parametric absolute indexes are generated for each country for 1979 and 2000 to assess the strength of the following standards: minimum wage, overtime, paid time off, unemployment/employment insurance, workers' compensation, collective bargaining, equal employment opportunity/employment equity, unfair dismissal, occupational health and safety and large-scale layoffs. Each standard is then compared between Australia and Italy for 1979 and 2000 through the use of graphic and qualitative analysis. The thesis' contribution to the literature has two distinct dimensions. First, it is the only study that has investigated and measured the changes that have occurred to labour standards over a prolonged period of time in different national contexts. Second, it is the only thesis that has sought to explain the economic and social forces that underpinned these changes and induced diversity across time.

The main finding of the study is that the Australian and Italian employment protection systems converged over the 1979-2000 period. Both countries increased the protection accorded to labour standards although one index, collective bargaining, significantly decreased in Australia following the downgrading of compulsory conciliation and arbitration and the decentralisation of the locus of bargaining. The decrease in the protection accorded to this standard made the Australian bargaining structure similar to the system operating in Italy, which has traditionally been based on *Collective Laissez Faire* rather than on regulatory institutions. This development proved to be crucial as it seriously undermined Labour's capacity to bargain with Capital in the antipodal country.

The main argument developed to explain this outcome relies on the insights offered by Karl Polanyi's "Double Movement", French Regulation theory and contributions originating in the disciplines of industrial relations and labour law. More specifically, this dissertation extensively refers to "Strategic Choice" theory and insights provided by Khan-Freund that investigate the relationship between changes affecting the nature of labour standards over time and the overall features of the power context.

The thesis maintains that the constant tension between market liberalisation and employment protection shaped the features of the employment protection systems in Australia and Italy over the period considered. The increase that occurred in most labour standards was part of a trade-off between the social partners that aimed to shield workers from institutional changes that enhanced the significance of market forces and decreased the relevance of society-based institutions. As part of this process of marketisation, the growing power of Capital was utilised to erode Labour's capacity to bargain. In Australia this process was initiated by the Labor Party in the late 1980s and furthered by the Liberal-National government in 1996 via the *Workplace Relations Act (Cth)*. In Italy the inception of the European Union in 1992, by requiring member countries to achieve a low GDP/public deficit ratio and reduce inflation, imposed "market discipline" and neo-liberal boundaries upon the social partners hampering Labour's capacity to bargain.

It is also argued that although employers and governments were committed to expand the realm of the market in both countries, Italian trade unions were more successful in defending their position in the market place than their Australian counterparts. This development was influenced by multiple factors including: the greater capacity of Italian trade unions to bargain with Capital and the State, the history of negotiation between the social partners and the political context in Italy, the

weakness of Italian governments, the continuous office held by center-left executives during the 1979-2000 period and the feeble nature of Italian corporatist practices in comparison with similar models adopted in Australia.

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STATEMENT OF DECLARATION

This thesis contains no material which has been accepted for the award of any other degree or diploma in any university and that, to the best of my knowledge and belief, the thesis contains no material previously published or written by another person, except when due reference is made in the text of the thesis.

.....

Name of candidate

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CHAPTER ONE

INTRODUCTION

1.1 The Background and the Objective

From the late 1970s, the level and type of legal protection accorded to labour conditions have triggered a vigorous debate amongst academics and policy makers, at both national and international levels. By this period, most developed countries were experiencing slow economic growth (and in the case of Australia severe recession), sustained public deficits, increasing rates of inflation, chronically high rates of unemployment and declining productivity. Highly regulated labour standards were perceived to be partly responsible for having induced rigidities in the labour market thus preventing firms from rapidly adjusting their productive assets in response to a more volatile economic environment (Posner 1974; 1984; Hayek 1960; 1979; 1980; Stigler 1971; 1975; Demsetz 1968; Reynolds 1996; Salvanes 1997; Overall 1997; Minford 1999). As a result, most western countries embarked upon programs of financial and social austerity. This trend was particularly pronounced in Anglo-Saxon countries. As part of this process, governments used their powers to modify the existing system of legal employment protection.

These policies have been supported by the progressive abandonment of Keynesian economic theories and an increased sympathy for neo-classical orthodoxy. The views of both neo-classical and heterodox economists in relation to labour standards will be reviewed in sections 2.3 and 2.3.1. For the moment it is important to point out that there is a fracture between these schools of thought in relation to the economic effects of labour standards and the extension of the legal protection that should be granted to Labour. While neo-classical economists tend to perceive labour standards (such as those legal requirements constraining the freedom of employers to

hire and discharge employees or provisions regulating wages, collective bargaining, working hours and time off) as an interference in the capacity of the "market" to allocate the factors of production (and in particular Labour) to their most efficient use, heterodox scholars outline the relevance of these standards in the development of constructive and long-lasting relationships between Capital and Labour and their beneficial effects in sustaining aggregate demand. This divergent perception induces neo-classical economists to support, in the main, limited regulatory intervention in the labour market and the maximisation of private autonomy. Heterodox economists, by contrast, tend to encourage the more active use of legislation.

The increasing reliance on the "market" that has occurred over the past two decades has produced major changes concerning the features of labour markets in most countries. In particular, there has been a sustained growth of "atypical" forms of employment such as casual or part-time work and self employment coupled with a tendency to decentralise the bargaining locus from the traditional industry level to the enterprise or the individual, and an increase in the participation rate of women. These changes affected the structure of the employment protection regimes established after the end of the Second World War. These regimes usually provided protection for male employees working full time, for an indeterminate period. As will be seen in sections 2.2.1 and 2.2.2, the extension of these changes induced a vehement debate amongst legal specialists with this debate focusing on how to achieve more flexibility in the labour market while retaining a reasonable level of employment protection.

The controversy concerning labour standards has also expanded internationally. The debate surrounding the inception of "globalisation" and the establishment of a multilateral trading and investment system has been accompanied by fear that the new global economy could induce a "race to the bottom" in which international competition would be pursued by violating Labour's fundamental rights

(Langille 1994; Emmerij 1994; Compa and Diamond 1996; Lee 1997; Montgomery 1996; Castle, Chaudhri and Nyland 1998; Rodrik 1997; 1998; Tonelson 2000; Dessing 2001). Thus, calls for a linkage between the right to engage in international trade and respect for fundamental workers' rights have gained intensity over the past two decades and have sparked a vigorous debate which involves academics, human rights activists, trade union members, non governmental organisations, employers and governments. This development has rendered labour standards a key issue of debate within the international business literature as is indicated in sections 2.4 and 2.4.1.

The primary objective of this thesis is to measure and compare changes that have occurred to labour standards in Australia and Italy over the 1979-2000 period. The thesis also aims to reveal common patterns which have shaped the evolution of the employment protection systems in the two countries.

This is particularly important given the scarcity of comparative studies on this topic. With the exception of a 1999 OECD study, which partially tried to map changes in employment protection in the OECD area during the 1993-1999 period, there have not been comprehensive studies attempting to reveal the extent to which employment protection systems have actually been modified over the two decades considered (Grubb and Wells 1993; OECD 1999; see further sections 3.4 and 3.4.1). This thesis will also inform the labour standards debate by identifying the political and economic forces which have influenced the process of change and shaped the features of the Australian and Italian employment protection systems.

Australia and Italy were chosen because of the similarities they share and the differences that distinguish their employment protection regimes (see chapters 4, 6, 7 and 9). Both countries have traditionally embraced a high degree of labour protection. In Australia, the simultaneous operation of compulsory conciliation and arbitration, tariff protection, the public ownership of key industries and selective immigration

policies ensured that Labour was partially sheltered from the operation of the free market. In Italy, the aggressive strategies trade unions pursued during the late 1960s-late 1970s, and the dominance of parliamentary office by centre-left governments, resulted in the enactment of statutory legislation virtually prohibiting the use of part-time, fixed-term contracts, outsourcing, and that strictly regulated unfair dismissal, occupational health and safety and equal employment opportunity/employment equity. In addition, since the early 1980s both countries have adopted corporatist arrangements even though such practices were alien to their industrial relations traditions.

Despite these similarities, Australia and Italy are also characterised by sharp differences in relation to their institutional and political contexts. On one hand, Australian labour standards were established, for almost 90 years, via the operation of compulsory conciliation and arbitration and awards. The common law of employment, inherited with British settlement, has traditionally played a marginal role in this country. The interaction between industrial tribunals, trade unions and employers' associations and the quasi-contractual nature of awards ensured a sustained and widespread degree of protection for typical contractual standards such as wages, overtime, paid time off. Under this system, Federal governments played a marginal and indirect role in shaping the features of labour standards. By contrast, unfair dismissal, occupational health and safety, equal employment opportunity/employment equity and large-scale layoffs were areas neglected by the Federal system of employment protection. On the other hand, Italy is a traditional civil law country. Labour standards are established through statutes and therefore the Parliament has traditionally played a central role in determining the type and level of legal protection granted to Labour. Unlike in Australia, the strictly legal nature of labour standards in Italy resulted in these standards being conceived, in the main, as minima only.

The period interceding between 1979 and 2000 was chosen because it was the year of the second oil shock, which affected the already fledging economies of most countries (including Australia and Italy) and heralded what Krugman (1990) has termed the "age of the diminished expectations". Following the second oil shock, Australia and Italy were afflicted by similar macro-economic problems which included slow and sometimes negative economic growth, high rates of inflation and unemployment, sustained public deficits, prolonged periods of financial and monetary volatility, and resistance to traditional Keynesian macro-economic policies (see further sections 6.2; 6.3; 9.2 and 9.3). In addition, 1979 marked the election of conservative governments in Britain (Thatcher) and two years later in the US (Reagan). These administrations abandoned Keynesian economics while their economic and social policies were characterised by the adoption of neo-liberal prescriptions and a declared hostility against detailed regulation of labour standards. As will be seen in sections 6.3 and 9.3, this trend was also partially embraced in Australia and Italy. Given the complexities of these events, it is of primary importance to explore to what extent employment protection systems, in different institutional contexts, have been affected by the economic, political and ideological turmoil which occurred internationally over the 1979-2000 period.

1.2 Methodology, Findings and Main Argument

This thesis relies on a methodology devised by Block and Roberts in 1998 to measure labour standards in the US and Canada (Block and Roberts 1998; 2000 and forthcoming). Non-parametric absolute indexes were generated for Australia and Italy in 1979 and 2000 (see section 3.4.1; chapters 5 and 8). These indexes measure the strength of the following standards: minimum wage, overtime, paid time-off, unemployment/employment insurance, workers' compensation, collective bargaining, equal employment opportunity/employment equity, unfair dismissal, occupational

health and safety and large-scale layoffs. Through the use of graphic and qualitative analysis, each index was compared across Australia and Italy for 1979 and 2000 (see chapter 10).

The main finding of this thesis is that through the 1979-2000 period, there has been an overall convergence between the two countries in relation to both the level and the type of labour standards protection. Most labour standards increased in both national contexts. Italy, which in 1979 lagged behind Australia in relation to overtime, paid time off, unemployment/employment insurance and collective bargaining, enacted provisions which had the effect of reducing the gaps in these areas, while Australia implemented legislation to strengthen the protection accorded to unfair dismissal, equal employment opportunity/employment equity, occupational health and safety and large-scale layoffs. However, not all the standards converged at a higher level. Collective bargaining decreased in Australia in a way that rendered the legal system regulating this standard more similar to the one operating in Italy.

This outcome will be explained through the use of Karl Polanyi's "Double Movement" theory, French Regulation School theory and intellectual contributions offered by industrial relations and labour law. Both Polanyi and French regulation conceptual frameworks emphasise the relevance of protective legislation as a force to counteract the tendency inherent in capitalist economies to generate forces that can endanger the viability of capitalism. It will be argued that, despite different institutional contexts, in Australia and Italy in the two decades studied there has been a constant tension between the perceived need to increase reliance upon market forces and the necessity to provide a reasonable level of employment protection. The continuous interaction between these two opposite forces resulted in the increase of some standards and the decrease of others in accordance with the institutional features of each country. These conceptual frameworks will be integrated by insights offered

by the disciplines of industrial relations and labour law. In particular, it will be argued that changes that affected the power position of Capital, Labour and the State over the period considered were critical in modifying the features and the degree of protection accorded to Labour in both countries.

As already stated in section 1.1, in 1979 in Australia the operation of compulsory conciliation and arbitration ensured a high level of protection to contractual standards such as minimum wage, overtime, paid time off and collective bargaining. In addition, the unemployment benefits, which due to the operation of arbitration have traditionally been administered in a residual and selective way, were considerably higher than in Italy. By contrast, standards like equal employment opportunity/employment equity, unfair dismissal, occupational health and safety and large-scale layoffs fell outside the umbrella provided by arbitration and conciliation and the legal protection granted to these standards was limited. Over the two decades studied, this system of labour protection underwent a dramatic transformation with this process tending to narrow the ambit of industrial tribunals and to decentralise the bargaining locus from the industry to the enterprise and the individual levels. This movement increased the domain of the market. However, this trend was constrained by a countermovement which aimed to control reliance on the market in definite directions. Federal constitutional constraints were challenged in an unprecedented way so that Labour could continue to enjoy some forms of employment protection. Legislation was introduced to regulate unfair dismissal and redundancy procedures and to improve equal employment opportunity/employment equity and occupational health and safety. In addition, a no-disadvantage test was adopted to ensure that terms and conditions of employment contained in enterprise and individual agreements would not disadvantage workers with little market power.

In Italy, in 1979 the protection accorded to equal employment opportunity/employment equity, unfair dismissal, redundancy and occupational health and safety was higher than in Australia. In addition, the use of part-time, fixed-term contracts and outsourcing was virtually prohibited. By contrast, overtime, paid time off, unemployment/employment insurance and collective bargaining received a minimum level of shelter. As with Australia, this employment protection regime underwent a dramatic change in the following two decades though the dynamic underpinning this process was very similar to the one operating in the antipodal country. The process of marketisation proceeded in Italy through the lifting of the limitations imposed upon the use of fixed-term, part-time contracts and outsourcing. But this movement was restrained by a countermovement. Unfair dismissal legislation was extended to firms employing less than 15 workers, unemployment benefits were continuously increased, while provisions regulating overtime, paid time off, equal employment opportunity/employment equity, occupational health and safety and large-scale layoffs were strengthened. In addition, the use of part-time and fixed-term contracts was made possible only upon previous endorsement by trade unions. This latter prescription partially re-addressed one of the most striking shortcomings of the Italian system of labour protection: the lack of legal mechanisms that would secure the employer's acceptance of trade unions as legitimate counterparts.

The market liberalisation-employment protection mix changed during the period considered in favour of the former. In Australia from 1983 to 1996, Labor governments were bound by corporatist arrangements with trade unions and this feature ensured that workers continued to be provided with a reasonable level of employment protection. However, with the election of a conservative Coalition government in 1996, this arrangement was partially reversed: the new executive displayed a more pronounced sympathy for market solutions. Similarly in Italy, during the early 1980s-early 1990s, Labour was able to rebuff Capital attempts to

expand the realm of the market. However, the creation of the European Union in the early 1990s, by imposing neo-liberal boundaries on State members, forced market discipline upon the social partners and greatly contributed to further marketisation by enhancing the subordination of Labour to Capital.

1.3 Thesis Structure

In order to achieve the objectives set up in section 1.2, the thesis will begin with an overview of the literature relating to labour standards. Chapter 2 will encompass the views of legal specialists and those of economists. In addition, a review of the international debate on labour standards and globalisation will be provided. It will be argued that the level of legal protection that should be granted to labour standards remains a highly contentious issue amongst both lawyers and economists and that no definitive agreement has been reached with regard to labour standards and their effects on the economic performance of a country. Chapter 3 will investigate qualitative and quantitative conceptual frameworks that are deemed relevant for the analysis of employment protection regimes over time. It will be found that industrial relations makes significant contributions that are of direct relevance for the analysis of the standards setting process. In particular, Dunlop and Flanders highlight the centrality of labour standards for the study of industrial relations while Kochan, Katz and McKersie emphasise the relevance of the strategies pursued by governments, trade unions and employers to promote changes in labour protection. In addition, Khan-Freund contributes to the debate by exploring the influence the power position of the actors exercises on the nature of the outcomes of the rules making process. However, despite these contributions this chapter will also argue that industrial relations does not adequately explore the place of labour standards within the wider societal context. This is mainly due to an entrenched reluctance of the subject to expand its traditional boundaries, which are normally limited to the analysis of the

labour market, to other fields of inquiry such as social policy. In order to address this shortcoming the chapter will continue by exploring complementary frameworks, namely Karl Polanyi's "Double Movement" and French Regulation theory. These models emphasise, with different perspectives, the relevance of labour standards as a counter force to limit the domain of the market thus ensuring the survival of society and the reproduction of the capitalist mode of production. The chapter will end by reviewing previous methods utilised to measure labour standards and, in doing so, it will highlight the scarcity of attempts to measure changes in employment protection systems over time. Finally, section 3.4.1 will consider the quantitative methodology utilised in the present study.

Chapter 4 will analyse the institutional features of the Australian employment protection system and associated changes during the period studied. It will be argued that there was a clear shift away from compulsory conciliation and arbitration towards legislation. This change was induced by the desire to increase reliance upon the market while maintaining a minimum level of employment protection. It will also be argued that this shift has the potential to enhance the scope of the common law of employment whose use has traditionally been marginal in Australia due to the operation of compulsory arbitration and conciliation. Chapter 5 will measure and compare labour standards in Australia in 1979 and 2000. This chapter will show the pattern briefly described in section 1.2. Chapter 6 will investigate the industrial relations process through which labour standards were changed in Australia and the underlying economic, political and industrial relations factors that contributed to this change. As already stated in section 1.2, it will be argued that the constant tension between market liberalisation and employment protection engendered an increase in most standards, though this increase was compounded by a weakening of trade unions' legal rights to bargain.

Chapters 7, 8 and 9 follow the same format as chapters 4, 5 and 6 and investigate the institutional context and the evolution of labour standards in Italy. Major differences were found in comparison with Australia. As mentioned in section 1.1, Italy is a civil law country and labour standards have been traditionally established through statutes. In addition, national legislation has been supplemented by regulations enacted at European level. Chapter 7 will also emphasise the fact that Italian governments utilised European directives to increase the protection granted to overtime, equal employment opportunity/employment equity, occupational health and safety and large-scale layoffs. Yet, despite these differences, the dynamic underpinning the process of change closely resembled that operating in Australia during the same period. This will be the focus of chapter 9 which will also discuss the effect corporatist arrangements have had on employment protection. Finally, chapter 10 will compare the indexes for the two nations showing an overall convergence between the two countries over time. In addition, this final chapter will further discuss the application of Polanyi and French Regulation theories to Australia and Italy, illuminating how the "Double Movement" impacted upon different institutional contexts to produce a converging outcome. This chapter will also emphasise the fact that important differences characterised the evolution of labour standards in Australia and Italy. In particular, while the agreement achieved by the social partners in Australia envisaged a trade-off between the introduction of a legislated floor of minimum standards and the weakening of Labour's legal right to bargain, in Italy trade unions concentrated on countervailing Capital's demand for marketisation by ensuring this process did not undermine their market power. It will also be argued that the strategy adopted by Italian trade unions proved to be more effective in containing the negative effects of marketisation, in terms of wage dispersion and employment casualisation, than the programs embraced by their Australian counterparts.

CHAPTER TWO

LABOUR STANDARDS: A REVIEW OF THE LITERATURE

2.1 Introduction

The literature relating to labour standards originates primarily in the disciplines of law and economics. Labour standards are normally established in two ways: directly by the State (Executive, Legislature and Judiciary) and indirectly by the interaction of autonomous agents that include individuals, employers' organisations, and trade unions. For the purpose of this research the term labour standards is confined to those provisions enforced by law. Hence, labour standards are:

> any governmentally established procedure, term or condition of employment, or employer requirement that has as its purpose the protection of employees from treatment at the workplace that society considers unfair or unjust. The common element across all standards is that they are mandatory-they are governmentally imposed and enforced. Employer failure to comply with the standards brings legal sanctions upon the employer (Block and Roberts 2000:277)

The making of labour law is influenced by social and economic conditions and socio-economic reforms, which are in turn constrained or facilitated by the legal framework. The relevance of legislation to these standards has been recognised since the early nineteenth century. Karl Marx (1887) argued that where an over-abundance of labour-power exists, employers will not spontaneously take account of the health and the workers' lives unless compelled to do so by law. Sydney and Beatrice Webb (1897) observed that the purpose of labour law is to establish a floor (minimum wage, maximum working hours, protection of women and children from hazardous jobs) below which the "higgling" of the market should not be allowed to function and within Australia Justice Higgins (1922), held that law is a remedy for regulating the

inherently conflictual relationship between profit-makers and wage-earners in capitalist societies and that employers should not be allowed to operate unless they can guarantee the minimum conditions of employment decreed by law. More recently, Supiot (1996:6) has argued that "Along with social security, [protective] labour law has been the major legal innovation of this century, and its main lines of reasoning have lost nothing of their relevance".

This chapter will argue that the level and type of legal protection granted to working conditions have traditionally been contentious issues in both law and economics. The dispute on labour standards has generated a vehement debate which has gained intensity in the past two decades due to events that have taken place in most developed countries. Within law, such events have challenged the traditional understanding of labour standards, while within economics the debate on labour market flexibility has been revamped. This process has mainly affected the internal coherence of labour law which, in order to keep pace with a new and uncertain phase of employment protection legislation, has had to expand its boundaries to areas which have traditionally been the domain of economics (see section 2.2.2). This development has produced an unprecedented level of exchange between the two fields since the main arguments concerning labour standards protection advanced by legal analysts parallel issues discussed by economists.

This review begins by considering the views of lawyers. It is acknowledged that the domain of labour law is broader than the simple notion of labour standards as it embraces areas that include: the contract of employment, collective agreements, and the rules governing industrial courts and tribunals. These aspects fall outside the scope of the present study and will not be discussed. The chapter will then proceed to examine the place of labour standards within economics as the issue is highly

contentious within the subject. It will conclude with an analysis of the international dimension of labour standards and the "social clause" debate.

2.2 Labour Standards and Labour Law

The main premise underpinning the evolution of labour law in relation to labour standards has been the assumption that there is an inherent imbalance in the bargaining power of the employer and the employee. This assumption clearly contrasts with the principle of equality entrenched in the common law of employment but nevertheless has become, over time, the primary rationale supporting protective labour law. However, law and its principles are not immutable over time as they are the point of convergence of economic, political and social pressures. This feature is of particular relevance to this thesis as recent developments such as the globalisation of the world economy, the increasing individualisation of the employment relationship, and the deregulation of the industrial relations systems are challenging the traditional internal coherence of the subject in ways that are of immediate importance for an understanding of labour standards. These events have sparked a vehement debate which has challenged the traditional understanding of labour law in relation to labour standards. This discussion of law and labour standards will consider the following two aspects: 1) the historical understanding of the purpose of labour standards and 2) the current dispute regarding the aims and purposes of labour law and the role of standards.

2.2.1 The Traditional Understanding of Labour Law in Relation to Labour Standards

The theoretical foundation of labour law in relation to employment conditions has produced a considerable volume of literature over the past 100 years in all western

societies. Through this period, labour law has grown to become an autonomous subject with its rules and its own *raison-d'etre.* The traditional rationale underpinning the existence of labour standards was identified by Kahn-Freund during the mid-1950s. He held labour law acts as a force to counteract the inequality of bargaining power inherent in the employment relationship (Khan-Freund 1965; 1968; 1972; 1977; 1978). The rationale underpinning this conception of labour law was laid down after the First World War with the main contributions coming in the intra-war period from Otto Gierke of the German historic school, Anton Menger, a critic of the German Civil Code and Hugo Sinzheimer (Hepple 1986). These scholars assumed that the individual worker is subordinated to management within the capitalist enterprise. This perspective contrasted with the assumption of equality between individuals embedded in private and common law. Prior to the intervention of these German scholars, lawyers had tended to conceive the employer-employee relationship as a relation between equals and were more concerned with the legal obligations to which the relationship gave rise (the respect and enforcement of terms and conditions sanctioned by the contract of employment) than with the distribution of power between the employer and the employee.

The analyses of Gierke, Menger and Sinzheimer were influenced by Marx's insight that capitalist property involves domination over human beings, by their Hegelian philosophical background and by historic developments such as the creation of the Weimar Republic and the challenge posed by the Communist Party. After the Second World War, the concept of subordination, implicit in their understanding of labour law, was further elaborated and expanded. In particular, Sinzheimer's pupil, Khan-Freund, developed the notion that law in general and labour law in particular is an instrument for the regulation of social power required because "power- the capacity effectively to direct the behaviour of others-is unevenly distributed in all societies. There can be no society without a subordination of some of its members to

others, without command and obedience, without rule makers and decision makers" (Kahn-Freund 1977:3). He extended the legal analysis of the power relationship also to the society and the state, as he believed that:

> It is a profound error to establish a contrast between "society" and the "state" and to see one in terms of co-ordination, the other in terms of subordination. As regards labour relations, the error is fatal. It is engendered by a view of society as an agglomeration of individuals who are co-ordinated as equals, by a myopic neglect or deliberate refusal to face the main characteristic of all societies, and not least of industrial societies, which is the unequal distribution of power (Kahn-Freund 1977:3)

Such inequality exists, according to Kahn-Freund, in the relation between an employer (who represents an accumulation of material and human resources and can be considered as a "collective power") and an isolated employee. Typically, it is a relation between a bearer of power and one who is not a bearer of power. The employment relationship, according to this conception, is an act of submission and in its operation is a condition of subordination. From this assumption follows what can be considered Kahn-Freund's *manifesto of labour law and labour standards*, which is:

> The main object of labour law has always been, and I venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship. Most of what we call protective legislation; legislation on the employment of women, children and young persons, on safety in mines, factories, and offices, on payment of wages in cash, on guarantee payments, on race or sex discrimination, on unfair dismissal, and indeed most labour legislation altogether must be seen in this context. It is an attempt to infuse law into a relation of command and subordination (Kahn-Freund 1977:6-7).

The relevance of this statement lies in Khan-Freund's belief that real equality in the employment relationship cannot be reached unless law re-equilibrates the imbalance in power between the employer and the employee by strengthening the employee's

position in the labour market. Such imbalance can be re-equilibrated in several ways: through welfare payments, taxation, subsidies to employers and direct regulatory intervention (Deakin and Wilkinson 2000:32; Sengerberger 1994(a)). Central to Khan-Freund's conception of labour law as a means to enhance the employee's power was regulatory intervention through the imposition of labour standards. His understanding of labour standards can be conceived as being substantive, procedural or promotional in nature. Substantive standards are those which directly regulate the individual employment relationship by establishing a "floor of rights" (minimum wage, maximum working hours, occupational health and safety) that cannot be derogated except under prescribed conditions (Davies and Freedland 1983; Wedderburn 1992). These standards directly interfere with the functioning of the market by imposing constraints upon the parties' freedom to negotiate terms and conditions of employment. Procedural standards, by contrast, do not directly seek to regulate terms and conditions under which labour is contracted, but instead provide legal support for collective negotiation by means of trade union immunities, compulsory conciliation and arbitration and provisions placing employers under the duty to bargain or at least to consult with specific representatives of the workforce (Davies and Freedland 1983). Finally, promotional standards focus on strengthening labour market opportunities by means of training, job creation, and social security. Promotional standards are usually implemented through subsidies to employers, targeted expenditures, social security payments and adjustments in the tax system (Deakin and Morris 1998:chapter 3; Deakin and Wilkinson 2000:32).

This thesis will mainly focus on substantive standards though three areas: collective bargaining, large-scale layoffs, and unemployment/employment insurance are related to procedural and promotional standards. In considering the relationship between the contract of employment and the parties' freedom to determine its outcomes, Khan Freund stressed that, as equality cannot be "naturally" achieved, the

domain of law should be extended to those areas not explicitly included in the contract of employment and in which the employer can exercise more power. These areas were identified by Hepple as:

1) The protection of children and young persons in factories, mines and so on.

2) The protection of women.

3) The protection of all workers from abuses in the payment of wages.

4) The protection of all workers from industrial hazard.

5) The limitation of the working day and provision of paid holidays.

6) Minimum wages legislation.

7) Provision of compensation for accidents, sickness payments, invalidity and old-age pensions and family allowances.

8) Measures to provide relief from unemployment, such as public works schemes, labour colonies, labour exchanges and unemployment insurance.

9) Protection against termination of employment.

10) Measures to facilitate self-regulation by tolerating freedom to organise and freedom to take industrial action.

11) Measures actively promoting self-regulation through employers' organisations and trade unions, either by voluntary means or positive rights.

12) Measures facilitating workers' participation in the making of managerial decisions at the plant or company level.

13) Measures actively promoting such participation.

14) Measures integrating workers' representatives in the administration of the economy (i.e. regional and national councils, etc.) or of the State (eg. special labour courts) (Hepple 1986:11).

Kahn-Freund did not dismiss the value of the market, but rather he insisted that substantive standards should be conceived as a bulwark below which the market should not be allowed to function. Also procedural and promotional standards interfere with the operation of the market. Procedural standards, by conferring extensive legal rights to one party (normally trade unions), limit the ability of employers to exercise unrestrained command in the labour market. Promotional standards, through direct State intervention, re-address market failures such as mismatches between supply and demand also achieving re-distributional objectives by means of unemployment benefits, subsidies and income tax differentials. Khan Freund's conception of labour standards gave to the subject of labour law a degree of autonomy never before experienced (Deakin and Morris 1995:1).

Within the research literature, there has been widespread agreement that Kahn-Freund's conception of labour law contrasts with *laissez-faire* economic theories as it has, as one of its main purposes, the protection of employment conditions through statutory legislation and the assumption that the market alone cannot achieve this goal (Ichino 1998; Hasselbalch, Neal and Victorin 1982). Hasselbach et al. (1982:15-17), for instance, see labour standards as a means to constrain the centrifugal forces of the market by imposing a base line above which the market is let free to function.

The conceptualisation of labour law embraced by the German school has proved to be lasting and convincing. Nevertheless, in the past twenty years, legislation enacted in most developed countries, designed to deregulate the labour market, has substantially modified the type and level of legal protection accorded to labour

standards. As a consequence, the widely accepted understanding of labour standards has been challenged both by economists and law makers. This has generated a continuing debate concerning the future aims and purposes of protective labour law and the function of standards.

2.2.2 The Debate Concerning the Aims and Purposes of Labour Law in Relation to Labour Standards

In section 2.2.1, it was revealed that one of the central concerns of the traditional conception of labour law was the protection and implementation of labour standards. Since the mid 1970s, there has been a significant weakening of support for the traditional protective view of labour law at both the theoretical and political levels. This reflects growing enthusiasm for the notion that prosperity can be best achieved through a greater reliance on the operation of market forces. There is widespread agreement that the internationalisation of the world economy is forcing changes to both the legal structure of the employment relationship and to the principles which have helped to shape it. However, while the place of labour standards used to be well-defined within the traditional conception of labour law, their role and status are unclear in the present debate.

In its most extreme form, the protective purpose of labour law in relation to labour standards has been challenged by legal theorists such as Richard Epstein and neo-classical economists like Fredrik Von Hayek (see section 2.3.1). In criticising the protective purpose of New Deal legislation in the United States (*Norris LaGuardia Act (1932)* and the *Wagner Act (1932)*), Epstein contends that the function of labour law should be merely to facilitate the individual transaction between a seller and a purchaser of labour, without seeking to regulate the outcomes of that transaction (Epstein 1983; 1984; Epstein and Paul 1984). Epstein defends his perspective by

arguing that common law, through an appropriate use of the principles of contract and tort, would provide an optimum outcome for both the employer and the employee (Epstein 1983:1364-65). Epstein's critique is not limited to the legislative intervention aiming to protect substantive labour standards, but also extends to procedural standards such as trade unions' rights as he maintains:

> There is no solid moral case for treating union members, as such, as the favored class of wealth distribution. To make union members wealthier is to make poorer not only employers (whose shareholders are often workers whose pension funds have been invested in the corporation) but also the non-union workforce and the poorer members of the general population...Desired redistributions (if any) are best accomplished by general tax measures. The possibility of factional or class legislation is thereby reduced, as is the likelihood that the process of redistribution itself will hamper the creation of wealth (Epstein 1983:1362)

Epstein's "market approach" to labour standards is reinforced by his interpretation concerning the role and the extension of the State's intervention in labour relations (procedural standards). His intellectual orientation, as stated by Epstein himself, endorses limited government and the maximisation of private autonomy (Epstein 1983:1359). These are the basic conditions to achieve a substantial convergence of libertarian and utilitarian principles. From this theoretical framework follows Epstein's support for common law and his hostility to the detailed regulation of labour conditions. Epstein holds that the State's intervention should be limited to: prevention of the private use of force and violence, the achievement of bargaining equality between the employer and the employee and the enforcement of promises (Epstein 1983:1359).

Epstein's perspective is an extreme critique of the traditional view of labour law. Most scholars in the field of legal enquiry remain faithful to the rationale envisaged by the German historical school and the centrality of labour standards.

However, labour market reforms in most developed nations over the past two decades have, to a significant extent, reflected a new sympathy for the "market approach". Perceptions as to the magnitude and the potential effects of this process vary greatly. At one end of the spectrum is Keith Ewing (1988) who, in his review of Lord Wedderburn's *The Worker and the Law*, predicted the death of labour law as it has been traditionally understood. He claims that recent developments in Britain and elsewhere such as the growth of part-time and temporary work, coupled with new statutory initiatives (beginning with the *1984 Trade Union Act*), have undermined the legal employment protection of many workers (Ewing 1988:296). He also outlines the difficulties for trade unions which are now facing a more inhospitable environment and accordingly have greater need for legislation that can provide protection for their members. This is difficult to achieve given the wish of many governments to dismantle protective labour legislation. He concludes, citing the example of Britain, that unless a social democratic party holds office, the protection offered by labour legislation will follow the "fate of dinosaurs". At the other end of the spectrum, Wolfgang Daubler (1994:105) claims that German labour law has remained almost unchanged over the past twenty years, that the dispute about the current scope of labour law is mere "Cassandra words", and that "the frictions and dangers that have been sketched will not arrive". He also argues that one of the reasons why labour law and its protective scope have remained and will probably remain unchanged in Germany and in other civil law countries (France and Italy, for example), is because labour standards' protection is entrenched in national Constitutions and hence requires a two-thirds majority in both chambers to be substantially modified, a condition very difficult to realise (Daubler 1994:108).

The main feature of the debate concerning the present status and place of labour standards is its confused nature coupled with the fact that there is no common understanding concerning the direction to be taken (Mitchell 1995; Collins 1989).

Mitchell (1995:viii) recognises the uncertain nature of the debate and argues that much of the confusion is generated by the interaction of two different aspects namely, labour law as defined in terms of its function and labour law seen as an analytical construct defining the scope of its territory. He further suggests "labour lawyers ought to be able to reach some common ground on the ambit of the subject, even if they inevitably disagree about its central or fundamental purpose" (Mitchell 1995:viii). In Mitchell's view, the distinction between the purpose and the ambit of labour law is crucial for understanding the nature of the changes which are taking place in protective labour legislation.

In criticising Ewing's view of labour law, Mitchell argues that it is the decline or disappearance of provisions that serve certain functions in regulating employment relationships or labour markets that Ewing mourns. These purposes are related with the traditional conception of labour law as a force to counterbalance the inequalities of the employment relationship by protecting and implementing labour standards. Mitchell suggests that with the decline of these functions, there are other laws, other policies and other institutions which influence and regulate labour conditions. These are the laws which deal with the control of labour demand and inflation, which are designed to produce human resource and productivity outcomes and are focused on the relationship between the rights of the employed and the unemployed as well as regulations affecting a person's participation in the labour market (i.e. regulations facilitating hiring). Mitchell calls for a broadening and a redefinition of the scope of labour law with more attention placed on areas that have traditionally been the domain of economics. These include labour market regulations and the provisions affecting the individual worker as opposed to the traditional collective model.

Mitchell's contribution is preceded by Collins (1989:471) who discussed the nature of the challenge now facing labour law and the place of labour standards within

legal theory. In the first essay, *Labour Law as a Vocation,* Collins argues that the report of the death of labour law seems a "little exaggerated". He insists the apparent demise of protective labour law is mainly due to a shift in lawyers' focus of attention from the traditional ground (the legal protection to be granted to collective agreements and labour standards including: health and safety at the workplace, working hours, minimum wages and legal controls over discriminatory employment practices) to a new one which takes the control of price inflation as its central theme. He argues this change has been induced by the policies adopted by western countries, particularly in Britain (under the Thatcher government), to combat inflation by abandoning commitments to full employment and public support for collective bargaining. As a consequence, attention has shifted from the social phenomenon of collective bargaining and the protection of working conditions to the economic phenomenon of the labour market.

Collins expresses his concerns about the internal coherence of this new approach as "[it] runs the risk of permitting the Government to set the agenda for scholarship and to define the terms of the debate" (Collins 1989:482). He suggests that a sense of vocation can help bring coherence to this different approach: "The sense of vocation marks out a field of inquiry, establishes criteria of relevance of legal materials, and finally constructs a critical vantage-point from which to assess the substance and techniques of current law" (Collins 1989:473). However, Collins does not adequately explain how the content of this new vocation differs from the traditional one. He states that "The vocation need not be the alleviation of the subordination of labour, for it might be regarded as more appropriate to advocate the establishment of patterns of employment which provide opportunities for secure, flexible, and properly remunerated work for everyone" (Collins 1989:482). This definition is not only vague but also appears to be compatible with the traditional

framework of labour law and to advocate the extension of substantive, procedural and promotional standards to the new typologies of workers.

The contradiction between the sense of vocation and the traditional understanding of labour law in relation to labour standards is the central theme of *The Productive Disintegration of Labour Law* (Collins 1997). The coherence and vocation of labour law are considered through a critical analysis of the processes that have shaped its boundaries since the Second World War. Collins claims that the failure of traditional labour law to settle an exhaustive theoretical framework capable of analysing the trend of deregulation, that occurred in Britain and other Western countries from the early 1980s, is the result of a deafness within the subject to the rival interpretations of the phenomenon offered by authors in the fields of macro-economic policy, political and social rights and social justice. As a result, macro-economic policy was able to explain the Employment Acts of the 1980s in Britain not as a blatant attack on collective bargaining and labour standards, but as a new anti-inflation strategy. Collins contends that the disintegrative pressure placed on the labour law discourse is mainly due to the narrowness of its traditional boundaries coupled with the fact that the discipline has been strongly influenced by the sociological interpretation of the system of industrial relations which has tended to see the employment relationship only in terms of conflict. Thus, he claims, there is a need for a productive engagement between labour law, economics and sociology. However, it is not specified how this process should unfold.

In open contrast with Mitchell and Collins, Rood (1997) argues that the protective scope of labour law and the centrality of labour standards still represent the cornerstone of the field even if the subject needs to be adapted to the new type of worker. The central point of Rood's argument is that the crisis of labour law is not generated by internal factors but rather by external ones which he summarises as: a)

the attack by modern Economics which has developed into a counterforce against legally imposed labour conditions and social security law; b) individualism that has turned out to be a threat to balanced relations between a worker and an employer; c) the type of worker who was the model for labour law regulations is vanishing and d) the attitude of governments in relation to labour standards has become less interventionist. Rood argues that contrary to the perspective which sees labour standards as an obstacle to the functioning of the labour market, economic thinking should leave activities unchanged when these are socially justified and that the legislator and not the economist should decide what is socially justified (Rood 1997).

One of the crucial features of the current debate on labour standards is the notion that labour law and economics should begin a close dialogue. The engagement between economics and law in relation to labour standards has been considered by Deakin and Wilkinson (2000). In agreeing that labour law needs to dialogue with economics, they challenge the way orthodox neo-classical economic theory conceives labour standards and criticise the fact that legal analysts seem to ignore the fact that the debate on labour standards is highly contentious within economics itself (Deakin and Wilkinson 2000:29). They stress substantive labour standards are often perceived by neo-classical economists as being "inderogable" while in reality the scope for such provisions is limited in most systems. They cite as examples the legal systems operating in most industrialised countries where it is possible to derogate statutory prescriptions by means of agreements negotiated between the collective parties at industry or enterprise level (Deakin and Wilkinson 2000:33). Within these systems "labour standards may *guide or channel* contractual outcomes, but rarely predetermine them in a rigid way" (Deakin and Wilkinson 2000:34).

Although acute in their analyses Ewing, Mitchell, Collins and Deakin and Wilkinson fail to provide a satisfactory forecast of the future of labour law and the

place of labour standards within the subject. They hold that protective legislation is undergoing a profound change and prescribe radical and uncertain shifts, the expansion of the boundaries of the subject or the election of social-democratic parties. At this point, two considerations are pertinent: first, these authors are Anglo-Saxon and their views are influenced by the current political situation in Britain, the US, Canada, Australia and New Zealand and second, none of these scholars, with the possible exception of Ewing, has considered the relationship between labour law and politics. This is important, as in all western societies law is subordinated to political power.

The French scholar Supiot (1996), in his *Perspectives on Work: Introduction* underlines the relevance of politics in shaping the legislative framework of a country but also reminds us of the importance of labour law with its own rules and *raison-d'etre* (Supiot 1996:3). According to Supiot, the globalisation of the economy and the changing profile of the employment relationship, encouraged by the wish of many developed countries to increase the reliance upon market forces, in no way calls into question the traditional protective purpose of labour law as:

> Subordination relationships are changing but continue to exist none the less. And subordination calls for a range of specific rights and safeguards, which have been worked out in the course of the historical development of labour law. By contrast to civil law, which is geared to equality and the individual, labour law offers an avenue for legal reasoning on hierarchy and collective issues. From the legal point of view, the distinctiveness of wage employment lies in the fact that it necessarily implies some impairment of personal freedom. It is indeed the very object of wage employment law to limit the extent of that impairment (Supiot 1996:6).

From the assumption that subordination still plays a primary role in governing the employment relationship, follows Supiot's conception of labour law and what he believes should be the place of labour standards in relation to the new typology of

worker. As the traditional boundaries between wage employment and self-employment are less polarised than before, it is necessary to expand workers' security and labour standards' protection also to self-employment (Supiot 1996; 2001). He believes that the most appropriate way for achieving this objective is through international regulation of Labour since nations are being increasingly exposed to global competition. In short, Supiot calls for an extension of the traditional approach to the new categories of workers, thus openly contradicting the aforementioned "Anglo-Saxon" view.

The protective scope of labour law, the centrality of labour standards and the necessity to separate labour law from politics are also advocated by Lyon Caen. He contends that while Labour and labour law are undergoing profound changes, they are not in decline (Lyon-Caen 1994; 1996). Lyon-Caen believes that labour law is a system aimed at regulating human relationships, and that it is alive with its own techniques, endowed with a relative force of inertia in respect of its own infrastructure, certainly evolving but resisting the vicissitudes of time because "it is largely timeless" (Lyon-Caen 1994:93). He holds that wage employment is now no more than one particular case of human activity and the labour law analyst, in order to conduct a full assessment of the changes which are taking place, should resort to the contributions offered by different branches of law such as business law, the law governing non-profit-making activity, family law, the law governing social security and public law governing the professions.

What emerges from this discussion of labour standards is that the traditional rationale of labour law, which centred upon reconciling the inequality of bargaining power between employers and workers, has been challenged over the past two decades. This development has deprived legal analysts of an effective tool for understanding recent deregulatory legislation such as *The Employment Act (1984)* in

Britain, *The Workplace Relation Act (1996)(Cth)* in Australia and *The Employment Contract Act (1990)* in New Zealand. The dismantling of protective legislation has been facilitated by a subtle weakness of the traditional approach, that is, the assumption of inequality in the distribution of power between the employer and the employee. This assumption, theorised first by Sinzheimer and the German school and subsequently expanded by Kahn-Freund, for the first time infused law into a relation of subordination. However, inequality is a fascinating although subtle concept in legal terms contrasting, as it does, with the postulate of equality between individuals entrenched in common law. As a result, liberal governments and some neo-classical economists have been able to dismiss the concept of inequality applied to the employment relationship on the basis that it limits the ability of each individual to independently bargain their employment conditions (see Epstein 1983; Epstein and Paul 1984). As the challenge to labour standards has been carried out primarily by neo-classical economists, it is appropriate to continue this review by considering the views of economists.

2.3 The Economic Nature of Labour Standards

The development of modern capitalism has been accompanied by significant changes concerning working conditions and their regulation. As Labour has been considered by mainstream economics to be one of the key factors of production influencing the economic development of a nation, the regulation of labour conditions has traditionally attracted the interest of economists and has sparked an intense debate concerning the extent and nature of protection that should be granted to employment conditions. The primary controversies have been centred on whether governments should intervene in the employee-employer relationship, how and where they should intervene, and how such intervention would affect the economic performance of a country. The next section will focus on the most recent developments in the field.

This is relevant for the thesis because, as stated in section 2.1, changes occurred to labour standards over the period studied were greatly influenced by the theoretical debate that occurred within the economic literature.

2.3.1 The Economic Dispute on Labour Standards and Employment Regulations: The Resurgence of Neo-Liberalism and the New-Institutionalists

The post Second World War period was characterised by the progressive abandonment of pure *laissez-faire* theories. In the area of employment protection, this development greatly benefited from Keynes' insight that microeconomic employment security is crucial for the economy as it facilitates social equity in firm-worker relations and mitigates cyclical unemployment through the income effects of more stable employment-enhancing overall economic stability (Keynes 1973:250). In addition, Coase made an important theoretical case supporting labour standards regulation by acknowledging that, in a world of zero transaction costs, the implementation of labour standards would not affect economic efficiency as resources can be recontracted to reach their most efficient use (Coase 1960:19; Coase 1988). This led Coase to state "That there is no reason why, on occasion...governmental administrative action should not lead to an improvement in economic efficiency"

(Coase 1960:19)[1]. These developments produced a sustained level of government regulatory intervention in the labour market. Such intervention influenced the labour dimension in two distinct ways: directly through the enactment of laws aimed at strengthening substantive and promotional standards including working time, the use of child labour, minimum wages, unjust dismissals, equal employment opportunity/employment equity, occupational health and safety, unemployment insurance and indirectly by implementing procedural standards aimed to encourage the recognition of trade unions and the promotion of collective bargaining as the principal means to settle industrial disputes. This process was facilitated by the sustained economic growth experienced by all industrialised countries after Second

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1 An environment characterised by zero transaction costs is an extremely unusual place and generally transaction costs are positive. As a result, the "Coase theorem" has generated a plethora of contrasting perspectives concerning the effects of regulatory intervention on economic efficiency when transaction costs are positive. These perspectives can be grouped into three rival and conflicting interpretations of the "Coase Theorem". The first holds that as long as markets display an "acceptable" level of effective rivalry between competing sellers and competing buyers, the imposition of labour standards would not prevent, in itself, re-contracting to achieve Pareto-efficient outcomes (Cooter 1998; Deakin and Michie 1997; on the application of this principle to maternity leave and economic efficiency, see Gruber 1994). By contrast, the second and prevailing interpretation maintains that as efficiency depends mostly on the capacity of agents to minimise costs, the main objective of legislative intervention should be to reduce barriers to exchange (Heldman; Bennet and Johnson 1981; Rowley 1985). According to this view, governments' intervention should be restricted to the implementation of a minimum set of labour standards' protection because any constraint on freedom of disposition and freedom of contract has the potential to reduce competitiveness and increase transaction costs. The third interpretation emphasises the role of legal intervention to overcome market failure. It is argued that unregulated markets are characterised by high transaction costs due to limited information and bounded rationality of economic agents (Deakin and Wilkinson 2000:37; Coase 1996). This led Coase to conclude that legal intervention in the form of private law or public regulation (including labour standards regulation) has the potential to be beneficial to reduce basic transaction costs and "mimic" the market by allocating rights to the agents who values them most highly and who would acquire them in the absence of barriers to exchange (Coase 1996). The critical point of this latter interpretation of the "Coase Theorem" is that State regulation cannot be ruled out on a priori grounds (Coase 1996:106).

World War, and by the "Cold War" concern that if labour standards were not improved, the working class would turn against capitalism.

However, since the late 1960s most industrialised countries have experienced relatively slow economic growth and high and prolonged rates of unemployment and inflation. This development induced most developing countries to modify their protective systems of labour law and to embrace, to varying degrees, the neo-classical theories of the Chicago and Austrian schools. The rationale underpinning these actions was that the high degree of social protection granted to workers, deriving from the legal imposition of labour standards, prevented employers from rapidly shifting from slower to faster segments of the economy. The parties advocating employment deregulation and withdrawal of the State from the economy have been further empowered by the internationalisation of the world economy and by the competitive pressures placed on the international markets by the growth of countries with low labour standards. This new course has generated a widespread debate inside and outside academia focused on how to achieve competitiveness while maintaining acceptable degrees of labour standards' protection.

On one side of the argument are the disciples of the Austrian and Chicago schools. They claim that labour markets are not different from product markets, the labour market is not exploitative and that excessive legal protection accorded to labour standards and trade unions since the end of the Second World War has produced slow economic growth, high rates of unemployment, "the cartelisation of labor markets", and systematic discrimination against non-union workers, minorities and the unemployed (see for example Posner 1974; 1984; Stigler 1971; 1975; Demsetz 1968; Reynolds 1996; Salvanes 1997; Overall 1997; Minford 1999). Their views are significantly influenced by the writing of F.A. Hayek (Hancock 1999:49). Hayek was mainly concerned with the distortion of the labour market provoked by the

legal immunities granted to trade unions in most developed countries from the beginning of the 20th century (Hayek 1960; 1979 and 1980). He claimed that statutory regulation of collective bargaining (one of the standards analysed in this thesis), coupled with unreasonable trade union immunities, negatively impacts upon wages and adversely affects the great majority of the workforce as "...wage fixing (whether by unions or by authority) will make wages higher than the wage at which all willing workers can be employed" (Hayek 1960:270). The market power artificially conferred to trade unions and their members is therefore opposed "to the interest of those who, in consequence, will find employment only in the less highly paid jobs or who will not be employed at all" (Hayek 1960:270). In short, protective intervention in the form of trade union immunities or wage regulation deprives the market of a primary function, which is to guide labour to where it can be "cleared" through the continuous change of relative market prices (Hayek 1980:18).

Hayek's critique is not limited to collective bargaining and the legal power of trade unions but also extends to promotional standards such as unemployment/employment insurance. He contends that although a minimum level of protection against unemployment should be retained, governments in most developed countries, during the post-war period, turned such services "into instruments for determining the relative incomes of the great majority and thus for controlling the economic activity generally" (Hayek 1960:303). The consequent redistribution of income, according to Hayek, is economically unacceptable as it subsidises inefficient sectors, hampers the adjustment of the labour market, and is morally unacceptable since it empowers the State which can by authority establish criteria for a "just" remuneration wherein "a majority takes from a minority because the latter has more" (Hayek 1960:303). Hayek calls for a drastic reform of unemployment allowances into systems of true insurance under which individuals pay for benefits offered by competing institutions.

Despite the fact that the Hayekian paradigm has been subjected to a series of revisions and refinements and that different labour standards are treated differently by orthodox economic literature (for different arguments against unfair dismissal and large-scale layoffs legislation, for example, see; Posner 1984; Gavin 1986; Flanagan 1988; Bertola 1990; Lindbeck and Snower 1988; Schellhaass 1990; Soltwedel 1990; Hamermesh 1988) the main line of reasoning has remained unchanged. The "new" neo-classical economists perceive labour standards imposed by law as an interference in the economy that limits the capacity of real wages to adjust to prices (Blank 1994). The general wisdom of orthodox neo-classical economics is that there is a general trade off between social protection and economic performance and that when some labour standards such as advance notice for dismissal and severance pay requirements are eased, the speed of labour market adjustment is enhanced (see above and Nickell 1978; Long and Siebert 1983; Joll 1983; Soltwedel 1990). They take as successful examples of what their presumptions can achieve the application of neo-classical policies in Britain, the US and New Zealand and observe that the economic growth and the comparatively (to continental Europe) low rate of unemployment in these three countries are due to sustained programs aimed at deregulating labour markets (Bierhanzl and Gwartney 1998). Finally neo-classical economists claim that in order to cope with today's more unstable and competitive economic environment, standards should be weakened in order to allow firms to adjust the quantity and timing of labour input with more flexibility (Reynolds 1996).

Neo-classical orthodoxy is being challenged at both the theoretical and the empirical levels. In particular, the hypothesis that the functioning of the labour market is in principle similar to that of the product market and that external intervention is likely to decrease rather than enhance efficiency is under scrutiny. Legislative intervention in the labour market is supported on several grounds ranging from social and equity considerations (Gould 1987; Stieber 1984), to the argument that labour

markets are not fully competitive because they are characterised by a fundamental power asymmetry between workers and firms. As a result, legal regulation is necessary to re-address the imbalance of power between workers and employers thus improving the conditions for efficient market transactions (Offe 1985; Buttler 1987; Ehrenberg 1985). Other arguments emphasise the advantages of legally imposed constraints for both the employees and the employers to encourage the construction of cooperative labour relations which will facilitate the introduction of functional flexibility, the acceptance of technological change and the formation of cumulative skills and competence (Rosow and Zager 1984; Thurow 1985). The last argument supporting labour standards maintains that employment security legislation, in the areas of wages' regulation, occupational health and safety, anti-discrimination, unfair dismissal and large-scale layoffs is needed to guarantee a more prosperous economic future. This is due to the fact that market transactions are characterised by a short time horizon for productive investments and therefore employment legislation is needed to compel the employers to adopt the longer-term time frame that is necessary to fully develop the available human resources and to utilise them to their most efficient use (Piore 1986 and 1989; Boyer 1993 and 1994(a)).

Comprehensive studies concerning the economic impact of labour standards have focused on the termination of employment and the minimum wage. The picture that emerges calls into question most of the theoretical assumptions previously mentioned (for excellent reviews of empirical studies on employment protection and economic performance see Buechtemann 1993:15-44; Addison and Siebert 1997). For example, the long standing neo-classical postulate that there is a trade-off between minimum wage increases and unemployment has been repeatedly challenged on both empirical and theoretical grounds. Rebitzer (1989) shows that in spite of a reduction in the real value of the US minimum wage of 8% from 1969 to 1979 and 19.8% from 1979 through 1984, there was no noticeable reduction in unemployment rates among

those most affected by the minimum wage (the unemployment rate of civilian workers aged 16-19 was 12.2% in 1969, 16.1% in 1979 and 18.9% in 1984) (Rebitzer 1989:17-18). In addition, Card and Krueger (1995) in their *Myth and Measurement: the New Economics of the Minimum Wage* call into question not only previous results and the quantitative methods used to measure the aforementioned trade-off, but also the underlying assumptions. The question that arises, therefore, is why these substantial reductions in the real value of minimum wages were not accompanied by reductions in unemployment rates. This is a relevant weakness in neo-classical theory that can be extended also to other labour standards regulated by law (for example unfair dismissal and statutory protection to collective bargaining).

What seems to be uncontroversial is the fact that, even in the absence of exogenously imposed statutory constraints, modern labour markets tend to generate a high degree of job stability due to market frictions caused by asset specificity and idiosyncratic exchange (Buechtemann 1993). This means that unlike commodity markets, labour markets involve specific irreversible investments that generate costs for both parties and, as long as the exchange between the parties continues, they produce a mutual interest in establishing a long–term employment relationship. Consequently, the labour market is much slower to adjust to changes in labour demand than the commodity market. These theories try to explain why unemployment often does not decrease when statutory rights are weakened or repealed and why wages are often fixed above the market-clearing level. The aforementioned inconsistencies between theoretical models and empirical observations gave rise to more complex models that can be grouped into three categories namely: Implicit Contract theories, Efficiency Wage or Effort Regulation models and Internal Labour Market theories. The first set of explanations (Implicit Contract theories and the Efficiency Wages models) conceive wages and employment conditions as determined not only by the mechanical interaction of supply and demand but also through a more

complex process involving conflicts and negotiations between the labour force and employers (see for example Rebitzer 1989; Akerlof and Yellen 1990; Solow 1990; Ehrenberg 1995; Bewley 2000). Implicit contract theories hold that workers are essentially risk-adverse and therefore are inclined to accept lower wages and employment conditions than those that would be established by the market in good times in exchange for stable employment during periods of economic downturns. Contract wages, thus, include a compensation and an insurance component that raise the price of labour above the market-clearing level that would exist in times of recession (Rebitzer 1989; Ehrenberg 1995; Rosen 1985). Efficiency Wage or Effort Regulation models insist that the wages paid by firms are usually established at a higher level than the ones fixed by the market as workers' productivity is difficult to measure and firms devise special compensation schemes to extract maximum work effort and thus achieve an efficient use of resources (Akerlof and Yellen 1986; Weiss 1990; Shapiro and Stigliz 1984; Lazear 1979). Finally, The Internal Labour Market theories offer an approach that, to a certain extent, melds the previous two theories. It is argued the existence of internal markets, in different segments of the economy, constrain the forces of supply and demand (Goldberg 1980; Okun 1981; Wachter and Wright 1990; Siebert and Addison 1991).

The Internal Market, the Implicit Contract and the Efficiency Wages theories try to overcome the empirically observed dualism of workforce adjustment inertia and wage stickiness in some parts of the economy as opposed to rapid market adjustments, characterised by external labour turnover and a higher level of wage flexibility, in others. These models attempt to overcome the neo-classical inability to explain the problem of unemployment. Amongst these scholars, suspicion arises that something other than extensive regulation of working conditions inhibit firms from cutting real wages even when unemployed workers are available and willing to work for less than the going wage.

These theories add complexity to the economic models of the Chicago and Austrian schools and at the same time represent progress in comparison with the idealistic and sometimes simplistic hypotheses of their predecessors. In addition, what Efficiency Wages, Implicit Contracts and Internal Markets theories seem to suggest is that the negative effects of labour standards on the economy is sometimes overestimated by neo-classical economics and that more attention should be paid to the analysis of empirical data as discrepancies can be found between theory and reality.

The neo-classical orthodoxy has also been challenged by a "new" group of scholars called "new revisionists" or "new institutionalists". This group includes Robert M. Solow, Bruce E. Kaufman, Richard B. Freeman, Stephen Nickell, Michael J. Piore and Kenneth A. Swinnerton. The "new-institutionalists" argue the economic reality of a country cannot be reduced to a standard mathematical model (see for example Dow 1995), that neo-classical hypotheses of perfectly rational behaviour and perfect knowledge of individuals are unrealistic and that the adoption of policies based on extreme *laissez-faire* theories and consequently the de-institutionalisation of labour standards can produce negative social outcomes. Among these negative effects are increasing wage inequalities, decreasing real wages, high labour turnover, social insecurity, increasing long-term unemployment and lower living standards (Piore 1986; Krueger and Summers 1988; Rebitzer and Robinson 1990; Nickell 1997; Blank and Freeman 1994; Kaufman 1996; 1998; Galbraith 1994).

The trade-off between protective labour legislation and labour market flexibility-economic performance, theorised by neo-classical economists, has also been questioned by the New Institutionalists. A study by Abraham and Houseman (1994) comparing three European countries (Germany, France and Belgium) and the US found that strong job security (such as advance notice for dismissal, compulsory

consultation for large-scale layoffs, compulsory compensation for dismissals) are compatible with labour market flexibility. Although the adjustment of employment to changes in external economic conditions is slower in the manufacturing sectors of these European countries compared with that of the US, the adjustment of hours appears very similar. According to these authors, tighter labour standards in Europe have encouraged employers strategies based on hours adjustments, thereby reducing reliance on hiring and firing to alter the level of employment (Abraham and Houseman 1994).

Another striking critique of neo-classical theory has been carried out by Freeman and Blank (1994). They claim that the orthodox economists' criticisms of social protection and legally enforced labour standards are weak in terms of standard economic theory. Laws aimed at implementing labour standards have the potential to create a static efficiency loss-lower GDP in the short run, but there is no evidence that they reduce growth rates in the medium and long terms (Freeman and Blank 1994). Similarly, Swinnerton (1997) has argued that neo-classical economists often treat labour standards as one entity rather than recognising that different labour standards can have different effects on the economic performance of a country. Swinnerton also investigated the impact of different labour standards on economic efficiency through the application of conventional neo-classical economic theory. He found that prohibiting forced labour has a neutral to positive effect on economic efficiency, that collective bargaining, freedom of association rights and prohibitions of discrimination in employment have no negative efficiency implications and that laws prohibiting child labour may have adverse effects but only in developing economies.

Finally, Nickell (1997), in analysing data concerning unemployment and labour market rigidities in Europe and the US, finds that employment protection legislation does not seem to have serious implications for average levels of

unemployment. Nickell takes as examples two extremes: Britain with the weakest unfair dismissal legislation in Europe and Italy with the toughest, and shows that in the period 1989-94 the two countries had similar rates of total unemployment. Nickell's study provides a convincing argument, based on empirical evidence, against the neo-classical postulate that protective labour legislation, by curtailing the employer's ability of freely hiring and firing, will generate unemployment.

2.4 Globalisation and International Trade: The International Dimension of Labour Standards

The increasing internationalisation of the world economy has generated widespread apprehension that unfair competition will force high labour standards countries (typically developed nations) to diminish the legal protection accorded to labour conditions in order to remain competitive. Consequently, calls for international regulation of labour standards have become more pressing in the past 15 years and have triggered a debate of unusual intensity. Although some of the issues do not significantly differ from those considered above, some are new and need to be addressed. This review continues by outlining the challenges posed to labour standards by globalisation and by analysing the debate these challenges have sparked.

2.4.1 Globalisation and Labour Standards: A Review of the Issues

There is no universal agreement regarding the conceptualisation of globalisation or its effects. Different and sometimes divergent definitions have been formulated. Broadly, the three major theses defining globalisation can be summarised as: the hyperglobalistic, the sceptical and the transformational (Held, McGrew, Goldblatt and Perraton 1999). Hyperglobalists suggest that following the end of the ideological confrontation between the capitalist and socialist nations and the introduction of new

technologies (principally information technology) which have shortened distances, capital markets have overpowered national states. Within the hyperglobalists, there are significant divergences on the effects of globalisation: on one hand, the neoliberals perceive the new interconnected environment as the effective realisation of classical economic theories embodied by the triumph of individual autonomy and market domination over state power, on the other hand, are neo-Marxists who claim that contemporary globalisation will result in an oppressive global capitalism and produce few winners (the capitalists) and many losers (unskilled labour) (Ohmae 1995; Greider 1997).

On the opposite side, the sceptical thesis holds that current patterns of international trade suggest only heightened levels of internationalisation in which national economies still play the predominant role (see for example Hirst and Thompson 1996). The sceptics contrast globalisation to a perfectly integrated global market and argue that the present level of integration falls short of this "ideal type" and that the level of integration currently prevailing does not significantly differ from that of Europe during the late 19th century (the era of the classic Gold Standard). These authors conclude that the hyperglobalist's thesis underestimates the power of national governments and that the extent of contemporary globalisation is wholly exaggerated (Hirst 1997). The sceptics go even further: they claim the most observable effect of globalisation is, paradoxically, the division of the world economy into three major financial and trading blocs, namely Europe, Asia-Pacific and North America and that exchange of goods and services between them is highly regulated through the operation of trade barriers (Ruigrok and Tulder 1995; Boyer and Drache 1996; Rodrik 2000). In short, according to the sceptics, globalisation remains essentially a phenomenon circumscribed to a defined number of developed and developing nations with its main feature being the accelerated speed at which

financial transactions take place rather than any real increase in the volume of international trade and opening of national borders.

In between these two extremes, the transformationalist thesis claims that globalisation is a central driving force underpinning the social and economic changes occurring within the world order. According to this thesis, nations and societies have to adjust to an environment in which there is no longer a clear distinction between international and domestic, external and internal affairs (see for example: Ruggie 1993; Linklater and MacMillan 1995; Sassen 1996). In contrast to the hyperglobalists and the sceptics, these authors do not make claims about the future development of globalisation as they argue that globalisation is replete with contradictions (Mann 1997; 2001; Hoogvelt 1997).

Globalisation theorists suggest that the internationalisation of markets has three primary implications for labour standards. First, globalisation makes the exit option more viable to some employers. As a result, workers are forced to pay a larger share of the cost of improvements in working conditions and benefits. Second, workers now face greater instability in earnings and hours worked in response to "global" shocks to labour demand or labour productivity. Third, as the employees' bargaining power has eroded, they are now receiving lower wages and standards whenever bargaining is the primary tool used to set terms and conditions of employment. Moreover, globalisation is held to have impacted upon governments by curtailing their taxation powers (Rodrik 1997). Finally, the expansion of multilateral trade agreements, regulated by bodies such as the World Trade Organisation (WTO), has weakened the ability of national governments to insulate domestic labour standards from external market risks by means of protectionist measures, as one of the most stringent requirements upon nations in order to gain access to the international trade system is the repealing of trade barriers.

The potential negative effects of globalisation on labour standards has generated widespread concern that the internationalisation of the world economy, if left ungoverned, could induce downward equalisation of the price of Labour resulting in a "race to the bottom" (Langille 1994; Emmerij 1994; Compa and Diamond 1996; Lee 1997; Montgomery 1996; Castle, Chaudhri and Nyland 1998; Rodrik 1997; 1998(a); Tonelson 2000; Dessing 2001). As a consequence, calls for international regulation of labour standards have become more pressing in the past 10 years. These calls have induced an intense debate on whether or not access to the international trade system should be accompanied by measures aimed at encouraging respect for labour standards.

There is a clear fracture, within academia, between supporters of a trade-related "social clause" and its opponents. Supporters of the social clause claim that there is a need to strengthen the capacity of international institutions to monitor and enforce labour standards (Emmerij 1994; Langille 1994; Wedderburn 1994; Ehrenberg 1996). The rationale underpinning calls for international regulation of labour standards is that as globalisation has weakened the regulatory powers of nation states, transnational regulation of labour standards is required to create the conditions which would enable Capital and Labour to bargain internationally and "to cope better with the unforeseen events that will surely accompany the accelerated evolution of the international economy we are experiencing" (Emmerij 1994:321).

Another argument promoting a linkage between international trade and labour standards is the "race to the bottom" previously mentioned. According to the proponents of this perspective, labour standards are being adversely affected by the behaviour of some nations (mostly developing countries) which tend to keep their labour conditions artificially repressed in order to attract foreign investment, even though their overall economic performance would allow labour standards to improve.

As globalisation makes the options available to national states more constrained by the political strategies adopted by others, international competition is distorted by the artificial repression of labour standards and this development leads to downward equalisation of labour conditions (see for example: Caire 1994:298; Emmerij 1994; Langille 1994; Herzenberg 1996; Rodrik 1997; Nyland and Castle 1999).

Supporters of a social clause in international trade agreements do not oppose free trade; rather, they want a common playing field in which "unfair" competition based on the deliberate suppression of wages and labour conditions is not a viable option (Emmerij 1994; Langille 1994; Hansenne 1994; Nyland et al. 1999). They also agreed on what labour standards should be included in multilateral trade agreements and what institutions should monitor their adherence and implementation. These are the standards referred by the International Labour Organization (ILO) as "core labour standards" and defined by the United Nations as "fundamental human rights". These standards were codified by the ILO through the enactment of specific Conventions, which are:

1) The Right to Bargain Collectively and Freedom of Association (C87, C98)

2) Freedom from Forced or Compulsory Labour (C29, C105)

3) Freedom from Exploitative Child Labour (C138)

4) Equality of Opportunity (C100, C111) (Caire 1994; Sengerberger 1994(b); Nyland et al. 1999; Kucera 2001).

According to its proponents, international respect and implementation of the aforementioned labour standards should be assured by joint cooperation between the ILO and the World Trade Organisation. The former should be charged with ensuring that gains deriving from international trade generate improvements in labour

conditions. The latter, endowed with a trade sanctions regime, should punish "unfair" behaviour and competition by denying access to international markets and through the imposition of trade embargos[2] (Ehrenberg 1996; Nyland et al. 1999; Michelotti and Nyland 2000; Michelotti and Nyland 2002).

The notion of a linkage between international trade and labour standards receives substantial support from legal analysts. This reflects the fact that lawyers have traditionally been concerned with the distribution of power in the employment relationship (see section 2.2.1) and many believe globalisation has disadvantaged unskilled workers *vis a vis* their employers. The issue enjoys less support amongst economists. Some specialists in this field, influenced by neo-classical orthodoxy, claim that regulatory diversity is one dimension of comparative advantage and that to argue against diversity is to argue against the rationale for trade itself (Bhagwati 1994; 1997; Srinivasan 1994; Freeman 1994; Krugman 1997; Golub 1997). Three economic theories supporting this claim are the Ricardian theory, the Heckscher-Ohlin model, and the Stopler-Samuelson theorem.

Based on these theories, those economists opposing international regulation of labour standards claim that low labour standards represent a comparative advantage for developing countries. The imposition of *a priori* established labour standards would negatively affect both developing and developed nations (the former would see their comparative advantage substantially reduced and the latter would be forced to produce goods that could be otherwise imported at a cheaper price).

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[2] The features of the WTO trade sanction system have been recently criticised on several grounds. For a comprehensive overview of the critiques and proposals to reform it see for example Charnovitz 2001; Alden 2000; Bhagwati 2001; Kessie 2000; Lindsey, Griswold, Groombridge and Lukas 1999

These arguments, which could be referred to as the neo-classical critique to international labour standards, are consistent and persuasive. However, it should be noted that the aforementioned theories are first-best considerations as they are based on strong assumptions such as full employment of all factors of production, perfect substitutability of all factors and perfect competition. Disagreements arise when second-best arguments are considered. These are the arguments that take into account distortions in the functioning of the markets such as political repression of labour rights and artificially maintained low labour standards. When second-best considerations are analysed, less clear positions emerge: on one side are those who believe that second best arguments still fail to provide a convincing case against free trade as the case for labour standards is a unilateral one, meaning that a country serves its own interests by pursuing free trade regardless of what other countries may do (Krugman 1997). It is also argued that bad labour standards do not necessarily drive out good labour standards (Srinivasan 1994; Freeman 1994; Bhagwati 1997; Krugman 1997). On the other side, Piore (1994) accepts that reality is more complex than what is described by economic models and that labour standards, if placed on the international agenda, would not necessarily impinge upon the globalisation process and the development of third world countries.

What is important to stress at this point of the discussion is that not all the scholars influenced by neo-classical economic theory are hostile to the insertion of social clauses in international trade agreements or, more broadly, to forms of regulation other than the one provided by the pure interaction of market forces. Herzenberg, Perez-Lopez and Tucker (1990), for instance, concede that core labour standards are embedded in orthodox neo-classical economic theory and therefore a social clause would not negatively impinge upon the functioning of the market (Dessing 2001; Fields 1990). They support their claim by demonstrating that neo-

classical assumptions are consistent with the conditions core labour standards seek to achieve, namely: free choice, equal bargaining power, and full information.

The general scepticism of economists opposing the social clause is strengthened by the fear that calls for a linkage between labour standards and international trade would conceal a misguided form of protectionism in which developed nations would invoke trade sanctions or rise trade barriers against countries that do not respect labour standards, in order to protect those industries facing competition from developing countries (Bhagwati 1994; 1997; Srinivasan 1994; Krugman 1997).

Different remedies are proposed by economists in order to ensure that "social progress goes hand in hand with economic progress" that range from labelling products made under good labour standards (Freeman 1994) to codes of conduct for multinational corporations (Bhagwati 1994; 2002:5-8). In particular Freeman (1994), who takes a pure neo-classical approach, argues that a certain level of working conditions may be considered as a commodity for which consumers and workers are willing to pay and that sufficient information, conveyed through labelling, should be all that is necessary to ensure these conditions are met.

As for domestic labour standards, neo-classical orthodoxy is challenged on several grounds. These range from the typical Keynesian argument that a social clause could enhance aggregate demand, help increase overall high wage employment, and stabilise the economic cycle (Herzenberg et al. 1990; Tsogas 1999; see also section 2.3.1) to the claim that a social clause has the potential to encourage the adoption of higher standards of employment necessary for high-productivity, quality-enhancing competition (Piore 1990). Also some Neo-Institutionalists support international labour standards by emphasising the fact that a social clause could help government

mediation in the labour relations process thus making conflict more manageable and reducing losses (Banuri 1990:59).

The debate on international labour standards is characterised by a stalemate at both theoretical and political level. However, attempts are being made to break this deadlock and disprove some postulates underpinning the arguments of both supporters and opponents of a social clause. For example, the scepticism displayed by neo-classical economists, regarding the effects of international labour standards on economic performance, is challenged at the empirical level. A 1996 OECD study, entitled *Trade, Employment and Labour Standards*, shows little evidence that low labour standards are associated with low labour costs, an important determinant of trade and investments flows. In the same study, it is also suggested that the suppression of three fundamental labour rights, freedom of association, collective bargaining and child labour are not positively related to a reduction of the export price of products manufactured in countries where these rights are repressed.

A similar result is achieved by Adriana Marshall (1994) who, in conducting a study amongst seven Latin-American countries, asserts that the degree of legal protection accorded to labour standards played a minor role in shaping the economic performance of these nations compared with other domestic or international determinants such as the level of investments, the productivity of Capital and the openness of the economy. Although restricted to Latin America, Marshall's study shows that the belief that the suppression of labour standards is sufficient to improve economic efficiency proves to be an over-simplification of reality.

Three more recent pieces of empirical research uphold the conclusion of both Marshall and the 1996 OECD study. In considering the correlation between average total Foreign Direct Investment (FDI) inflows from 1995 to 1998 and freedom of association and collective bargaining rights in 75 developed and less developed

countries, the OECD found that FDI tends to be greater in nations where workers' rights are better protected and implemented (OECD 2000(a)). Consistent with this result are the findings of Kucera and Rodrik. Kucera (2001) analyses the effects of freedom of association, collective bargaining, child labour and gender discrimination/inequality on FDI in 127 countries and finds no solid evidence that FDI are higher in countries where these rights are suppressed. Rodrik, in confirming the results of previous research, estimates that FDI tend to be greater in countries with stronger workers' rights (Rodrik 1994; 1999).

It is also important to point out that other studies disavow the "race to the bottom argument" as they claim, in different contexts, that empirical evidence does not support the claim that globalisation is resulting in a downward equalisation of labour conditions (Oman 2000; Albert and Standing 2000; Chin 1998). The same empirical literature, however, has not supported the notion that labour standards undermine competitiveness. In particular, the 2000 OECD study concerning the effects of core workers' rights on FDI addresses whether or not there is evidence of a "race to the bottom". Such research concludes that there are no clear signs of "any inexorable tendency towards global 'bidding wars' among governments in their competition to attract FDI," though the same study warns that the "prisoner's dilemma nature of the competition creates a permanent danger of such 'wars'" (Oman 2000:10).

The findings of these empirical studies seem to suggest that the "social dumping" or "race to the bottom" argument could prove to be inconsistent as no empirical evidence supports the claim that the voluntary repression of core labour standards actually results in an economic advantage.

On the political side Griffin, Nyland and O'Rourke (2002) empirically show that the claim trade unions in developing countries oppose a social clause in

international trade agreements is false. In addition, in attempting to advance new strategies to get over the political stalemate, Hensman (2002:1) notes that the main reason why no-common ground on labour standards has been so far achieved is due to governments' desire to protect employment in one's own country neglecting, in this way, the needs of others. Hensman calls for the elimination of these nationalistic considerations which are preventing workers worldwide from reaping the benefits associated with globalisation (Hensman 2002:14). Hensman is echoed by Sebbens (2000:254) who calls for an increasing internationalisation of Labour strategies though he warns that the focus of trade unions should remain initially at local level. Finally, the Carnegie Endowment (2001:5-9), a NGO, advances a new model of the social clause designed to gain support from those who oppose the standard "trade sanctions" proposal. The Carnegie Endowment proposes, compliance should be achieved by following five principles: a) cooperation, consultation, and consensus should be favoured over confrontation; b) enforcement mechanisms must stop short of discriminatory trade sanctions; c) national compliance with core labour standards should be the main objective; d) diversity among nation should be acknowledged and respected and e) penalties should be targeted and specific. In this model, the ILO should ensure compliance while sanctions would target specific firms or governments.

2.5 Conclusion

The debate concerning the type and the level of legal protection granted to employment conditions has traditionally been contentious. The debate on labour standards has received renewed attention over the past two decades due to the inception of globalisation and major economic and associated social changes that occurred worldwide. Although the dispute on labour standards has gained complexity over time, it remains open to challenges advanced by both supporters and opponents of protective regulatory intervention. At the domestic level, two developments have

attracted the attention of scholars: a) a tendency on part of governments to decentralise the bargaining locus from the collective (industry based) down to the enterprise or the individual level and b) a decreasing emphasis placed on labour standards' protection and the demise of many nations' commitment to achieve full employment by means of Keynesian economic policies. The latter tendency has been compounded by a preference for monetary policies utilised to control inflation and stimulate investments.

These developments have challenged the internal coherence of labour law which relied, for almost forty years, on the centrality of labour standards, the defence of collective bargaining and the protection of trade unions. In particular, the traditional understanding of labour standards has been exposed to the criticism advanced by neo-classical economists and their counterparts in the field of legal enquiry who have remained faithful to the primacy of the contract of employment, predicated by common law, as the primary means to establish employment conditions. Legal analysts are currently engaged in reconceptualising and expanding the boundaries of the subject and the place of labour standards. Within economics the issue is also contentious though current developments have not impacted upon the subject in the same way they are affecting labour law. This is mostly due to the fact that the protective understanding of labour standards was widely accepted by the majority of legal analysts while contrasting perspectives have traditionally co-existed within economics. A sustained engagement between the two fields has recently begun. Economics is providing legal analysts alternative explanations of current events concerning the status of labour standards while labour law is revealing new insights to economists on the complexity of protective provisions and the relation between collective agreements and legislation.

The contentiousness of the theoretical debate is reinforced by the lack of comprehensive empirical work investigating to what extent employment protection systems have actually changed and the forces which influenced such developments. In section 3.4, it will be shown that most empirical studies have focused only on a few aspects of employment protection (typically minimum wage, unfair dismissal and unemployment insurance) and that, until recently, there has been a lack of both a common definition of labour standards and reliable measures to quantify them. This is a relevant lacuna since new light could be shed on the theoretical debate by considering the extension of changes in a broad range of neglected areas including employment equity, occupational health and safety, collective bargaining, paid time off and overtime. As the aim of this study is to compare labour standards in Italy and Australia in 1979 and 2000, and place such changes into their institutional contexts, the next chapter will review past methods for measuring and quantifying labour standards. It will also consider the literature concerning theoretical models used to analyse the evolution of employment protection systems across nations.

CHAPTER THREE

QUALITATIVE AND QUANTITATIVE MODELS FOR THE ANALYSIS OF LABOUR STANDARDS

3.1 Introduction

The study of labour standards poses some important challenges. For the purpose of this thesis, two major methodological problems need to be addressed. First, there is a necessity to develop an analytical framework that can be utilised when comparing the different form and purpose of standards setting regimes and their evolution over time. Second, there is a need to determine how best to measure the strength of labour standards in ways that make cross-country comparison possible. The first problem deals with difficulties related to the conceptualisation of an analytical framework suitable for comparing standards setting systems across countries and able to identify the main factors which determine convergent or divergent patterns over time. The second requirement has as a fundamental prerequisite the creation of a precise definition of labour standards and the determination of an appropriate measurement tool.

The first section of this chapter will consider the status of labour standards in industrial relations theory. It will be argued that current industrial relations models do not provide comprehensive theoretical frameworks suitable for the comparative analysis of labour standards. Continuing, the chapter will investigate alternative models offered by Karl Polanyi's Double Movement thesis and French Regulation theory. It is argued that, if the insights offered by these scholars are melded with contributions made by industrial relations, a framework can be developed that can be utilised for the analysis of the empirical results provided in chapters 5 and 8. The chapter will then move to review past methods for quantifying labour standards.

Finally, the last section will explain the quantitative methodology used in the present study.

3.2 Industrial Relations and Labour Standards: Relevant Conceptual Frameworks

Labour standards are established through the enactment of legally enforceable norms. As a consequence, the State plays a major role in determining what labour conditions must be implemented, and the sanctions for infringing these standards. However, the State cannot act in isolation from the broader context of society and its most influential groups, which in the case of labour standards are the owners of capital and labour. Employment conditions can be established through direct bargaining or conflict between the parties, or by law, but the mechanism of interaction between employers and trade unions is similar in both cases. What differs is the level at which interaction occurs, which in the case of direct negotiation can take place at different levels (regional, individual, enterprise and industry), whereas in the case of labour standards this process is invariably more centralised. An important issue is thus not only the relative power positions of Capital and Labour, but also their respective capacity to exert pressure on state legislatures.

The relation between collective bargaining and the enactment of protective legislation is central to this research and raises some important questions. For instance, what are the conditions that lead to the establishment of labour standards? Under what circumstances does regulatory legislation prevail over collective bargaining? What is the attitude of trade unions, employers' associations and governments to the use of legislation as a tool to protect labour conditions? What is the influence of external factors such as the contextual economic cycle or the political affiliation of the executives in relation to labour standards?

The centralised nature of the labour standards process suggests that the most appropriate literature to be explored is that concerned with the functioning of the macro level of an industrial relations system and the rules generated by this system. This perspective necessarily focuses on the interactions between employers' organisations, trade union confederations and governments. Influential industrial relations scholars who have concerned themselves with industrial relations systems and the study of the rules setting process include Dunlop, Flanders, Kochan, Katz and McKersie and Kahn-Freund[3]. These scholars have all made significant contributions to the labour standards debate and a number of their insights will be used in this thesis to analyse the dynamics underpinning the process of change in Australia and Italy over the period studied (see chapters 6 and 9).

A relevant starting point is the work of John T. Dunlop (1958), the founder of Industrial Relations Systems' theory. Dunlop's theory represents one of the earliest attempts to develop a holistic framework of analysis for industrial relations and the rules-setting process. According to Dunlop, "an industrial-relations system...is regarded as comprised of certain actors, certain contexts, an ideology which binds the industrial-relations system together, and a body of rules created to govern the actors at the work place and work community" (Dunlop 1958:7). An important characteristic of this model is the web of rules governing the actors at the work place, which constitutes "...a critical and central feature of an industrial relations system, distinguishing one system from another" (Dunlop 1958:14). Substantive, procedural and promotional standards are certainly part of these rules and Dunlop observed that the notion of rules refers to those provisions governing compensation in all its forms,

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[3] It is acknowledged that the literature on industrial relations is much richer than the one reviewed in this section. It is beyond the scope of this thesis to review the history of industrial relations theory. The aim of this chapter is limited to the review of theoretical models that are of direct relevance for the comparative analysis of changes that affected employment protection systems over time.

and regulations defining the rights and duties of workers (Dunlop 1958). This feature of an industrial relations system is fully accepted and reinforced by Flanders (1965) who argued that a system of industrial relations is a "system of rules" with these rules "[appearing] in different guises: in legislation and in statutory orders; in trade union regulations; in collective agreements and in arbitration awards; in social conventions; in managerial decisions; and in accepted customs and practice" (Flanders 1965:10). Flanders concluded the study of industrial relations "May therefore be described as a study of the institutions of job regulation" (Flanders 1965:10).

In Dunlop's conception of systems' theory, labour standards are envisaged as one of the possible outcomes produced by the interaction of employers, trade unions and governments. Dunlop states: "The actors in given context establish rules for the work place and the work community" (Dunlop 1958:13). These rules embrace procedures for establishing employment conditions, substantive norms and the procedures for deciding the application of these norms to particular situations. Labour standards should be conceived as a sub-group of the substantive and procedural rules which include: 1) rules governing compensation in all its forms; 2) the duties and performance expected from workers including rules of discipline for failure to achieve these standards and 3) rules defining the rights and duties of workers (Dunlop 1958:14). According to Dunlop, substantive rules not only include labour standards but also relate to the broader outcomes of the bargaining process such as terms and conditions of employment laid down in collective agreements (Meltz 1988:171).

Dunlop also emphasises the dynamic nature of the standards setting process noting that substantive rules change over time "as a consequence of changes in the contexts and in the relative statuses of the actors" (Dunlop 1958:13). According to this view, the process leading to the establishment of labour standards is a component of the broader industrial relations system in which the actors interact at central level and the outcome is regulatory legislation. Dunlop also argues that "In general terms

the rules, including the procedures for establishing and administering them, may be treated as the independent variable to be "explained" theoretically in terms of other characteristics of the industrial relations system" (Dunlop 1958:15). These characteristics are the actors of the system, certain contexts and the prevailing ideology. The establishment of labour standards can be the result of either direct government intervention in the negotiation process and/or the simple certification of a *de-facto* established practice or agreement between the parties. This apparent dichotomy, concerning the functions performed by the State, led Dunlop to warn it is crucial "to see through such veils of governmental rule-making" and to explore the subtle relations among the actors in a national industrial relations system (Dunlop 1958:123)

However, difficulties emerge regarding the relation between the features and the overall operation of the standards setting process. These problems have been highlighted by Richard Hyman (1975) who has argued Dunlop's framework fails to provide an effective tool to analyse the rules setting process. Hyman adds that the supposed dynamic nature of Dunlop's scheme is not adequately supported. Three issues in particular are underdeveloped in Dunlop's theory of rules setting: the behaviour of the actors, their status, and the treatment of power and ideology. The discussion of the actors' behaviour/status is severely constrained by the assumption that the scope for the rules making process is to maintain stability and the equilibrium of the system, that the various industrial relations institutions and procedures are mutually compatible and well integrated and that conflict is largely self-correcting. This notion is strengthened by Dunlop's belief that the values of the participants are an automatic source of order, as "An industrial-relations system creates an ideology or a commonly shared body of ideas and beliefs regarding the interaction and roles of the actors which helps to bind the system together..." (Dunlop 1958:383). The actors interact in a setting which involves three sets of contexts: 1) the technological characteristics of the work-place and work community; 2) the market or budgetary

constraints which impinge on the actors and 3) the locus and distribution of power in the larger society (Dunlop 1958). The status of the actors is therefore given and "external" to the system, and their behaviour contributes to the maintenance of stability.

The problem with this conceptualisation is twofold. First, if the system of rules setting is so well integrated how does a change in the status of the actors affect the standards setting process? Second, what are the most important factors determining the change in the status of the actors? Dunlop talks of a "...prescribed status of the actors" defined as the "prescribed functions...and the relations with the other actors in the same system" (Dunlop 1958:97-99), but it is not clear what is prescribed. He also omits to identify those factors that influence this status. Furthermore, Dunlop notes the status of the State, employers and employees can change over time but he is vague about the dynamics inducing such shift and the strategies pursued by the actors to achieve changes.

The reason why Dunlop fails to provide a sound framework to describe the behaviour/status of the actors in the rules-standards setting process lies in his underdeveloped analysis of the notions of power and ideology within an industrial relations system. This is widely acknowledged to be the case among both Marxist (see for example Hyman 1975) and Pluralist scholars (Wood, Wagner, Armstrong, Goodman and Davis 1975). The former claim Dunlop treats power as being exogenous to the rules setting system (Hyman 1975) and the latter that Dunlop is mostly concerned with the notion of power at macro-level, thus neglecting its distribution at the workplace (Wood et al. 1975). The latter criticism is important because changes in the power context occurring at the workplace have the potential to affect the power of the actors at the macro level and therefore the features of labour standards and the level of protection granted by these standards. Dunlop defines the power context as "...largely imposed upon an industrial relation system from outside

by the community...or [it] may develop within the industrial-relations system and then be confirmed by community sanction or recognition" (Dunlop 1958:99). The power context is thus treated as given by Dunlop's model, and this assumption severely constrains the capacity of the systems framework to explain the dynamics of the process through which the actors interact with governments in order to enact labour standards and the relationship between the distribution of power at different levels (i.e. institutional, industry and workplace) and the rules-making process.

Dunlop's model constitutes an attempt to construct a theoretical instrument suitable for the analysis of the standards setting process. It is principally concerned with the macro-level of the system, has the merit that it introduces the notion of "industrial relations system", and identifies the major participants in this system. In chapters 6 and 9, it will be seen that the interaction between employers' associations, trade unions and governments greatly influenced the evolution of labour standards in Australia and Italy. Nevertheless, Dunlop's theory does not provide an exhaustive architecture to analyse the standards setting process. This is due to the fact that the notions of power and status are not sufficiently developed. In addition, systems theory, by focussing on the interaction between the actors and the rules making process within the labour market, fails to adequately explain the place of labour standards in the wider social system. Moreover, no reference is made to the strategies pursued by the actors in order to achieve their objectives in relation to standards.

Similar shortcomings are also embedded in a re-formulation of Dunlop's model, known as the "strategic choice" framework (Kochan, Katz and McKersie 1994). This model aims to capture changes which have occurred to industrial relations regimes in most developed countries since the mid 1970s. Kochan, Katz and McKersie acknowledged the static nature of Dunlop's model and adapted it to take into account the dynamism of the strategies pursued by the actors. They take the view that "...industrial relations practices and outcomes are shaped by the interactions of

environmental forces along with the strategic choices and values of managers, union leaders, workers, and public policy decision makers" (Kochan et al. 1994:5). According to strategic choice theory, the outcomes and processes of an industrial relations system are the result of a continuously evolving interaction of environmental pressures and organisational responses. One of the key features of this model thus becomes the readiness of each actor to adjust to changed external conditions and to respond to the strategies pursued by the other actors. Therefore, choice and discretion on the part of Labour, management and government shape the characteristics of the industrial relations system and determine the outcomes. However, the range of feasible choices available is constrained by certain limits such as management values towards trade unions (and vice versa) and the history of negotiation between the parties (Kochan et al. 1994). Kochan Katz and McKersie find, for example, that the transformation of American industrial relations in the 20 years to 1994 developed primarily from managerial action aimed at achieving a more symmetrical relationship between broad business strategies and industrial relations practices within the firm. This led them to conclude the scope of the industrial relations discipline has to be broadened well above the functional level described by Dunlop in order to include the strategic decisions of management, Labour and government.

Kochan, Katz and McKersie's main argument is that the foundations of the New Deal industrial relations policies, which centred on the legal regulation of substantive and procedural standards relating to wages, working hours and trade unions rights, have been challenged by workplace innovations and the increased significance of the non-union sector (Kochan et al. 1994:23). They also question Dunlop's assumption that a common ideology binds the industrial relations system together as they believe mainstream industrial relations scholars have often misinterpreted some forms of pragmatic behaviour on the part of the actors as a sign of philosophical acceptance. Kochan, Katz and McKersie sustain this argument by claiming that American managers never fully accepted unions as legitimate

counterparts. Rather, they were forced to do so by external factors such as the New Deal labour policies, the central role played by collective bargaining in American industrial society and the high costs associated with the avoidance or dislodgment of established unions.

In order to explain how external (the economic environment, for example) and internal forces (the strategic choices made by the actors) shape the industrial relations arena and the standards setting process, Kochan, Katz and McKersie divide the activities of management, Labour and government organisations into three tiers: 1) a top tier of strategic decision making; 2) a middle or functional tier of collective bargaining or personnel policy making and 3) a workplace level where policies directly affect individual workers, supervisors and union representatives on a daily basis. Employers, trade unions and governments pursue certain strategies according to the level of industrial relations activity.

The enactment of labour standards, according to the strategic choice framework, originates at the top tier. The middle tier is the domain of traditional industrial relations analysis with its focus being the establishment and administration of rules and policies aimed at governing labour-management relations usually at industry level. Finally, the bottom tier concerns those strategic choices relevant for the organisation of work and the structuring of workers' rights at the workplace. Although all three actors and levels are deemed important, in proceeding to the analysis of the changing character of industrial relations, the authors are mainly concerned with the workplace level and the activity of management. Kochan, Katz and McKersie justify this focus by arguing that in most developed countries there has been a shift in importance from the top two tiers down to the bottom tier.

The strategic choice framework has two distinct advantages: first, it highlights the relevance of strategy in shaping the standards setting dynamic and second, it emphasises the relevance various strategic decisions, undertaken at different levels,

exert on the actors within the system. This represents a significant advance on Dunlop's model and, as will be seen in chapters 6 and 9, the interrelations between governments, employers and trade unions at the workplace level have had a significant influence on the evolution of labour standards in both Australia and Italy.

Nevertheless, as with Dunlop's model, "strategic choice" does not provide an entirely convincing architecture for the analysis of the rules making process. It has been claimed Kochan, Katz and McKersie's analysis reproduces the weaknesses of Dunlop's model in that it is not an explanatory approach in itself (Blyton and Turnbull 1994). In relation to labour standards the main weakness in the "strategic choice" model is the fact that the authors pay little attention to the top two tiers. Kochan, Katz and McKersie emphasise the importance of the interaction between different tiers and the influence strategies pursued at the bottom tier can exercise on the top two tiers. However, the feedback between different levels of industrial relations activity is not adequately discussed due to their desire to explore the role of managers at the base. This latter point induced Hildebrand (1994) to observe that the strategic choice framework overstates the relevance of managerial strategies in affecting the character of industrial relations and the rules making process. Standards are mainly understood, in Kochan, Katz and McKersie's discussion, in terms of workplace agreements rather than legally enforceable norms and there is no exhaustive explanation concerning the way in which changes at the bottom tier can influence the upper levels. Thus, the emphasis placed on the bottom tier prevents the strategic choice framework from providing an effective means for exploring why labour standards are enacted and changed over time.

Another important weakness of the strategic choice approach, as far as standards setting is concerned, is that it does not consider the circumstances determining the outcome of the interaction between the actors, whether it is awards, negotiated agreements, protective legislation, or a combination of the three.

According to Kochan, Katz and McKersie, labour standards are statically conceived as emerging from negotiation occurring at the top tier level, but no mention is made regarding the process that leads to this outcome. Hence, as with Dunlop's model, the sources of employment regulation are not adequately analysed. This is recognised as an unresolved problem in industrial relations theory (Kahn-Freund 1977:38). The rules of employment are laid down in collective agreements, arbitrated awards or legislation. These sources are not mutually exclusive, though their mix can change from place to place and from time to time (Kahn-Freund 1977:38). The relation between changes in the relevance accorded to each of these sources and the functioning of the broader industrial relations systems is a particularly difficult terrain of analysis because the borderline separating collective bargaining and legislation is often blurred and greatly influenced by cultural, economic, geographic, historical and political factors (Kahn-Freund 1977:38). For example, the same labour standard can receive protection in some countries by means of collective agreements and in others through legislation or awards. Moreover, some national contexts, such as Italy or Belgium, have developed systems of labour protection hinged on the mutual exchange between collective agreements and legislation (see further section 7.1). Yet, the relationship between different sources of employment regulation and its change over time is a crucial issue to be tackled in comparing standards setting regimes as it can conceal changes in the power context (Kahn-Freund 1977:38-39).

To confront this last issue effectively, it is necessary to move beyond industrial relations to labour law and economics. From labour law we gain the important insight offered by Kahn-Freund concerning the relationship between changes in the power context of the actors and the regulatory outcomes of the rules setting process. Kahn-Freund argued that "regulatory legislation is apt to prevail over collective bargaining where and when the political pressure power of the workers exceeds their industrial pressure power and, with great caution, this proposition can be reversed" (Kahn-Freund 1977:39). Kahn-Freund believed that as the industrial power

of unions grows, the significance of legislation declines and the relevance of collective bargaining rises, whilst as their political influence increases, so does the volume of regulatory legislation. He cited Italy and France as cases underpinning this argument. According to this view, labour legislation and collective bargaining are not mutually exclusive; rather the outcomes of an industrial relations system are determined by the characteristics and the magnitude of Labour's power. In Italy, for example, the growth of trade unions' political influence paralleled the increase in their industrial power from the early 1960s to the middle 1970s (see further sections 7.2 and 7.3). This was followed by a general transformation of principles developed by collective agreements into law (Kahn-Freund 1977).

Changes in the source of labour standards regulation, Kahn-Freund argued, is not simply a technicality which should attract the attention of students in the field of legal inquiry; on the contrary, it indicates a deeper change in the relationship between the actors and a shift concerning the features of the power context. The boundary between collective bargaining and legislation and its change over time cannot be solely understood by studying the interaction, as Dunlop and Kochan, Katz and McKersie systems do, between the actors, but "may largely result from the facts of political and economic history" (Kahn-Freund 1977:39). For example, the fact that in Britain most standards are protected through collective bargaining, rather than legislation, is rooted in the country's industrial history. The countervailing power achieved by British trade unions developed in many industries well before Labour was able to politically pressure governments. As a consequence, unions in Britain "were traditionally disinclined to put their trust in legislation to be applied by courts of law" (Kahn-Freund 1977:40). By contrast, in most continental European countries trade unions have been to great extent creatures of the political parties and this feature made Labour more inclined to accept the use of legislation as a tool to protect labour conditions.

Khan-Freund warned that this complex issue cannot be resolved exclusively through the application of the aforementioned intuition; however, by placing emphasis on the relationship between sources of employment regulation, the features of the power context and the history of negotiation between Capital and Labour, he contributes to develop a conceptual framework for the analysis of the standards setting process.

The discussion in this section focused on industrial relations attempts to draw a theoretical framework capable to explaining the standards setting process. Industrial relations makes some significant contributions that are of direct relevance for the analysis of the standards setting process. In identifying the actors of an industrial relations system, Dunlop argues their interaction has the potential to modify the features of a country's employment protection system over time. In echoing Dunlop, Flanders notes the centrality of labour standards for the study of industrial relations. Kochan, Katz and McKersie highlight the relevance of the strategies pursued by governments, trade unions and employers at the top tier to promote changes in labour protection. In addition, by dividing the industrial relations and rules setting activity into three tiers, Kockan, Katz and McKersie highlight the mutual influence that these three levels exercise on each other and ultimately on the standards setting process. Finally, Kahn-Freund contributes to the debate by providing an explanation concerning the influence the power position of the actors exercises on the nature of the outcomes of the rules making process. The insights of Dunlop, Kochan, Katz and McKersie and Khan-Freund on the rules-making process will be utilised in chapters 6 and 9 to analyse the interactions between governments, trade unions, and employers, and the process through which such interactions influenced changes brought to labour standards in Australia and Italy over the 1979-2000 period.

Despite the contributions made by industrial relations specialists in relation to the rules setting process, this section also argued that industrial relations theory does

not provide satisfactory models to analyse changes in labour standards protection. Hence, in order to explore the place of labour standards within the wider societal context it is necessary to move beyond industrial relations to economics. While Khan-Freund provides deeper insights on the rules making process by bridging industrial relations, the power context and labour law, the next section will consider two frameworks, developed by economists, that are of primary relevance for this thesis and broaden the field of research to the area of "social protection".

3.3 Karl Polanyi and French Regulation Theory

In section 3.2, it was noted that industrial relations theory fails to provide a convincing architecture for the analysis of labour standards. This is primarily due to a general reluctance of the subject to expand its traditional boundaries, which are normally limited to the analysis of the labour market, to other fields of inquiry such as social policy. Ramia (1998) correctly characterises this dichotomy by noting that "though social policy analysts have increasingly embraced work and the labour market as being relevant, industrial relations scholars have not, in the main, reciprocated by considering social policy...in a serious way" (Ramia 1998:35). It is beyond of the scope of this thesis to describe the shortcomings of industrial relations in relation to social policy (for an excellent review on this topic see Ramia 1998:35-84). However, two frameworks, offered by Karl Polanyi and by French Regulation theory have powerful explanatory capacity and are of primary relevance to an understanding of the process that led to substantial reforms of the employment protection systems in Australia and Italy during the 1979-2000 period. These two models also underpin the main argument advanced by this thesis (see section 1.2). Both frameworks emphasise the function of labour standards and social protection as dynamic forces to countervail the domain of the "market" and explain why these instruments are common to all developed market economies.

The tension between social protection and market liberalisation was captured by Karl Polanyi in his book *The Great Transformation* (1944). Polanyi argued that the development of 19th century capitalism and the increasing reliance on the market, as an abstract institution to regulate economic and social transactions, was premised upon two mutually exclusive principles: economic liberalism and social protection. The interaction between these two opposites began soon after the inception of the industrial revolution resulting in a "double movement" that

> can be personified as the action of two organizing principles in society, each of them setting itself specific institutional aims, having the support of definite social forces and using its own distinctive methods. The one was the principle of economic liberalism, aiming at the establishment of a self-regulating market, relying on the support of the trading classes, and using largely *laissez-faire* and free trade as its methods; the other was the principle of social protection aiming at the conservation of man and nature as well as productive organization, relying on the varying support of those most immediately affected by the deleterious action of the market-primarily, but not exclusively, the working and the landed classes-and using protective legislation, restrictive associations, and other instruments of intervention as its method (Polanyi 1944:132).

According to Polanyi, the development of modern society has been dominated by this double movement. Every time the reliance on the market has been increased, society reacted by introducing more social protection as stated by Polanyi himself

> For a century the dynamics of modern society was governed by a double movement: the market expanded continuously but this movement was met by a countermovement checking the expansion in definite directions. Vital though such a countermovement was for the protection of society, in the last analysis it was incompatible with the self-regulation of the market, and thus with the market system itself...This was more than the usual defensive behaviour of a society faced with change; it was a reaction against a dislocation which attacked the fabric of society, and which would have destroyed the very organization of production that the market had called into being (Polanyi 1944:130).

The countermove concerned the factors of production labour, land and money. Polanyi rejected the assumption, advanced by classical economists, that labour, land and money could be exchanged as commodities on the market. Rather he insisted that, although land, labour and money were traded in markets, they remained essentially not commodities because they had not been *naturally* deemed as products for sale (Polanyi 1944:72).

With regard to labour the contrast is particularly striking. In recalling the writings of Karl Marx, nearly a century earlier, Polanyi argued that the capacity to perform paid work was not always treated as a commodity. In feudal times, for example, servants were not compelled to sell their labour power, rather the capitalist mode of production induced people to do so (Polanyi 1944). According to Polanyi, in order to function, the market necessarily involved the trading of a commodity as the "commodity fiction" in which none of the aforementioned three factors of production was really produced (Polanyi 1944: chapter 6). They were merely names used to describe complex human activities (Polanyi 1944:72).

Central to Polanyi's thesis and in line with Marx's argument, is the awareness that, if the market was to be left unrestrained for an indefinite period, the effects would be disastrous. Unrestrained exploitation of labour would lead to the annihilation of human beings; environmentally irresponsible production would deprive land of its beauty and economic usefulness and extreme money market volatility would make purchasing power subjected to radical shifts between shortfall and oversupply (Polanyi 1944:73). Given the self-destructive potential of the market, Polanyi argued, a countervailing force was called into play so that society could be saved and the coexistence between the capitalist mode of production and society itself continually renewed. Such force refers to the protection of fictitious commodities. For genuine commodities could be organised by the market, labour, land and money could

not. This took the form of protective labour legislation for labour, land laws and agrarian tariffs for land and central banking for money. As stated by Polanyi himself

> if factory legislation and social laws were required to protect industrial man from the implications of the commodity fiction in regard to labor power, if land laws and agrarian tariffs were called into being by the necessity of protecting natural resources and the culture of the countryside against the implications of the commodity fiction in respect to them, it was equally true that central banking and the management of the monetary system were needed to keep manufacturers and other productive enterprises safe from the harm involved in the commodity fiction as applied to money. Paradoxically enough, not human beings and natural resources only but also the organization of capitalist production itself had to be sheltered from the devastating effects of a self-regulating market (Polanyi 1944:132).

In sum, society and capitalism have been able to coexist through the protection of the fictitious commodities. The double movement has continuously ensured the reproduction and the endurance of the capitalist mode of production. Every time the market expanded, more protection was introduced to counteract the potentially disastrous outcomes deriving from an excessive reliance on the market. In relation to labour standards this movement has taken the form of protective legislation in areas like wages, working hours, leave, unfair dismissal, occupational health and safety, collective bargaining, mandatory unemployment/employment insurance and discrimination. Polanyi, by stressing, as Marx did, the self-destructive outcomes that are associated with an excessive commodification of the fictitious factors of production (in particular labour), provides a powerful framework to analyse the evolution of labour standards. Polanyi could utilise 100 more years of experience than Marx in relation to Capital-Labour relations. Unlike Marx, who envisioned the overturning of capitalism, Polanyi argued that the double-movement had the potential to perpetuate this system of production. Labour standards, by limiting the damage markets can impose on the owners of labour, ensure the continued availability of labour power.

A related argument is advanced by the *French Regulation School*. The starting point of this tradition is the rejection of the standard Marxist assumption that there are eternal, ineluctable laws characterising the development of capitalism with these laws demonstrating "the existence of the tendency toward the deepening of capitalist crises, in particular due to the deepening of the capital-labor relationship and the declining rate of profit that it implied" (Boyer 1988:12). Although, in the main, the French Regulation School accepts Marx's insight on capitalism (Boyer 1988:11), they try to explain why this social formation has endured for so long when it is so clearly replete with contradictions. Crisis should be the norm and not the exception while the incapacity of orthodox Marxist theory to explain the sometimes long-term regime of capital accumulations (such as the wave of expansion that took place after the Second World War until the mid 1970s) is a critical theoretical weakness.

Central to their thesis is the notion that capitalism has the capacity to reproduce itself and sometimes to prevent the inherent recurrent crisis by means of "regulation" (Lipietz 1987(b):5; Boyer 1988). Regulation refers to the process, expressed by means of general laws and social relations, which enable a specific mode of production (and in particular the capitalist way of production) to reproduce itself in a defined historical period (Boyer 1988:117). As stated by Boyer it is

> the set of mechanisms involved in the overall reproduction of the system, given the state of the economic structures and social forms. This system of regulation lies at the origin of the short- and medium-term dynamics of the economy...(Boyer 1988:119).

More specifically, regulation is "the dynamic process of the adaptation of production and social demand, that is, the combination of the economic adjustments associated with a configuration of social relations, institutional forms, and structures" (Benassy cited by Boyer 1988:118). French Regulation theory centres upon the institutional forms that capitalism takes at a specific period of time in a precise context (Jessop 1988:149; Hampson 1991:116).

The French Regulation School tends to relate the changes in institutional formations to a well defined phenomenon which is the need for capitalism to reproduce itself if it is to survive. French Regulation theorists reject the classical and neo-classical assumption that market equilibrium, achieved through the organisation of free access to the market, the monitoring of full transparency of the information and the enforcement of property rights and private contracts, will provide Pareto-efficient outcomes (Boyer and Yamada 2000:6-8). They support this position with reference to research, built upon the notion of asymmetric information, which show that markets are not self-equilibrating (for an overview on this debate see section 2.3.1). Rather, they insist that social forms of regulation channel and guide the most relevant aspects of the accumulation process so that disequilibria and contradictions are concealed or postponed (Aglietta 1976; Lipietz 1987(b); Boyer 1988 and 1994(b); Boyer and Yamada 2000). In Boyer's term, the synergy between transformation and conditions of production denote "a set of regularities that ensure the general and relatively coherent progress of capital accumulation, that is, that allow for the resolution or postponement of the distortions and disequilibria to which the process continually gives rise" (Boyer 1988:35).

Consequently, in order to understand the crisis in which capitalism incurs, it is not sufficient to analyse only the dynamic and the malfunctioning of the "market" but it is also necessary to refer to a given set of institutional forms (that can change from context to context) that are compatible with capitalism and contribute to its reproduction. The interaction of different institutions and modes of regulation, which can pursue diverse and contrasting aims and are peculiar to each context, is a key factor that contributes to the system's stability or crisis (see Aglietta 1980 for the US; Boyer 1979 for France and Boyer 1988 for most European countries).

Having outlined the relevance of institutions in the process of Capitalism's reproduction, French Regulation theory describes the five institutional forms of

regulation. Two of these forms, *The Wage Labour Nexus* and *The Relations of the State with the Economy*, directly regulate the features of labour standards and determine changes over time. These forms are summarised by French Regulation scholars as:

(1) *The Monetary Regime*, which considers how financial deficits and surpluses are consolidated within the banking system.

(2) The *Wage Labour Nexus* refers to the principles in the division of labour, methods for organising production, statutory constraints that limit the ability of capitalists to dispose of the workforce (protective labour legislation) and that are usually integrated by the existence of a welfare system. French Regulation theorists insist that the enactment of protective legislation in the areas of workers' compensation, occupational health and safety, wages, equal employment opportunities and dismissals, is a key factor that enable capitalism to survive.

(3) *The Forms of Competition* refers to the rules through which firms compete on product, credit and capital markets. They include rules governing the rights of entry, the regulation of bankruptcy and what is considered to be an acceptable degree of cooperation and collusion. The ideal of pure and perfect competition is rarely observed, instead other forms tend to exist with their study being crucial to analyse the dynamic of prices, profit and investments.

(4) *The Relations of the State with the Economy* is another crucial factor and may take various forms over time and across countries. According to French Regulation theory, since the Second World War a major issue, which enabled a new cycle of capital accumulation, has been the existence and extension of the welfare system and the enactment of different forms of regulation by means of statutory legislation. As for the *Wage Labour Nexus*, the State,

which is defined as "the (often contradictory) totality of a set of *institutionalized compromises*" (Boyer 1988:41) and of which labour standards represent an outcome, "create semiautomatic rules and regularities in the growth of public spending which, at least in principle, are radically different from the logic of commodity exchange. One might think of the differences between civil law and social security law or of those between commercial law and labor law" (Boyer 1988:42; Boyer and Yamada 2000).

(5) The relations of a given economy with the international system defines the last institutional context: *The Forms of Insertion of the Nation into the World Economy*.

These forms concern the ways in which a country regulates the commodities, products, investments, labour, credit, intellectual property rights and may vary drastically from one country to another (Boyer and Hollingsworth 1997; Boyer and Yamada 2000:10-11). The interaction of these five institutional forms may lead to a regime of capital accumulation or to its crisis since these five forms can move in opposite directions.

French Regulation theory has been used to explain the crisis of "Fordism", defined as the regime of capital accumulation that began in the aftermath of the Second World War, in the US and the transition to "Post-Fordism"[4]. Central to the argument is the notion that one of the most relevant factors that generated a new regime of capital accumulation after the Second World War was the legal protection accorded to labour standards (see above) and the inception of a welfare system (Lipietz 1987(b); Boyer 1988). This regime entered a phase of crisis due to a generalised downturn in the rate of productivity worldwide which, coupled with

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[4] It should be emphasised that the term "Post-Fordism" rarely appears in French Regulation theory and usually refers to what is not "Fordism".

workers' increased power, led to an erosion of profitability (Liepietz 1987(b)). As a result, new ways out of the crisis were sought.

French Regulation scholars are sceptical of the possibility that new "Post-Fordist" arrangements can lead to a new regime of accumulation (Aglietta 1976; Boyer 1988; Clarke 1988; Jessop 1988). Nevertheless, they provide some sketches concerning the future. Lipietz, for example, presents a dichotomy according to which on one side the restructuring would strengthen the interests of Capital by breaking down the social democratic compromise and the abandonment of Keynesian economics (Liepietz 1987(a):12). This model, pursued by Thatcher and Reagan, would seek to restore "old liberalism" within the context of the modern "technological innovation" (Liepietz 1987(a):12). This development would unfold through the breaking down of rigidities such as protective labour legislation and the welfare system, which hamper the functioning of the market. On the other side, a poorly defined ecological model would bring immeasurable prosperity. These are only sketches and French Regulation theorists warn that the interaction between institutions could bring outcomes that can vary from context to context.

Both Karl Polanyi's "Double Movement" thesis and French Regulation theory emphasise the dangers inherent in a sustained reliance on market forces and highlight the relevance of protective legislation as a force to counteract the tendency of the market to generate forces that are incompatible with the survival of capitalism. However, while Polanyi's "Double Movement" has a relevant explanatory capacity in relation to labour standards, French regulation theory provides a model against which to test hypothesis rather than a framework to analyse the evolution of labour standards. Unlike Polanyi, French Regulation thought is heavily influenced by Marxist theory and there is a strong belief that the adjustment between market and regulatory arrangements will eventually break down leading to the disruption of the capitalist mode of production. In addition, the French Regulation school

contextualises labour standards since they are considered a key factor that contributed to generate a stable process of accumulation in a particular period (the post Second World War period) in a given context (Western countries). It is not presumed labour standards will always represent a crucial factor contributing to the reproduction of capitalism. Polanyi, on the other hand, argued that an excessive reliance on the market system is incompatible with the "very fabric of society" and therefore every expansion of the market will always be accompanied by an expansion of social protection. This arrangement could endure for an indefinite time. This thesis relies heavily on Polanyi's concept of social protection and on the notion of regulation entrenched in French Regulation theory and assumes there is a tension between market relations and peoples/workers' desire for security. In particular, it will be argued that, at least in the case of Australia and Italy, the features of the *Wage Labour Nexus* and the *Relations of the State with the Economy* have endured during the period studied representing a key factor in the development of the market-employment protection mix and shaping the evolution of the industrial regimes in both Australia and Italy. Having considered the two most relevant theoretical frameworks that underpin the main argument advanced by this thesis, the chapter will now move to review past methods offered for quantifying labour standards.

3.4 Measuring and Comparing Labour Standards: A Review of Methods

The development of a reliable methodology to measure labour standards across national contexts is very much influenced by the definition of labour standards adopted. The lack of a common, clear conceptualisation of labour standards has given rise to a proliferation of different methods that tend to consider only few aspects of the employment relationship.

Rodrik (1994; 1999) developed a technique to measure the degree of protection accorded to labour standards based on a series of indicators. Some of these

relate to the number of ILO conventions ratified by member states, while others deal with either specific legislation or actual practices (Rodrik 1994; 1999; Cooke and Noble 1998). These indicators are: the total number of ILO conventions ratified by a country (*Totconv*) and ranging from 0 (Gambia, Oman and Vanuatu) to 123 (Spain). The ratified number of "core" ILO labour rights conventions (*Bwrconv*) (Forced labour convention (Conv. 29), Freedom of association and protection of the right to organise (Conv. 98), Right to organise and collective bargaining (Conv.98), Abolition of forced labour (Conv. 105), Discrimination (Conv. 111) and Minimum age for employment (Conv. 138)). The *Bwrconv* ranges from 0 (China) to 6 (Finland). The *Democ*, which relates to a combination of civil and political rights (also including such labour rights as the presence of free trade unions, the effectiveness of collective bargaining and freedom of exploitation by employers). The *Democ* is based on the "Freedom House" survey of political rights and civil liberties conducted in 1993-1994, and ranges from 0 to 1 with 1 indicating the full set of civil and political rights (Italy, Australia and United Kingdom for example). The *Child* captures the extension of child labour exploitation. This index ranges from 0 to 2, with 0 indicating fully adequate legislation and enforcement, 1 if either legislation or enforcement are unsatisfactory and 2 if both are inadequate. The *Hours* refers to the number of statutory working hours during a normal working week in the manufacturing or construction industries, ranging from 40 to 48. The *Leave* which is the number of minimum paid leave days per annum ranging from 5 to 38. The *Union* that relates to the percentage of unionisation among the working population with its range varying from 1% to 100% (Rodrik 1994:49-50).

Although this is a wide range of indicators, there are several weaknesses in Rodrik's method. First, most of the indexes chosen by Rodrik are based on the ratification of ILO conventions (the *Totconv*, the *Bwrconv* and the *Child*). These indicators provide misleading information about labour standards protection for two main reasons. First, just because a country ratifies a convention does not

automatically mean that relevant legislation will be enacted. The voluntary nature of membership to the ILO, coupled with this body's statutory inability to impose sanctions on nations that fail to implement the conventions (see section 2.4.1), represents a weak incentive for recalcitrant governments to comply with contracted obligations. The second problem relates to the degree to which ILO conventions are respected in practice. The fact that a country passes relevant legislation after having ratified a convention does not constitute a guarantee of its effective enforcement (Rodrik 1994:48).

A more recent research which exhibits similar weaknesses is a 1996 OECD study, entitled *Trade, Employment and Labour Standards*. This investigation assesses the impact that the compliance with the ILO "core" labour standards conventions has on trade performance (see section 2.4.1). The focus of the report is circumscribed to freedom of association. Countries are divided into groups 1 to 4, with group 1 displaying the broadest rights of freedom of association and group 4 the narrowest. The ranking is based on adherence of statutory legislation with regard to the principles enshrined by the ILO conventions, with in group 1 being most of the OECD countries (Except Mexico and Turkey) and at the other extreme countries (such as China, Egypt, Indonesia, Iran, Kuwait, Syria and Tanzania) where freedom of association is virtually non-existent. In the OECD study it is assumed that the fact that statutory legislation is enacted automatically means that the standard is adequately enforced; as previously noted this approach does not take into account the degree of enforcement. The same shortcomings are also contained in an update of the 1996 OECD report entitled *International Trade and Core Labour Standards* (OECD 2000(a)).

A more satisfactory but still flawed attempt to measure labour standards is put forward by Kucera (2001). He develops statistical indicators to evaluate the protection accorded to four ILO core workers' rights namely Freedom of Association and

Collective Bargaining, Child Labour, Forced Labour and Gender Inequalities (Kucera 2001). These measures are used to assess the impact of the aforementioned rights on labour costs and foreign direct investment. These measures are more complete than those adopted by previous studies as they incorporate not only *de jure* criteria (which are information arising from the analysis of the actual legislation) but also *de facto* problems such as the number of violations of a certain statutory right (Kucera 2001:12). This method is unsatisfactory for the purpose of this thesis as it was specifically devised to assess relevant issues in developing countries and is limited to four basic rights. The evaluation of at least three rights, freedom of association, child labour and forced labour is quite insignificant for this study since the degree of enforcement of the aforementioned rights is sustained in developed countries.

A significant advance on previous efforts to measure labour standards is contained in two OECD studies (1994; 1999) which aimed to evaluate the effects that different levels of employment protection have had on labour market performance in member countries. The methodology is based on research undertaken by Grubb and Wells (1993) who developed indicators to assess the strictness of employment regulation. These authors circumscribe the definition of employment regulation to those forms of working arrangements in which "...an individual employer cannot, even by agreement with his or her own employees, use particular working arrangements or forms of employment contract, without risking legal sanctions or the invalidity of the relevant provisions in the contract" (Grubb and Wells 1993:9). Utilising this definition, Grubb and Wells identify the following forms of employment regulation: restrictions on employers' freedom to dismiss workers, limits on the use or legal validity of fixed-term contracts, limits on the use of temporary work agency, restrictions on weekly hours of regular or overtime work, limits on shift, weekend and night work and limits on employers' use of part-time work. They then proceed to measure the strictness of employment protection legislation by considering: regular procedural requirements to lay off workers (divided in the two sub-classes:

notification procedures and estimated time before notice can start), notice and severance pay for no-fault individual dismissal (divided in notice period and severance pay) and difficulty of dismissal (classified into definition of unfair dismissal, trial period at the beginning of employment before a worker is able to claim unfair dismissal, and extent of reinstatement after a dismissal is sentenced unfair). Initially, variables are expressed either in units of time (days spent on administrative procedures before giving notice to a dismissed worker) or as a score ranging from 0 to 3 (with 3 representing the maximum level of protection). Subsequently, countries are ranked by weighting the variables so that they are expressed in absolute terms. Finally, separate summary indicators are constructed for the three main areas (regular procedural inconveniences, notice and severance pay for no-fault individual dismissals, and difficulty of dismissal) in order to rank the countries also aggregating all the sub-areas.

The method used by Grubb and Wells has merit in that it clearly defines employment regulation. Moreover, the codification of the legislation makes use of absolute indicators such as days and months that are useful in undertaking a comparative analysis.

However, some weaknesses severely constrain the reliability of this instrument. First, in assigning the scores (0 to 3) to provisions concerning individual dismissal, the authors seem to largely follow an arbitrary criterion. The scale used to assess the strength of legislation is not constructed *a priori* so that an objective criterion can be applied, but rather seems to be the result of personal impressions. An example can explain this point. When notification procedures are evaluated, Grubb and Wells assign a score of 1 to Belgium and a score of 0.5 to Denmark (Grubb and Wells. 1993:42). The administrative procedures considered refer to those employees who are dismissed on grounds of poor performance or individual redundancy but without fault. The authors conclude Belgium's legislation is stricter because it

requires provision of a statement of reasons to dismissed employees while the Danish provision does not have such requirement but permits the employee to involve a trade union in negotiation (Grubb and Wells 1993:42). The assignment of the score is questionable as the right to involve a trade union in the dispute may be more restrictive than a simple statement of reasons not followed by further action. Second, the authors quantify only the normative strength of the provisions but no mention is made to other important aspects such as the degree of legislative enforcement.

In 1999, the OECD undertook a new survey on employment protection and labour market performance. The definition used by this study is closely related with the one applied by Grubb and Wells. Employment protection is understood to refer "both [to] regulation concerning hiring (e.g. rules favouring disadvantaged groups, conditions for using temporary or fixed-term contracts, training requirements) and firing (e.g. redundancy procedures, mandated prenotification periods and severance payments, special requirements for collective dismissals and short-time work schemes)" (OECD 1999:50). All the provisions are converted to first level indicators and normalised to range from 0 to 6 with higher values representing stricter regulation.

Both OECD methods significantly advance the construction of reliable methodologies for measuring and comparing labour standards. However, their focus remains firmly on the notion of employment protection neglecting other areas such as minimum wage, workers' compensation, unemployment/employment insurance, occupational health and safety, paid time off and overtime. This omission needs to be addressed.

In this section, previous methods for quantifying labour standards were reviewed. Most of these attempts were found unreliable or lacking specificity for the purpose of this thesis. The next section will continue by analysing a recent methodology specifically devised to quantify and compare labour standards. This

method is of primary relevance for this thesis and will be applied to Australia and Italy in chapters 5 and 8.

3.4.1 Block and Roberts Methodology for Measuring and Comparing Labour Standards

The method utilised in this study relies heavily upon work undertaken by Block and Roberts (1998; 2000; forthcoming). Their method was originally developed to measure and compare labour standards in the US and Canada. Block and Roberts generated the definition of labour standards enunciated in section 2.1[5] (Block and Roberts 1998:7; 2000:277). In pursuance with this definition, labour standards were divided into two categories:

(1) Standards requiring employer monetary payments, either to workers or to a government agency. This category comprises: minimum wage, overtime, paid time off, unemployment/employment insurance and workers' compensation.

(2) Standards that place constraints on employer action *vis-à-vis* employees. This category includes: collective bargaining, non-discrimination legislation (equal employment opportunity/employment equity), unjust discharge, occupational health and safety and advance notice of plant closing/large-scale layoffs (Block and Roberts 2000:277).

Absolute indexes were constructed, based on an *a priori* constructed scale, for each standard ranging from 0 to 10 with 0 indicating the lowest protection and 10 the strongest. The index for each standard consists of two sub-components: a sub-index for each provision that is greater the higher the level of protection provided to the

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[5] For different definition of labour standards see for example Compa 1993; Piore 1990.

workers (substance of the standard) and a weight assigned to each provision within each standard.

The main component of the index is represented by the statutory substance of the standard. This was achieved through coding and arraying provisions that were comparable across Australia and Italy during the 1979-2000 period. An ordinal scale was constructed for each provision based on a technique originally developed by Kochan and Block for coding collective bargaining agreements (Kochan and Block 1977; Block 1978(a); Block 1978(b)). Values were assigned to each provision ranging from 0 (absence of provision) to 10 (strongest protection). For example, in relation to minimum wage laws, the presence of sub-minimum wages was given a score of 0 and their absence a score of 10. Intermediate scores were constructed, for example, in relation to the minimum wage level, which was assigned a score of 10 if it exceeded AU$ 10.5, a score of 8.57 if it was comprised between AU$ 9 and 10.4 and so on (see section 5.5.1). In addition, an "enforcement component" is added assessing the extent to which the enforcement mechanism is favourable to employees. The scoring assigned to the enforcement mechanism was based on the assumption that the broader the rights of appeal, from the decision of the administrative agency which is in charge to enforce the standard, the weaker the enforcement procedure (Block and Roberts. 2000:280). This assumption is supported by the relevant literature (Crowley 1987; Novak and Somerlot 1990; Mullan 1993; Wolkinson and Block 1996; Block 1994; 1997) and is based on two principles: 1) the principle of "justice delayed-justice denied" and 2) the higher likelihood that an agency charged with administering a standard will interpret the standard in a way which is more sympathetic to the statute than the court omitting, for example, non-statutory consideration (Block and Roberts forthcoming). The second and last component of the standard is represented by a weighting scheme within each labour standard such that the sum of the weights for each standard is equal to 1 (Block and Roberts 2000:281). Greater weights were assigned to provisions within each standard that were considered to be the most

important. For example, in relation to minimum wage, the first provision, the minimum wage level, was given a weight of 0.92 as opposed to the other provisions that were assigned a weight of 0.4, 0.2 and 0.2 respectively (see table 5.1). This reflects the fact that the actual monetary level was deemed to be the most significant provision within the minimum wage standard (see table 5.1). The weights used in the present study strictly follow those provided by Block and Roberts (Block and Roberts forthcoming).

In analytical terms the index construction can be expressed as follows:

Let S_{pdj}= the score assigned to provision p in standard d in country j, where $0 \leq S_{pdj} \leq 10$

Let W_{pdj}= the weight assigned to provision p in standard d in country j where $0 \leq W_{pdj} \leq 1$; and let X_{dj} the index score for standard d; then

$$X_{dj} = \sum_{p=1}^{n} S_{pdj} * W_{pdj} \quad \text{with } 0 \leq X_{dj} \leq 10$$

The scales applied to each standard largely reflect those created by Block and Roberts and will be analytically explained in chapters 5 and 8. Changes were made to the original scales to better capture the peculiarities of labour standards in Australia and Italy and to enable comparison. These changes concern minimum wage, overtime, paid time off, collective bargaining and equal employment opportunity/employment equity. The departures from the original scale are usually marginal and will be explained and defended in chapter 6 before proceeding to quantify each labour standard.

In addition, Block and Roberts envisaged the possibility to derive another index: the coverage deflated index. This index would be generated by multiplying the basic index by an estimate of the workforce covered by each standard so that the incorporation of coverage will lower the indexes to the extent that coverage is less

than comprehensive. This would provide more of an "aggregate, societal level measure than the basic index" (Block and Roberts. 2000:278). Symbolically, this can be expressed as $C_{dj}=X_{dj}*V_{dj}$ where C_{dj} is the coverage deflated index score for standard d in country J, X_{dj} is the standard d in country J and V_{dj} denotes the percentage of employees in country J covered by standard d (Block and Roberts 2000). The present study will make use only of the basic index because it was not possible to find reliable and comparable data for each standard for the two countries in 1979 and 2000. Some estimates could be generated for a country but comparable data were not available for the other country or for the same year. Coverage-related issues will be discussed whenever they are relevant (see chapter 5). It should be noted that Block and Roberts encountered similar difficulties and could create coverage-deflated indexes only for four standards: minimum wage, workers' compensation, overtime and collective bargaining for 1998 (Block and Roberts 2000:282). In addition, Block and Roberts acknowledged that discrepancies between basic and coverage-deflated indexes are minimal given the basic nature of the standards considered. Hence, their discussion centred upon the basic indexes (Block and Roberts 2000:282-300).

Other relevant limitations concern the analytical potential of Block and Roberts methodology in relation to the theoretical framework developed by this thesis (see sections 3.2 and 3.3) and the time-frame utilised. The statistical indexes have a restricted explanatory capacity to capture the social and economic forces underpinning changes in labour standards protection over-time. Block and Roberts methodology provides a static picture of labour standards in two distinct years, 1979 and 2000 and numerically quantifies associated changes over time although no reference is made to the following factors: 1) the dynamic interaction between market liberalisation and social protection which, as conceptualised by Karl Polanyi (see section 3.3), is a key factor in determining shifts in employment protection; 2) the nature of changes that affected the structure and dimensions of the modes of Capitalist regulation as described by the French Regulation School (see section 3.3); 3) The

shifts in the power position of Labour, Capital and the State because, as argued in section 3.2, they have the potential to modify the extension of a country's employment protection regime over time and; 4) the strategic choices adopted by the actors at different levels of the industrial relations activity and the associated effects on labour standards (see section 3.2). These limitations are tackled in chapters 6, 9 and 10 which explain the statistical changes in Italy and Australia by applying the theoretical framework constructed in sections 3.2 and 3.3.

Finally, the time frame also restraints, to a certain extent, the reliability of the numerical method. As repeatedly stated, Block and Roberts methodology will be applied to two years, 1979 and 2000, and therefore intermediate changes in labour standards protection, which may have occurred within this period, will be eschewed by the statistical indexes. For example, in Australia labour standards were generally higher in 1993, following the enactment of the *Industrial Relations Reform Act (Cth)*, than in 2000 (see sections 4.3.1 and 4.3.2) though this trend does not emerge from the statistics. This shortcoming is addressed in chapters 4 and 7, which discuss in detail legal changes in employment protection that occurred in Australia and Italy within the time-frame chosen.

3.5 Conclusion

This chapter reviewed theoretical frameworks and quantitative models relevant for the comparative analysis of labour standards over time. In section 3.2, it was found that mainstream industrial relations models have unsatisfactory explanatory capacity. This is mostly due to the narrow focus adopted by these models and to a general reluctance to consider the distribution of power within society and its changes over time. Two theoretical frameworks, Karl Polanyi's "Double Movement" and French Regulation theory, were deemed more significant for this thesis (see section 3.3). They emphasise the dynamic nature of capitalism and provide useful tools to investigate the relation

between market liberalisation patterns and labour standards protection. These two theories will be integrated in this study by Kahn-Freund's insight that legislation is apt to prevail over collective bargaining when the political power of trade unions exceeds their industrial power.

Sections 3.4 and 3.4.1 investigated methods to quantify and compare labour standards. In section 3.4, models partially or fully based on the ratification of ILO conventions (Rodrik 1994; 1999; Cooke and Noble 1998; OECD 1996; 2000) were found to be unreliable, as they fail to consider the actual rate of conversion of ratified conventions into legislation and the degree of enforcement. The Grubb and Wells/OECD method, based on the codification of employment protection legislation, is more accurate although three major weaknesses were found. First, the indicators exclude the level of enforcement of legislation. Second, scores evaluating the strictness of employment protection provisions were largely assigned on an arbitrary basis. The latter point is recognised by the authors themselves who state "The scoring algorithm is somewhat arbitrary" (OECD 1999:115). This weakness is mainly due to the lack of an *a priori* constructed scale to classify the normative substance of legislative provisions. Third, the Grubb and Wells/OECD methodology focuses mainly on termination of employment and collective bargaining neglecting other important aspects of employment protection (see above). Section 3.4.1 considered a more recently developed method which aims to overcome the shortcomings of previous attempts by utilising *a priori* constructed scales which incorporate the degree of enforcement of legislation. A slightly modified version of this method will be used in chapters 5 and 8 to measure and compare labour standards in Australia and Italy in 1979 and 2000.

Having considered major theoretical and methodological issues, chapter four will proceed to investigate the evolution of the institutional framework governing labour standards regulation in Australia over the 1979-2000 period.

CHAPTER FOUR

LABOUR STANDARDS IN AUSTRALIA: THE INSTITUTIONAL FRAMEWORK AND CHANGE

4.1 Introduction

Labour standards can be established through the use of common law, statutory law or awards of industrial tribunals or through a combination of these means. A change in the relevance accorded to each of these sources greatly affects the structure and extension of a country's employment protection system. This chapter describes and investigates the legal and institutional framework regulating the establishment of labour standards in Australia and the changes to this framework in the period between 1979 and 2000.

Labour standards are established and modified through a process that involves the recourse to different sources of regulation. This process is governed by a set of judicial and administrative institutions. Changes affecting the structure of these sources and institutions and their inter-dependence, substantially influence the outcomes generated by a system of labour protection. In Australia, for example, the decreasing reliance on the traditional system of compulsory conciliation and arbitration and industrial tribunals, has resulted in an overall decline in the importance of arbitrated awards and a more pronounced dependence on contractual arrangements. On the other hand, the system of labour protection in Italy, which has traditionally been based on the enactment of statutory legislation, is being increasingly supplemented by regulations legislated directly by the European Parliament (see section 7.4). The analysis of parliamentary legislation, supra-national regulations, awards and common law cases is of limited value in explaining the process of change unless reference is constantly made to the broader context of institutions and sources

of regulation, their interrelations and changes experienced over time. In other words variations in the extension of labour standards protection cannot be exhaustively understood without a description of the changes that take place at the institutional level.

The main finding of this chapter is that the sources of labour standards regulation changed dramatically in Australia over the period studied. While in 1979 labour standards were mainly established through arbitrated awards, in 2000 the Australian employment protection system relied more on provisions contained in legislation. This shift was part of a broader change that affected the overall legal framework regulating industrial relations in Australia. The overriding source of change was the decentralisation of the bargaining locus from the industry to the enterprise and individual levels. The latter development, it is argued, has the potential to expand the scope of the traditional contract of employment and the use of common law. Yet, despite the overarching change brought to the Australian system of labour protection, the new institutional framework is the expression of the interaction of the two opposites described in section 3.3 and captures well the tension between the perceived need to increase the reliance upon the market and the necessity to shelter Labour. While the move away from awards in favour of contractual agreements negotiated at enterprise or individual level aimed to expand the domain of the market, statutory legislation regulating areas like termination of employment, equal pay for work of equal value, parental leave, equal employment opportunity/employment equity and redundancy was introduced, for the first time in Australia, to countervail the market itself and allow capitalism to reproduce. This countermovement, hypothesised by Polanyi (1944) and expanded upon by French Regulation theory, is enshrined in the institutional features of the new system of employment protection and has developed continuously during the period of transition.

This chapter is divided into two main parts: the first describes the sources of regulation and institutions governing the establishment of labour standards in Australia in 1979 and the second investigates the changes that occurred over the following two decades. The first part begins with an analysis of the hierarchically most relevant source: the Constitution and the powers conferred by this document to the Federal and State Parliaments to regulate conditions of employment. The second section investigates the three main sources of labour standards regulation: statutory law, common law and Australia's unique system of compulsory conciliation and arbitration. The third section focuses on the arbitration system and the role of the Federal industrial tribunals in establishing legally enforceable conditions of employment. The fourth section discusses the "traditional" relation between these sources of labour standards regulation.

The second part of the chapter initially investigates major changes that affected the system of compulsory conciliation and arbitration in the late 1980s to the mid 1990s and which resulted in a declining reliance on arbitrated awards and industrial tribunals and an increased use of contractual agreements. This section also analyses the impact these changes had on labour standards regulation. The last section ends by discussing the increasing recourse to protective legislation by the Federal Parliament during the 1980s through a sustained use of the constitutional External Affairs and Corporations powers and the subsequent decline in the use of these powers that occurred under the Coalition (Liberal-National) government in the 1990s.

4.2 Labor Standards Regulation in Australia: The Traditional Framework

4.2.1 The Constitution and the Federal and State Systems of Labor Standards Regulation

The Federal system of labour protection in Australia was based on the operation of compulsory conciliation and arbitration for almost 90 years. Under this system, labour standards were contained in arbitrated awards of industrial tribunals. Unlike most civil law countries, the use of legislation had been marginal in Australia. This was due mainly to constitutional restrictions limiting the capacity of the Commonwealth to legislate on a range of matters and to override the legislative power of the States. However, starting from the early 1980s Federal governments have been more prone to use legislation. This trend was facilitated by a series of High Court decisions along with a more sustained use of "alternative" constitutional powers.

Under the Constitution the legislative power is shared between the State and the Federal Parliaments. While the power of the States to pass legislation, including industrial relations legislation, and laws regulating labour conditions is plenary, the powers of the Federal Parliament are limited. The Federal Parliament is granted *exclusive* jurisdiction over issues such as the "seat of government of the Commonwealth" (s. 52) and "duties of customs and of excise" (s. 90), while some other powers, such as those listed in section 51 are *concurrent*, which implies that the Commonwealth and the States can concomitantly legislate on the same matters.

This division of powers is highly relevant for this thesis as the heads of power contained in section 51 are used by the Federal Parliament to enact industrial relations laws, and their restricted applicability has often prevented the Commonwealth from directly legislating on labour conditions (Stewart 2001; Quinlan 1991; 2000; Creighton and Stewart 2000; Williams 1998). The concurrent nature of the powers listed in section 51 has produced a high degree of confusion and litigation between

States and Federal governments. As a result, the High Court, the body ultimately responsible for interpreting the Constitution, has been frequently involved in the resolution of disputes concerning the constitutional legitimacy of Federal labour laws. These developments made this institution a major contributor to Australian labour law (Creighton and Stewart 2000; Williams 1998; Bennett 1994).

On the other hand, the plenary legislative power of the States is sanctioned by section 107 of the Constitution, which holds that the power of the Colonial Parliaments "shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth". Unlike the Federal Constitution, the Constitution of each State confers general and broad legislative powers to the States' Parliaments on issues such as industrial relations and labour standards regulation. For example, section 5 of the *Constitution Act 1902* (NSW) proclaims that "The legislature shall, subject to the provisions of the Commonwealth of Australia Constitution Act, have power to make laws for the peace, welfare and good government of New South Wales in all cases whatsoever". In other States the wording of the statutes is slightly different, but the substance of these documents remains the same in conferring plenary legislative powers. As a result, protective legislative provisions concerning occupational health and safety, workers' compensation, unfair dismissal and working hours were traditionally regarded as the domain of the States, while the application of Federal legislation on these matters was usually restricted to Commonwealth employees.

However, the Commonwealth has from time to time taken over fields of industrial relations and employment regulation, with this process becoming more prevalent during the mid 1980s-early 1990s and attenuating with the 1995 election of the Coalition government and the enactment of the Federal *Workplace Relations Act (1996)(Cth)* (see for example Creighton and Mitchell 1993; Creighton and Stewart

2000; 1997; McCallum and Pittard 1995; Kirby 1989). The Federal *Industrial Relations Reform Act (1993)(Cth)* and the *Industrial Relations Amendment Act (1994)(Cth)* contained provisions imposing obligations on employers in relation to equal pay, unfair dismissal, redundancy, parental leave and discrimination in employment. The expansion of the Commonwealth's jurisdiction at the expense of the States was mainly due to the High Court's expanded interpretation of the constitutional powers, the increasing recourse to powers other than the "industrial power" and to the broad construal of section 109 of the Constitution (Williams 1998 and 1997; Kirby 1989). This section regulates the conflict between Federal and State laws and holds that Commonwealth laws override inconsistent State laws.

Despite the fact that the Commonwealth does not possess a specific power to legislate directly on issues such as industrial relations and labour conditions, some of the powers contained in the Constitution enable the Commonwealth to establish a Federal system of labour protection. These powers are: the Industrial power, the Corporations power, the Trade and Commerce power, The External Affairs power and the Taxation power. All these powers are *concurrent*.

The Industrial power is the most relevant constitutional power in relation to labour standards. Section 51(xxxv) of the Constitution enables the Commonwealth to make laws with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state". The scope of the Industrial power is limited. Section 51(xxxv) only empowers the Commonwealth to create the mechanism for the prevention and settlement of certain types of dispute by means of conciliation and arbitration. This led to the establishment of a separate body, the current *Australian Industrial Relations Commission* (AIRC), which is charged with the duty to prevent and settle disputes. This institution is provided with different instruments, particularly arbitrated awards and National Test Cases that are utilised to establish and regulate conditions of employment. Both

arbitrated awards and National Test Cases are of primary relevance as sources of labour standards regulation and, as it will be seen in this chapter, have been widely used to establish uniform and legally enforceable conditions of employment across the country.

A clear example of the indirect approach the Commonwealth is forced to take in relation to labour standards regulation is the determination of minimum wage rates. Pursuant to section 51(xxxv) the Federal government cannot directly legislate the minimum wage rate. Rather, it can attempt to persuade the Federal industrial tribunals to adopt its preferred policy. This is usually achieved through National Wage Cases (now called the Living Wage Case). Although a Living Wage Case is technically a hearing convened to settle an interstate industrial dispute in one or more selected industries, it is used to allow the Federal government to put submissions to the arbitral tribunal indicating the principles that should be followed by this body to fix or vary minimum wage rates in the awards sector.

Section 51(xxxv) further constrains the access to the Federal arbitration machinery. These limitations concern the nature of the disputes that must be "industrial" in character and extend "beyond the limits of any one State" (interstateness). The latter requirement is particularly important as it means that the Commonwealth must share legislative responsibility with the States. Historically, both requirements have generated a plethora of constitutional challenges against the jurisdiction of the Federal industrial tribunals that have questioned whether a specific submission satisfied the requirement of interstateness and if a particular dispute was "industrial". It is common for Federal tribunal decisions to be challenged on the basis that they fall outside the scope of section 51(xxxv) (Creighton and Stewart 2000; Williams 1998; Sykes and Glasbeek 1972; Creighton et al. 1993; McCallum and Pittard 1994).

Although section 51 (xxxv) is the most relevant source of power concerning labour standards regulation, the Constitution contains other heads of power that have been used to enact Federal protective legislation and, in some cases, to override the limitations related to the Industrial power. Two powers are of particular importance: the Corporations and the External Affairs powers. Section 51(xx) empowers the Commonwealth to make laws with respect to "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth". The general and ambiguous nature of the wording of section 51(xx) has produced many High Court decisions, clarifying the characteristics of "foreign", "trading" and "financial corporations" and the activities that can be regulated through the use of this power (for excellent reviews of these cases see for example Williams 1998; Blackshield and George 1998). The restrictive interpretations adopted by the High Court, during the early stages of Federation, prevented the Commonwealth from making an extensive use of this power for most of the 20th century. However, this situation has recently changed due to broader interpretations concerning the scope of this power.

The first significant use of the Corporations power in relation to labour standards dates back to 1974 with the enactment of sections 45D and 45E of the *Trade Practices Act (1974)(Cth)*, which protect corporations from various forms of "secondary boycotts". Since then this power has been increasingly employed to modify the system of labour relations and labour standards regulation. For example, in reliance on section 51(xx), the *Industrial Relations Act (1993)(Cth)* contained provisions enabling "a constitutional corporation" to enter into collective agreements without the involvement of a trade union (Enterprise Flexibility Agreements). The *Workplace Relations Act (1996)(Cth)* also contains provisions enacted through the use of this power. Part VIB Division II and Part VID Division II of this Act, for example, enable a "constitutional corporation" to enter into collective or individual agreements with its employees, without any need for these agreements to be related to the prevention or settlement of an interstate dispute. In addition, the Corporations power

also underpins provisions dealing with unfair contracts, victimisation and unfair dismissal which were inserted in the *Workplace Relations Act (1996)(Cth)* (see section 4.3.1 and Stewart 2001; Williams 1998; Williams and Simpson 1997; Ford 1997; Creighton and Stewart 2000).

Another constitutional option to the Industrial power is the External Affairs power (section 51(xxix)). As with the Corporations power, the exact meaning of the words 'External Affairs' and the matters that can be dealt with by resorting to this power have been tested by the High Court on several occasions. Although the scope of this power remains contentious (for excellent reviews on High Court cases concerning the scope of the External Affairs power see Williams 1998; Blackshield et al.1998), the High Court, in developing the doctrine concerning the External Affairs power, held that this power extends to any matter which is the subject of a treaty or other international instruments, or any matter of international concern even if that matter does not fall directly within the Commonwealth legislative powers[6]. By so doing, the High Court legitimated the use of this power to enact protective Federal labour legislation in observance of international obligations. In the field of employment standards these obligations usually refer to requirements arising from the ratification of ILO conventions. This head of power was used widely in the 1993 *Indu rial Relations Act (1993)(Cth)* to pass legislation sanctioning various forms of employment discrimination and imposing obligations on employers in relation to minimum wages, equal pay, termination of employment, parental leave and leave to care for immediate family members, irrespective of any connection with interstate "industrial disputes" or federal awards or agreements (Pittard 1994; Ford 1994; Ludeke 1994; Moore 1994). The ILO Termination of Employment Convention, for

[6] The process that led to this interpretation started in the early 1970s and was consolidated in the mid 1980s to the mid 1990s.

example, was ratified by the Federal government in 1993 and was converted into Federal legislation through the use of the External Affairs power in the same year.

The Constitution also provides for two other heads of power that have been used to indirectly regulate certain aspects of employment conditions. These powers are the "Trade and Commerce" power and the "Taxation" power. Section 51(i) allows the Commonwealth to make laws with regard to "trade and commerce with other countries and among the States". This power has not been extensively utilised to enact protective labour legislation, mainly because the scope of section 51(i) has begun to be tested only recently (Williams 1998:126). To date, this power has been employed to extend the ambit of the Federal arbitration system to certain groups of employees such as flight crew officers and maritime workers. Matters pertaining to these employees may be brought before the Federal tribunal even in the absence of an interstate dispute. Finally, the Taxation power, in section 51(ii) of the Constitution, enables the Commonwealth to make laws with respect to "taxation". This power has a very limited applicability and, in the field of employment protection, has only been used to require employers to contribute to superannuation schemes on behalf of their employees (Stewart 2001; Williams 1998). The Taxation power was used in 1992 to institute a superannuation guarantee through the *Superannuation Guarantee Act* and the *Superannuation Guarantee (Administration) Act*. This power was also utilised in 1990 to impose a national training levy on employers through the same two acts (Teicher and Grauze 1996:61-63; Dabscheck 1995:48-49).

In summary, the features of the Federal system of labour protection operate within the shifting parameters of the Constitution. Labour standards can be established only within the limits of section 51 of the Constitution and in particular through the use of the Industrial, Corporations and External Affairs powers. Different constitutional powers are associated with different sources of labour standards regulation. The Industrial power is associated with conciliation and arbitration and

labour standards are contained in arbitrated awards. By contrast, the Corporations and the External Affairs powers enable the Commonwealth to utilise statutory legislation. Federal governments had traditionally relied on the Industrial power to regulate industrial relations and, indirectly, labour conditions. This saw the creation of a system of labour protection largely dependent on the determinations issued by independent industrial tribunals. The ascent of compulsory arbitration and conciliation has also hampered the recourse to parliamentary legislation for most of the century. This was mainly due to the fact that the Corporations and the External Affairs powers have only recently begun to be extensively tested and their use has been accompanied by a sustained level of contentiousness. The next section will analyse the sources through which labour standards are established.

4.2.2 Sources of Labour Standards Regulation

Labour standards can be established through common law, statutory law and awards. These sources are not mutually exclusive but rather the system of labour protection at any time is influenced by their interaction. Thus, for instance, while the majority of workers at a certain workplace might have their entitlements determined by awards, most of the remainder, in particular professional and managerial employees, might have their employment conditions regulated by individual contracts of employment. Furthermore, changes in the perspective endorsed by one of these sources, in relation to a particular issue, can influence the approach taken by other sources. For example, the long-standing reluctance entrenched in common law to impose obligations upon the employer in relation to both procedural and substantial fairness in dismissing an employee, was partially reversed after awards began incorporating provisions protecting employees from dismissals that were "harsh, unjust or unreasonable" (see for example Creighton and Stewart 2000; 1993; Moorhose and Punch 1994; Mitchell and Naughton 1989). In *Gregory v. Philip Morris Ltd.* the Federal Court held that federal awards clauses prohibiting harsh, unjust or unreasonable dismissal, should be

incorporated into individual employment contracts (Pittard 1995; Coulthard 1996; Chapman 1997)[7]. This decision compelled employers, bound by such awards, to extend the duty of procedural and substantial fairness also to those employees under individual contracts. As common law, statutory law and awards are interwoven, it is important to analyse not only their institutional features but also their inter-relationships and evolution over time.

The common law of employment refers to the body of rules initially developed by the English Judiciary during the 18th and 19th century and adopted by the Australian Colonies as part of their British heritage (for a general review on common law principles see Selznick 1969; for their application to Australia see Creighton and Mitchell 1995; Smith 1992). Common law principles do not usually lay down specific standards; instead they tend to impose a series of general obligations upon employers and employees that can become binding to the parties as "implied terms". Common law also regulates the remedies available in the event of violations of these or other contractual duties. Normally, these principles only apply to those areas of employment that are governed by neither expressed or implied agreement between the parties, nor by legislation or awards. However, it is widely accepted that the values underpinning common law principles have exerted their influence also on other fields of jurisprudence such as the interpretation of statutes and awards (Creighton and Stewart 2000:10 and 234; Smith 1987).

The most important obligations, for the purpose of this thesis, are those imposed upon the employers. Through history a series of implied obligations have been developed by the Judiciary that constrain the freedom of employers to deploy their workforce. There are four main duties. The first duty relates to the employer's

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[7] This decision was overruled in 1995 in *Byrne v. Australian Airlines Ltd.* Nevertheless it still represents a good example of the mutual influence exercised by different sources of labour standards regulation (Coulthard 1996).

obligation to afford employees the opportunity to earn wages by providing work. In the area of employment termination, the second principle establishes (though with a certain degree of ambiguity) that an employer, unless otherwise specified by the contract, cannot lay-off a worker when work is unavailable nor suspend him/her without pay on disciplinary grounds (Creighton and Stewart 2000; McCallum 1989). The third obligation prevents an employer from standing down or dismissing employees for whom work cannot be provided, whether because of business downturn or because of factors outside the employer's control such as natural disasters or industrial action undertaken by other workers (see *Devonald v. Rosser (1906) 2 KB 728* as reproduced by Creighton et al. 1993). In the field of occupational health and safety, the fourth obligation relates to the employer's duty of care. The precise meaning of the employer's duty of care has been defined in a number of cases. The clearest definition is contained in the *Hamilton v Nuroof (WA) Pty Ltd* (1956) decision, which held that

> The duty...is that of a reasonably prudent employer and it is a duty to take reasonable care to avoid exposing employees to unnecessary risks of injury. The degree of care and foresight required from an employer must naturally vary with the circumstances of each case. (*Hamilton v Nuroof (WA) Pty Ltd (1956)* as reproduced in Creighton and Stewart. 2000:440).

Common law principles also establish that this duty must be performed on a continuous basis. Along with these four main obligations, the common law also imposes other duties. These duties are relatively new and their prescriptions largely reflect similar obligations contained in other sources of regulation such as awards and legislation. Amongst these obligations stand out: the duty not to damage or destroy trust and confidence at the workplace by means of unjust accusations or harassment (McCarry 1998), the duty to provide medical assistance and the duty to exercise every discretionary power "reasonably" (Creighton and Stewart 2000). The latter obligation is particularly relevant in the area of personal privacy as the development of new

systems of surveillance poses serious problems concerning the extent to which an employer should be allowed to collect information about a prospective or existing employee (for a general overview about the problems associated with surveillance and record-keeping see Sempill 2001; McCallum and McCarry 1995).

The obligations imposed by common law are few and general in their specifications. In comparison with other common law countries, such as the US or Britain, Australia's common law of employment has traditionally been under-developed. This is because most labour standards in Australia have been established through arbitrated awards and, to a lesser extent, through statutory legislation and this has contributed to reduce the relevance of common law (Chin 1997; Ford 1994).

By contrast, parliamentary legislation plays a substantial role. Unlike common law, the statutes establish detailed standards that are usually of broad application. Moreover, legislation creates labour standards which are more lasting and less exposed to judicial interpretation. Until recently, the enactment of legislation has been mainly the prerogative of the States. Due to constitutional restrictions (see section 4.2.1), States have been more able to use this tool than Federal governments. For example, legislation granting minimum entitlements in relation to annual leave dates back to 1944 in New South Wales and 1973 in the Australian Capital Territory[8]. The same is true for long service leave with New South Wales and Western Australia provided with protective laws since 1955 and 1958 respectively[9].

The Commonwealth has also been hesitant to enact legislation even in respect of those matters such as discrimination and equal employment opportunity that can be more easily regulated by recourse to powers other than the Industrial. The core of Federal anti-discrimination laws is constituted by the *Racial Discrimination Act*

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[8] see *Annual Holidays Act* 1944 (NSW); *Annual Leave Act* 1973 (ACT).

[9] see *Long Service Leave Act* 1955 (NSW); *Long Service Leave Act* 1958 (WA).

(1975)(Cth), the *Sex Discrimination Act (1984)(Cth)* and the *Disability Discrimination Act (1992)(Cth)*. All these laws derive their constitutional legitimacy from the External Affairs power and apply to the States (see further Creighton and Stewart 2000:281 and chapters 5 and 6). States legislation is often more comprehensive than Federal law in defining the grounds upon which anti-discriminatory action can be initiated. For example, all the States, except for Tasmania, make unlawful discrimination on the ground of age while this area is not covered by Federal legislation. Sexuality is another matter where Federal legislation falls short of the States. With the exception of Western Australia and Tasmania, all the States prohibit discrimination based in general on "sexuality", with this term being defined in various ways. The incompleteness of Federal anti-discrimination law is mainly due to the Commonwealth's reliance upon the "External Affairs" power to pass legislation that applies to the States. As a result, and in order to avoid constitutional challenges, the content of Federal anti-discrimination laws must be very similar to the prescriptions contained in ratified International conventions.

The last but most important source of labour standards regulation, at least until recently, is compulsory conciliation and arbitration. The peculiarities and the complexity of this source are such that a specific section of this chapter is dedicated to the description of the awards system of labour protection.

4.2.3 Labour Standards, Compulsory Conciliation and Arbitration and the Role of the Australian Industrial Relations Commission

For more than 80 years, arbitrated awards had been the main source of labour standards regulation. The historical foundations of this system of labour protection date back to the turn of the century when compulsory conciliation and arbitration was adopted by the Commonwealth and the States and became the main tool governing industrial relations. While the events that led to the establishment of this system of

labour standards regulation fall beyond the scope of this thesis (for comprehensive reviews see for example Mitchell 1989; Macintyre 1989; Markey 1989; Plowman 1989; Bennett 1994), it is important to note that the relevance of the Federal system of compulsory conciliation and arbitration gradually increased from the time the first *Conciliation and Arbitration Act* was enacted in 1904. This Act established an independent Court of Conciliation and Arbitration provided with extensive powers to prevent and settle interstate industrial disputes by means of conciliation and arbitration.

Initially, the activities of the industrial tribunals were restrained by the High Court's restrictive interpretations of Section 51(xxxv) brought about by challenges to the Federal jurisdiction advanced by employers and the States (Plowman 1989; Bennett 1994; Creighton and Stewart 2000). However, the jurisdiction of the Federal Tribunal broadened over time, mostly because of expansive interpretations of section 51(xxxv). For example, in 1914 the High Court accepted that participants could use "paper disputes" to attract the jurisdiction of the Federal Court of Conciliation and Arbitration[10], while in 1935 it was held that a "dispute" does not only refer to open conflict between the parties but it can also arise in the context of "agreement, difference or dissidence"[11]. These and other decisions (for a summary see for example Creighton and Stewart 2000; 1993; Fox, Howard and Pittard 1995) encouraged a more interventionist role by the Federal government and contributed to the establishment of compulsory conciliation and arbitration as primary tools to regulate labour conditions and labour relations.

As previously mentioned, the Federal institution, which has traditionally established "legally enforceable" labour conditions, is the current Australian

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[10] see *R v Commonwealth Court of Conciliation and Arbitration; Ex parte GP Jones* (1914) 18 CLR

[11] *Metal Trades Employers Association v Amalgamated Engineering Union* (1935) as reproduced in Creighton et al.1993:380-381.

Industrial Relations Commission[12]. The Commission performs both conciliatory and arbitral functions. Conciliation can be defined as an assisted process through which disputes between employers and employees are settled by negotiation. This process involves the intervention of a third party, the Commission, which is vested with the role of mediator. Arbitration, by contrast, involves a more formal and adjudicatory role played by the Commission, whose determinations are binding for the parties and legally enforceable.

The core of this system lies in the fact that the matter in dispute can be referred to an arbitrator and that the decision of this referee must be accepted by the parties (Creighton and Stewart 2000; 1993). The binding nature of the determinations issued by the Commission, when acting as an arbitrator, raises a problem concerning the enforcement procedure. The Commission in Australia can only perform non-judicial powers while the enforcement procedures are the exclusive domain of the Judiciary. This arrangement, known as the separation of powers doctrine, is the result of constitutional inconsistencies and High Court cases.

Unlike the US and the civil law countries, the Australian Constitution does not contain a strict separation of legislative, executive and judicial powers (Williams 1998). This ambiguity enabled the Commonwealth Court of Conciliation and Arbitration to perform judicial and non-judicial functions for more than 50 years and this arrangement generated great controversy. This situation was brought to an end in 1956 when the High Court, in the *Boilmakers* decision (*R v. Kirby; Ex Parte Boilmakers' Society of Australia* (1956)), held that the Conciliation and Arbitration tribunals' principal function was to settle disputes by imposing new obligations upon

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[12] This tribunal changed name few times. It was initially named the Commonwealth Court of Conciliation and Arbitration and subsequently rebaptised the Commonwealth Conciliation and Arbitration Commission and the Australian Conciliation and Arbitration Commission. It is currently called the Australian Industrial Relations Commission (AIRC).

the parties, with this function being legislative rather than executive. As a result, the High Court ruled that the tribunal could only exercise non-judicial powers. This necessitated enforcement powers to be transferred to different and "external" tribunals. This decision is highly relevant for this thesis because, as will be seen in the next two chapters, by separating the judicial and non-judicial functions the High Court made the enforcement procedure external to the arbitral tribunals, and this significantly reduced the extension of protection accorded to those labour standards regulated through arbitrated awards (see chapters 5 and 6).

For present purposes, the most important features of this system of labour protection and industrial relations regulation were: the compulsoriness of conciliation and arbitration, the independent nature of the industrial tribunals and the inclusion of the notion of "public interest" in the determinations issued by the arbitrators. Under the repealed *Conciliation and Arbitration Act (1904)(Cth)* and its successors, the recourse to conciliation and, if this failed, to arbitration was compulsory once a dispute was notified (Niland 1978). This does not mean that all the disputes were settled by conciliation or arbitration. Minor issues were usually accommodated between the parties without the involvement of industrial tribunals. However, once a dispute was formally notified, the process became compulsory in the sense that the tribunal could compel the parties to participate to the dispute resolution process and impose a legally binding outcome.

The second important feature of compulsory conciliation and arbitration relates to the status of the industrial tribunals. The arbitration tribunals are independent of the social partners in Australia as they are publicly funded. Furthermore, the disputants cannot freely choose their arbitrators. This contrasts with practices, common in other Anglo-Saxon countries (typically the UK), of leaving to the parties the freedom to appoint mutually acceptable arbitrators and often to pay for their services. Finally, and unlike other nations, arbitral tribunals in Australia are

sensitive to the outcomes of the disputes they are charged with resolving. For in determining the outcome of a dispute, the tribunals must also safeguard the public interest. Thus, during the process of arbitration the tribunal must find a solution that is acceptable for the parties and that serves or at least is not contrary to the interests of the broader community (see further Isaac and McCallum 1992).

The instruments available to the Federal tribunal for establishing and regulating labour standards are awards and national test cases. As previously observed, the end product of the arbitration process is an award. Awards are legally binding documents containing clauses describing terms and conditions of employment. Until recently, awards could regulate a wide array of employment conditions, including: wages, hours of work, leave, overtime, form of hiring, termination and grievance procedures. These conditions were usually minima only and were often superseded by individual contracts or collective agreements granting more generous entitlements.

Under this system, employees could be covered by one or more awards. Generally, most employees had their conditions of employment determined by at least one major award detailing the basic labour standards in broad industries, such as construction, mining and metallurgy. These awards constituted the basis for secondary awards, with the latter regulating conditions of employment for specific groups of employers and employees within an industry. The enactment of major awards helped create considerable uniformity of conditions of employment across Australia, to the point that it is possible to identify basic *standards*, which were common to all the major awards, regulating matters such as wage and overtime rates and paid time off (Creighton et al. 1993; Deery and Plowman 1991:388-391; CCH 2000(c); see also chapters 5 and 6). Such uniformity extends also to State awards. There are two principal reasons why this is so. First, section 109 of the Constitution applies to all Federal laws including awards (see section 4.2) and in the event of conflict Federal

awards normally override inconsistent State awards (Williams 1998; Williams 1997). Second, the Federal system has traditionally exercised a considerable influence on State tribunals in relation to key issues such as wages and overtime rates, working hours and various categories of leave. State tribunals have tended to follow the decisions of the Federal body and this trend has created "a national system of industrial relations [and labour standards regulation] which predominantly reflects the outcomes of the federal industrial relations process" (Creighton et al. 1993:698).

The other mechanism through which labour standards can be established, although indirectly, is national test cases. National test cases are initiated by the parties, usually the Australian Council of Trade Unions (ACTU) or the Federal government, in order to establish new standards of employment that can be subsequently included in awards. National test cases extend the legislative functions of the Commission as they overcome, to a certain extent, the limitations imposed by the Constitution upon the scope of the Federal arbitration tribunals. As previously mentioned (see section 4.2), the nature of the Australian Constitution is such that the Commission cannot lay down standards of general applicability as its intervention is conditional upon the existence of a "dispute". National test cases are formally disputes created for jurisdictional purposes in order to extend the scope of the Commission. The standards established by national test cases are of general applicability as they cover large segments of the workforce and serve as benchmarks for other awards. National test case decisions include substantive standards and principles that should be implemented by federal tribunals in establishing standards. National test case decisions formally apply only to the parties which are part of the created dispute and therefore, in order to become fully operative, these standards must be subsequently incorporated in other awards. National test cases are tools of primary relevance for labour standards regulation and they have greatly contributed to the creation of a homogeneous system of labour protection across the country.

National test cases have been mounted in relation to a wide range of matters, such as termination of employment, various forms of leave and wages. The most striking example of the relevance of this instrument is probably represented by the system of wage fixation that began operating in Australia soon after Federation in 1901. Every year a Living Wage Case is heard by the Federal Commission. Technically a Living Wage Case consists of an application to vary the basic rates of pay contained in a number of key awards. The submission of the unions, who are invariably the applicants, is lodged by the ACTU while the employers are usually represented by the Australian Chamber of Commerce and Industry (ACCI). Commonwealth and State governments also intervene, as do a number of other participants. The most relevant arguments, influencing the decision of the Commission, centre upon the capability of the economic system to sustain any general wage increase and the size of such an increase. Other important issues concern the conditions which must be satisfied in order to gain access to any increase awarded by the Commission. For example, groups of employees who have obtained pay increases through enterprise bargaining may be excluded. The hearings can extend over a period of weeks or months. Once a decision has been made, the outcomes "flow on" to other awards in the Federal system. They are also adopted by State awards usually through a series of State wage cases.

4.2.4 Awards, Statutory Law and Common Law: The Traditional Framework

The interaction between common law, statutory legislation and compulsory conciliation and arbitration created a relatively stable system of labour standards regulation in Australia that lasted for nearly 90 years. As previously noted (see section 4.2.2) these three sources are interwoven, although compulsory conciliation and arbitration has traditionally played a dominant role. Since Federation was achieved in 1901, the relevance of compulsory conciliation and arbitration has steadily increased

at both Federal and State levels and this process has contributed to the marginalisation of statutory legislation and common law. For example, in 1968 the proportion of the workforce whose conditions of employment were determined solely by awards was 88.7% and in 1985 it was still 85% (ABS 1991). One of the factors that help to explain why compulsory conciliation and arbitration superseded other sources of regulation lies in the uniformity of awards conditions. Since its establishment, the Court of Conciliation and Arbitration has sought to grant consistent conditions of employment to different groups of employees. The principle of uniformity was supported by one of the keenest proponents of the insertion of section 51(xxxv) in the Australian Constitution, Justice Higgins, who in 1919 stated: "[Awards] must be consistent one with the other, or else comparisons breed unnecessary restleness, discontent, industrial trouble" (Higgins 1922:191). This principle was promptly adopted by the arbitration tribunals and made this body a de-facto legislator.

The supremacy of arbitration became fully operational during the early 1930s (see Creighton and Stewart 2000; 1993; Bennett 1994) and lasted for more than 50 years. During this period, common law and statutory law played a subordinate role (Chin 1997; Ford 1994). The ascent of compulsory conciliation and arbitration particularly affected the relevance of common law, whose role in Australia has traditionally been limited to the integration of the gaps left by the other two sources (Creighton and Stewart 2000:234; Ford 1994). The complementary role of common law is performed in two ways: directly by imposing obligations on both employer and employee (but in particular on the employee), and indirectly by interpreting the sometimes unclear provisions contained in awards and statutes. In imposing obligations, common law can act in tort as for the general duty not to inflict harm through negligent conduct, in equity as with some employees' fiduciary duty to protect their employers interest or in restitution as with the obligation to repay money erroneously transferred by one party to the other. In integrating awards clauses, common law has been utilised for interpreting awards prescriptions. For instance, the

question of employees' freedom to use or disclose the employer's trade secrets is generally regulated, in the absence of specific provision on the issue, by a combination of implied terms and the equitable duty of confidence (Creighton and Stewart 2000). Common law also provides for terms and definitions that are used in statutes.

The dominance of arbitration also affected the significance of legislation. This is particularly evident at Federal level where, as of December 1979, the only pieces of legislation related to labour standards regulation were the *Racial Discrimination Act* (1975) and the 1904 *Conciliation and Arbitration Act(Cth)*. A similar situation could be observed at State level where, in spite of the absence of Federal constitutional constraints, protective statutes were rarely enacted and their standards usually provided for minima only.

The system of labour standards regulation, hinging as it did on the operation of compulsory arbitration and conciliation, lasted until the mid 1980s, when a process that aimed to substantially decentralise labour relations began. The next two sections will investigate changes that took place in the last two decades of the twentieth century and significantly altered the institutional features of labour standards regulation in Australia.

4.3 The Transformation of the Institutional System of Labour Standards Regulation

Beginning in the late 1970s, a vigorous debate began in Australia around whether compulsory conciliation and arbitration should be replaced by a more decentralised system of labour relations. While this debate led to a substantial reduction in the relevance of awards, paradoxically it was accompanied by an increasing reliance on statutory law as a means of standards setting. The singularity of this "double" movement and its effects on labour standards are such that the next two sections will

consider the two processes separately: section 4.3.1 will investigate the fall of compulsory conciliation and arbitration, while section 4.3.2 will analyse the uncertain rise of statutory legislation.

4.3.1 The Demise of Compulsory Conciliation and Arbitration and the Rise of Enterprise Bargaining.

At the beginning of the 1980s, the system of industrial relations and labour standards regulation in Australia was still firmly based on the functioning of the *Conciliation and Arbitration Act (1904)(Cth).* By 1987, this Act had been amended more than 80 times. Nevertheless, it remained the core of the Australian system of labour relations. As at May 1985, for example, the Australian Bureau of Statistics estimated that 82.4% of employees had their conditions of employment regulated by awards or determinations of the various State and Federal industrial tribunals (ABS cited in Creighton and Stewart 1990:43).

However, starting from 1987 this system underwent a dramatic revision aimed at reducing the relevance of conciliation and arbitration in favour of contractual arrangements. Two distinct phases of this process can be identified: a first one encouraging the recourse to enterprise bargaining while retaining compulsory conciliation and arbitration, and a second more dramatic one drastically reducing the scope of industrial tribunals and forcing employers and employees to enter into contractual agreements. This process started with the enactment of the *Industrial Relations Act (1988)(Cth),* followed by the *Industrial Relations Reform Act (1993)(Cth)* and the *Industrial Relations Amendment Act (1994)(Cth),* and was completed by the *Workplace Relations Act (1996) (Cth).*

In 1988 the Hawke government initiated the process of labour relations restructuring with the enactment of the *Industrial Relations Act (1988)(Cth).* This Act attempted to shift the emphasis of the system from conciliation and arbitration to

collective bargaining. Although the *Industrial Relations Act (1988)(Cth)* was little more than a "consolidating measure" (Deery and Mitchell 1999; Creighton and Stewart 1990:39; Stewart 1989; Mitchell 1988), it represented the first step in what subsequently became the most substantial reform of the legislative framework regulating industrial relations and labour standards since 1904.

One of the few innovations, that distinguished this Act from the former *Conciliation and Arbitration Act (1904)(Cth)*, was that it allowed for certified agreements (*Industrial Relations Act (1988)* sections 115 to 117). Unlike awards, certified agreements envisaged a more indirect role played by the Commission and their legal features resembled, to a certain extent, those of collective agreements negotiated in Continental Europe. However, the Commission retained extensive power during the certification process as it could refuse to certify an agreement if it was "contrary to the Public interest". Moreover, reliance on certified agreements was restricted only to the "parties of an industrial dispute" and this prescription made it very difficult for an employer to avoid the involvement of trade unions (Stewart 1989:113; Creighton and Stewart 1990:70). This, coupled with the considerable discretionary power left to the Commission, made these agreements very similar to the consent awards contained in both the *Industrial Relations Act (1988)(Cth)* and the former *Conciliation and Arbitration Act (1904)(Cth)* (Stewart 1989:113). The *Industrial Relations Act (1988)(Cth)* did not substantially modify the legal framework regulating industrial relations and labour standards but rather, by introducing certified agreements, it started to address the demands of the proponents (employers associations, neo-classical economists and to a certain extent trade unions) for a more decentralised and 'flexible' system of industrial relations and labour standards regulation.

The deregulatory process continued in subsequent years, although the existence of compulsory conciliation and arbitration was not seriously threatened. In

1992, for example, the Commission's discretionary power in relation to the registration of certified agreements was slightly curtailed, but the emphasis of the system remained firmly on compulsory conciliation and arbitration (Creighton 1994; Pittard et al. 1995). During this period, the most important agent of reform was the High Court of Australia which, in a series of cases, further specified the meaning of "interstate" and "industrial" disputes and extended the powers of the Commission to the areas of termination of employment and redundancy (some of these reforms are discussed in the next two chapters; for a review of the most important High Court decisions see Creighton and Stewart 1994: 64-72 and 212-216).

In 1993 the newly elected Keating government enacted the *Industrial Relations Reform Act (1993)(Cth)*. This legislation introduced the most significant changes up to that time. Indeed, with the Act the government attempted to shift the focus of the entire system away from "conciliation and arbitration" towards direct negotiations between the parties. In order to do so, the *Industrial Relations Reform Act (1993)(Cth)* made innovative use of the constitutional Industrial power (s. 51(xxxv)), which placed more emphasis on conciliation than arbitration and encouraged the *prevention* rather than the *settlement* of industrial disputes (Ford 1994; Naughton 1994; McCarry 1994; Moore 1994; Pittard 1994). Moreover, this legislation further simplified the registration of "collective agreements" and introduced a non-union stream of certified agreements called *Enterprise Flexibility Agreements (EFAs)*.

Section 89A of the *Industrial Relations Reform Act (1993)(Cth)* stated that the function of the Commission was to prevent and settle industrial disputes "so far as possible by conciliation" and "where necessary by arbitration". The re-wording of this section clearly indicates the political willingness to move the focus of the system away from arbitrated awards and to encourage the parties to enter into contractual agreements. The reorientation of the system was also promoted by the introduction of a new type of collective agreement, the *Enterprise Flexibility Agreement*, which

mirrored the existing certified agreements with three major differences. First, the operation of *Enterprise Flexibility Agreements* depended more upon the involvement of an "employer that is a constitutional corporation" (s.170NA), rather than the existence of an industrial dispute. This meant that the constitutional underpinning of these agreements was derived by the Corporations rather than the Industrial power (Stewart 2001). Second, trade unions were not required to be parties to the EFAs in the same way they had to be parties to certified agreements. Third, the operation of EFAs was limited to a single enterprise and this precluded the conclusion of broader EFAs, such as industry-based EFAs.

Although the *Industrial Relations Reform Act (1993) (Cth)* brought new and in some ways effective changes to the legal framework regulating industrial relations and labour standards, at the end of 1994 conciliation and arbitration was still successfully operating at both Federal and state levels. This was mainly due to the fact that the Act *encouraged* the adoption of enterprise bargaining rather than *forcing* it. The new section 89A, for example, retained all the arbitral functions of the Commission (Creighton and Stewart 1994; 2000; Ludeke 1994). Also the introduction of EFAs represented little more than a marginal change as unions could still be involved at various stages of the negotiation process (Creighton and Stewart 1994:119-120; Australian Financial Review 7 October 1993, Ludeke 1994) and the agreements had to pass a no-disadvantage test. The latter requirement meant that the parties were not allowed to negotiate conditions of employment that disadvantaged the employees in comparison with existing awards. In short, under the *Industrial Relations Reform Act (1993)(Cth)* enterprise bargaining and compulsory conciliation and arbitration largely co-existed with the latter retaining a relevant role. As at 1990, for example, award coverage was still around 80% and although this figure might have fallen further in the intervening period (Morehead, Steele, Alexander, Stephen and Duffy 1997:207), the proportion of the workforce covered by awards at the end of 1995 was still very high at around 70% (Morehad et al. 1997).

This hybrid did not last for long. The demise of conciliation and arbitration and the move towards enterprise bargaining accelerated in 1996 when the newly elected Howard government passed the *Workplace Relations Act (1996)(Cth)*. Unlike the previous legislation, this Act took a more assertive action as it formally limited the arbitral functions of the Commission and, in doing so, it forced employers and employees to engage in contractual negotiations. While the *Workplace Relations Act (1996)(Cth)* makes numerous changes to the labour relations legislative framework (for general overviews see for example Stewart 2001; Creighton and Stewart 2000; for analysis of specific provisions see Howe 2000; Ford 2000; McCallum 1997; Naughton 1997; Pittard 1997), three of them are particularly relevant for the purpose of this thesis. First, the *Workplace Relations Act (1996)(Cth)* restricts access to arbitration as it limits the range of issues that can be included in Federal awards to 20 "allowable matters" (*Workplace Relations Act (1996)(Cth)* s. 89A). The Commission retains a residual arbitral role in relation to non-allowable matters in two circumstances: under section 89A(7), which enables the Commission to arbitrate in relation to "exceptional" (i.e. non-allowable) matters, and under section 170MX, which empowers the Commission to terminate a bargaining period and arbitrate where industrial action, undertaken to support the claims, threatens to endanger the safety of the "population" or cause "significant" damage to the Australian economy or part of it.

It is to be stressed, however, that these two sections operate only in exceptional circumstances and can hardly be used to bypass the restrictions imposed by section 89A. The second change relates to the abolition of EFAs and their incorporation into two broad categories of collective certified agreements that can be registered with or without the involvement of trade unions (*Workplace Relations Act (1996)(Cth)* Part VIB Division 2 and Division 3). Finally, the third and probably most controversial change concerns the introduction of individual agreements, the Australian Workplace Agreements (AWAs). Both certified agreements and AWAs

must pass a no-disadvantage test that is weaker than the one introduced by the 1993 Act. In particular, while the no-disadvantage test was administered, under the 1993 Act, on a condition-by-condition basis, under the *Workplace Relations Act (1996)(Cth)* the AIRC and a new body, the Office of the Employment Advocate, must ensure that the employees are overall no-disadvantaged in comparison with existing terms and conditions contained in awards. This shift suggests that the parties can now alter all employment conditions provided that, at the discretion of the AIRC or the Office of the Employment Advocate, the workers are not "globally" disadvantaged. This arrangement is inducing an erosion of labour standards because employment conditions can now be traded off during the bargaining process (Waring and Lewer 2001; Merlo 2000).

The introduction of AWAs has also altered the traditional weighting between sources of labour standards regulation: awards, statutory provisions and common law cases. It is argued, by some scholars in the field of legal enquiry, that the complexities associated with the certification of AWAs have the potential to encourage employers to by-pass AWAs altogether and try to force employees to enter into "staff contracts" regulated by common law (Chin 1997; Creighton 1987)[13]. This possibility is envisaged by the *Workplace Relations Act (1996)(Cth)* itself which at section 3(c) states that the Act "is aimed at enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances, '*whether or not that form is provided for by this Act*'" (Italics added). Chin warns that such a development would be detrimental for labour standards as common law in Australia has traditionally been in an atrophic state and, despite recent attempts to socialise it by introducing new obligations upon the employers, the employment contract remains

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[13] Such complexities are those relating to the obligations imposed upon employers (*Workplace Relations Act (Cth) 1996* ss. 170VO-170VPA) during the negotiation and certification of AWAs.

"an inherently inadequate device for the systematic protection of employees" (Chin 1997:117) [14].

The spur to enterprise and individual bargaining was of such intensity that by 1999 only 22% of all Australian workers in organisations with 5 or more employees had their conditions of employment determined solely by awards (AMAWRA 1999). Although this figure should be handled with some caution (the last survey concerning awards coverage dates back to 1995 (AWIRS 1995) and it is not directly comparable with the 1999 data) it provides empirical evidence that the legislative changes introduced in the past two decades have radically shifted the emphasis of the system of labour protection away from compulsory conciliation and arbitration. The AMAWRA survey also shows that this process accelerated after the introduction of the *Workplace Relations Act (1996)(Cth)* and this is mainly due to the compelling nature of the Act.

The demise of compulsory conciliation and arbitration and the ascent of enterprise and individual bargaining were also accompanied by an increasing reliance upon legislation aimed at providing a floor of legislated minimum labour conditions (Pittard 1994; Creighton 1997). However, while protective legislation was utilised extensively by the Keating government, the Howard legislature has been much less inclined to use this source of regulation. The next section will investigate the rise and the fall of statutory legislation that occurred in Australia in the last two decades of the twentieth century.

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14 Chin's conjecture is based on recent disputes at Bell Bay in Tasmania and Boyne Island, Gladstone and Weipa in Queensland and Rio Tinto in which management attempted to offer "staff contracts" which fell outside the scope of AWAs.

4.3.2 The Rise and Fall of Statutory Legislation

As was revealed in section 4.2, the Federal Parliament had traditionally been hesitant to utilise statutory legislation. This was mainly due to the constraints imposed by the Constitution and to the fact that industrial tribunals had de-facto taken over the regulatory function. This situation changed at the beginning of the 1990s when the Keating Labor government began to explore the possibility of introducing legislated minimum labour standards to accompany the introduction of enterprise bargaining. These provisions should have provided a "safety net" for those workers disadvantaged by the reform of Australian industrial relations. This process led to the enactment of the *Industrial Relations Reform Act (1993)(Cth)*, which contained provisions granting minimum entitlements to most employees. What made the enactment of these labour standards particularly controversial was the fact that these provisions applied to the great majority of Australian employees and overrode the jurisdiction of the States. Some of these protections were maintained by the *Workplace Relations Act (1996)(Cth)*, but some others, such as termination of employment and minimum wage provisions, were either repealed or weakened.

The *Industrial Relations Reform Act (1993)(Cth)* laid down, for the first time, minimum standards in the areas of termination of employment and leave and established guidelines for the setting of minimum wages and equal pay for work of equal value. The 1993 provisions derived their constitutional legitimacy from the External Affairs and Corporations powers. The External Affairs power, in particular, was extensively used to circumvent the restrictions connected with the use of the Industrial power (Ford 1994; Pittard 1994; Creighton 1997; Stewart 2001).

In order to be constitutionally legitimate, the External Affairs power must give effect to international conventions or international treaties (see section 4.2). The minimum standards contained in the 1993 legislation were enacted to give effect to the following ILO conventions and recommendations: the convention concerning

termination of employment at the initiative of the employer, the recommendation concerning termination of employment at the initiative of the employer, the convention concerning discrimination in respect of employment and occupation, the recommendation concerning discrimination in respect of employment and occupation, the convention concerning equal opportunities and equal treatment for men and women workers (workers with family responsibilities), the recommendation concerning equal opportunities and equal treatment for men and women workers: workers with family responsibilities and the minimum wage convention. As the provisions contained in the 1993 Act were based on these ILO conventions and recommendations, the wording in places was almost identical and this reflected the Commonwealth's extreme caution in establishing a constitutional foundation through the External Affairs power (Pittard 1994; Ford 1994; Creighton 1997)).

The 1993 provisions in most cases overrode the States' jurisdiction. For example the standards laid down in section 170DB of the *Industrial Relations Reform Act (1993)(Cth)* and granting employees a minimum period of notice in case their employment was to be terminated, applied to all workers in Australia (*Industrial Relations Reform Act (1993)(Cth)* Div 3). The same was true for the provisions regulating minimum wages. Section 170AD empowered the Commission to make an order setting the same minimum wage for all employees in a group specified in the order or to make an order setting different minimum wages for different categories of employees in a group specified in the order. The access to section 170AD was open to all workers in Australia provided that a similar order could not be issued by a State or Federal tribunal (*Industrial Relations Act (1993)(Cth)* s.170AE(3)(a)). Finally, the parental leave standard set out in schedule 14, which granted a minimum entitlement of 52 weeks unpaid leave to employees and their spouses, also supplemented the States' jurisdiction as it was enacted to give effect to the family responsibilities convention and to the workers with family responsibilities recommendation.

The *Industrial Relations Reform Act (1993)(Cth)* also made new use of other heads of power. In particular the Corporations power was utilised to provide constitutional underpinning to the provisions regulating EFAs (see section 4.3.1 and further Creighton and Stewart 1994:119-121; Ford 1994:111-117). This new use of the relatively unknown External Affairs and Corporations powers was challenged by non-labour State governments soon after the enactment of the 1993 Act. Victoria, South Australia and Western Australia argued that the Commonwealth lacked the power to enact both the minimum labour standards contained in Part VIA of the Act and the Enterprise Flexibility Agreements provisions, whether under the Corporations or the External Affairs powers. They also argued that the application to the States of these provisions was invalid as it violated the constitutional immunities deriving from the concurrent nature of the powers listed in section 51 of the Constitution (see section 4.2.1 and further Williams 1998:119-120). In 1996 the High Court, in *Victoria v. Commonwealth*, rejected these arguments and upheld the constitutional legitimacy of the Corporations and External Affairs powers as used in the 1993 Act. This decision is highly relevant because, by confirming the constitutionality of the minimum labour standards contained in the *Industrial Relations Reform Act (1993)(Cth),* the High Court provided an effective avenue to Federal governments to extend their legislative authority over employment and industrial matters and to override the complexity that is associated with the use of the Industrial power.

The implementation of labour standards by means of statutory legislation was halted by the enactment of the *Workplace Relations Act (1996)(Cth).* By the time the High Court handed down its decision in *Victoria v. Commonwealth* the Howard government had already made clear its intention to minimise reliance upon the External Affairs Power as a constitutional underpinning for protective labour legislation (Creighton 1997; Stewart 2001). This announcement was part of a broader strategy directed at deregulating labour relations by limiting access to arbitration and reducing the effectiveness of the statutory standards contained in the 1993 Act.

Through the enactment of the *Workplace Relations Act (1996)(Cth)*, the new government repealed the minimum wage standards inserted in sections 170AA to 170AH of the *Industrial Relations Reform Act (1993)(Cth)*, substantially reduced access to the 1993 termination of employment provisions and modified the constitutional underpinning of other elements of the 1993 Act. As the *Workplace Relations Act (1996)(Cth)* stands, only the sections regulating equal pay, parental leave and some termination of employment provisions are still underpinned by section 51(xxix) of the Constitution.

While the standards regulating equal remuneration for work of equal value and parental leave were retained in their original form, termination of employment legislation underwent substantial revision (Chapman 1997). The 1996 termination of employment provisions were enacted to strike a "fairer" balance between employers and employees by removing those features of the 1993 legislation that the government believed to unduly favour employees (Chapman 1997). The new system represents a departure from its predecessor and it is very close in form to State laws on unfair dismissal developed in South Australia. For example, it directly incorporates the language used in one of the most famous state unfair dismissal cases, *Re Loty and AWU [1971] AR (NSW)*, in stating that the procedures and remedies established by division 3 of the *Workplace Relations Act (1996)(Cth)* are "intended to ensure that...a 'fair go all round' is accorded to both the employer and employee concerned" (*Workplace Relations Act (1996)(Cth)* s. 170CA(2)).

Furthermore and more importantly, the 1996 Act restricts the applicability of unfair dismissal provisions. The new unfair dismissal system now primarily covers workers employed under Federal awards by incorporated employers (s. 170CB(c)). Section 170CB(c), by deriving its constitutional legitimacy from the Corporations power, excludes State awards employees from the umbrella provided by Federal unfair dismissal legislation and this shift marked the abandonment of the Keating

government's goal of establishing a genuine national system of labour standards protection (Chapman 1997). It should also be noted that the reliance on the External Affairs power had been lowered. Section 170CA(1)(e) now merely talks of "assisting" in giving effect to the ILO convention 158, as opposed to section 170CA(a) of the *Industrial Relations Reform Act (1993)(Cth)*, which expressly stated its purpose, which was to give effect to the ILO termination of employment convention. In short, by introducing new provisions based on the Corporations rather than on the External Affairs power, the Howard government successfully emasculated the efficacy of the former unfair dismissal legislation in terms of coverage and adherence of the legislation to the ILO obligations (Sijun Shao 1997).

While statutory legislation was widely used in the *Industrial Relations Reforms Act (1993)(Cth)* to implement labour standards (although as minima only), this process was not only frozen by the enactment of the *Workplace Relations Act (1996)(Cth)* but in some cases statutory protection was removed or substantially reduced. This is particularly evident in relation to the provisions of the 1993 Act regulating the setting of minimum wages and termination of employment. While the former sections were completely repealed, the latter underwent a substantial revision that significantly undermined their effectiveness.

4.4 Conclusion

The Federal system of employment protection has undergone a dramatic institutional transformation through the last two decades. While the establishment of labour standards in Australia was based, for more than 80 years, on the operation of compulsory conciliation and arbitration, it now relies more extensively on enterprise contractual agreements underpinned by a few statutory provisions that act as a "safety net". The consequences of this process are twofold: first, the demise of compulsory conciliation and arbitration has eroded the significance of the standards established by awards and second, by substantially reducing the scope of the industrial tribunals,

most of the regulatory functions have returned to the executive. Consequently, over the past two decades, the use of statutory legislation has increased and extended to areas such as termination of employment, equal employment opportunity and parental leave. The extension of statutory protection granted to labour standards peaked in 1993 but subsequently declined with the enactment of the 1996 *Workplace Relations Act*.

The demise of compulsory conciliation and arbitration also reduced the significance of the standards included in awards. As previously mentioned, the basic conditions of employment established and regulated through arbitration were considerably uniform and covered the great majority of employees. As a result and as long as compulsory conciliation and arbitration was fully operative, it was possible to identify a floor of labour standards (regulating in particular working hours, overtime rates, holidays and paid and unpaid leave) that applied to most of the workforce employed under Federal or State awards. The shift to enterprise bargaining has altered the homogeneity of these standards as the proportion of the employees covered by awards has dramatically shrunk over the past two decades. Awards still retain a residual role as both certified agreements and AWAs must pass a no-disadvantage test, but there is already evidence that contractual agreements, in some cases, have eroded award standards (Waring and Lewer 2001; Merlo 2000). In addition, the emphasis placed by the new legal framework on the individualisation of the bargaining locus has the potential to enhance the relevance of common law. Given the underdeveloped status of the common law of employment in Australia, this tool could prove to be ineffective in protecting labour standards (Chin 1997).

The transformation that occurred in the institutional framework regulating labour standards in Australia, reflects the continuous tension between the desire to increase reliance upon the market and the need to shelter society from the potentially disastrous effects associated with the market itself. At the institutional level, the

process of marketisation was enshrined in the progressive downgrading of compulsory arbitration and conciliation and the rise of enterprise and individual bargaining. Yet, this movement was immediately counteracted by a countermovement which checked the expansion of the market in definite directions. Statutory provisions were introduced to shelter Labour and a no-disadvantage test aimed to ensure that employees at the fringes of the labour market could continue to enjoy some forms of protection. The contradictory way in which the new legal framework operates, is the expression of a dynamic embedded in capitalism and accurately described by Karl Polanyi and French Regulation theory (see section 3.3).

In chapter 6 it will be revealed that the introduction of protective statutory legislation was also the expression of increased political power on part of Labour which, from 1983 to 1995, was bound by a corporatist arrangement with the government. This latter feature confirms Khan-Freund's conjecture that statutory legislation is more likely to be introduced when the political power of Labour increases (see section 3.2). Further support for Khan-Freund's intuition is also provided by the fact that the weakening of the statutory provisions, which occurred under the *Workplace Relations act (1996)(Cth)*, followed a decrease in Labor's political power as the conservative Howard government did not enter into corporatist arrangements with the ACTU. The impact of the institutional changes on labour standards and the "double movement" observed in this chapter will be empirically analysed in more detail in the next chapter.

CHAPTER FIVE

AUSTRALIAN FEDERAL LABOUR STANDARDS: THE QUANTITATIVE ANALYSIS (1979-2000)

Introduction

In chapter 4 it was revealed that the institutional framework regulating the establishment of labour standards in Australia was subjected to a comprehensive revision in the 1979-2000 period. It was also argued that this transformation was contradictory with such contradiction stemming from the continuous interaction of two centrifugal forces: market liberalisation and employment protection (see sections 3.3; 4.1; 4.3.2). While chapter 4, by describing the institutional features of the system of employment protection in Australia and its changes over the studied period, took a broad perspective, no mention was made of the extent to which these changes impacted upon the level of labour standards protection. This chapter will fill this omission by analysing and quantifying Australian labour standards in the years 1979 and 2000. The method utilised to carry out the exercise was described in section 3.4.1 and is based on the methodological framework developed by Block and Roberts (2000).

The chapter has four significant dimensions. First, it provides a measure of the effects of the institutional changes described in chapter 4. Second, it presents empirical evidence that will be used in chapter 6 to investigate the economic, political and industrial relations factors that led to the reform of the system of labour protection in Australia. This evidence will also provide empirical support for the main argument proposed by this thesis. In particular, the chapter will show that while most standards increased or remained unchanged during the studied period, two standards, workers'

compensation and collective bargaining, decreased. Third, the indexes constructed for Australia will enable cross-country comparison with Italy (see chapter 10). Fourth, these results can serve as a starting point to compare the indexes generated in the present study with those developed by Block and Roberts for the US and Canada.

The labour standards examined are: minimum wage, overtime, paid time off, unemployment/employment insurance, workers' compensation, collective bargaining, equal employment opportunity/employment equity, unjust discharge, occupational health and safety, advance notice of plant closing/large-scale layoffs. The original scale (Block and Roberts 2000) was partly modified in relation to overtime, paid time off, unemployment/employment insurance, collective bargaining and equal employment opportunity/employment equity to better suit the characteristics of Australia and Italy. Departures from the original scale will be explained and justified only in relation to unemployment/employment insurance, collective bargaining and equal employment opportunity/employment equity since modifications brought to the scale in relation to these standards involved structural changes of the components originally created by Block and Roberts. Finally, Victorian legislation was used to generate the indexes for workers' compensation and occupational health and safety. This arrangement was necessary due to the presence of constitutional constraints (see section 4.2.1) that limit the applicability of Federal legislation to Federal public employees. The use of Victorian statutes does not affect the significance of the occupational health and safety standard as all the States and Territories are provided with legislation that is very similar in content to that operating in Victoria.

5.1 Minimum Wage

The weights, sub-index values and scores for Australian minimum wage provisions are shown in table 5.1. The monetary values are expressed at the 2000 level. The 1979 monetary values were converted by utilising the historical series of the Consumer

Price Index for Australia (OECD 2000(b)). This standard increased slightly during the period studied. In order to capture these changes, section 5.1.1 analyses the minimum wage in 1979 while section 5.1.2 will consider the year 2000.

5.1.1 Minimum Wage in 1979

The 1st component of the standard evaluates the level of minimum wage. The higher the monetary value the higher the standard. The minimum wage rate was fixed, on the 27th of June 1979, at AU$ 123.80 per week following a national wage case decision that granted a 3.2% increase (Plowman 1992). This figure, expressed at the 2000 rate, is AU$ 368.43[15]. The hourly rate was obtained by dividing the weekly rate by 40 which was the standard for working hours in Australia. The hourly rate thus obtained is AU$ 9.21 and this positions this component of the standard in the second highest category of the scale (AU$ 9 to 10.4). Accordingly, a score of 8.57 was assigned to the sub-index value.

The 2nd provision relates to the sub-minimum wage. A score of 10 is assigned if legislation does not provide for sub-minimum wages, 0 otherwise. This scoring is based on the assumption that the existence of sub-minimum wages limits the extension of protection granted by this standard. Sub minimum rates applied in Australia in 1979 to juniors and trainees. As a result, a score of 0 was given to the sub-index value for this provision.

In the 3rd component, a score of 10 is assigned if legal sanctions can be imposed upon an employer who fails to pay the minimum wage, 0 otherwise. Fines for breaches of awards were contained in Part VI of the *Conciliation and Arbitration Act (Cth)(1904)* (sections 119 and 122). Under section 119(1)(d), the maximum

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[15] According to the OECD DX survey, the CPI for Australia in June 1979 was 36,32 and in June 2000 was 108.09. The value of the 2000/1979 ratio is therefore 2.9760.

penalties that could be imposed were AU$ 1000 if the fine was issued by the Federal Court of Australia and AU$ 250 if any other Court sanctioned the penalty. The minimum wage is technically an award granted in one or more selected industries (see section 4.2.2) and penalties for breaches of awards were in place in 1979. Therefore a score of 10 was assigned to the sub-index value.

The last provision evaluates the efficacy of the enforcement mechanism. As described in section 3.4.1, the enforcement component is based on the assumption that the broader the possibility of appeal outside the agency charged with the duty of enforcing or establishing the standard, the lower the standard in itself (Block and Roberts 2000). In 1979 the doctrine of the "separation of powers", originating from the *Boilmakers Case (1956)* (see section 4.2.3), was well established and consequently the Conciliation and Arbitration Commission could not exercise judicial powers. The rights of appeal were rather broad in Australia as an award could be enforced only "externally" by the Judiciary. Thus, a score of 0 was assigned to the sub-index value for the enforcement component.

5.1.2 Minimum Wage in 2000

The main difference between the 1979 and the 2000 standard is due to provision number 1, the minimum wage value, while the other components have remained unchanged. On the 1st of May 2000 the Australian Industrial Relations Commission (AIRC) fixed the minimum wage rate at AU$ 400.40 per week. This figure was then divided by 38, the "standard" working weekly hours to obtain the hourly rate[16]. The hourly rate is AU$ 10.53 and this figure falls in the top category of the scale (greater

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[16] The 38 hours standard is contained in conditions of employment laid down in federal awards in the metal trade, building, construction, and road transport industries which have been "traditional pacesetters in respect of wages and industrial conditions for the Australian workforce" (CCH 2000(c) par. 30-450). The adoption of a 38 hours week in the awards of these industries "created a de facto standard working week at that level in Australian industry" (CCH 2000(c) par. 30-450).

than or equal to AU$ 10.5). A full score of 10 was therefore assigned to the sub-index value.

The values assigned to the sub-indexes for the other components of the standard have remained unchanged. Sub-minimum wages still apply to juniors and trainees in Australia; fines for breaches of awards are now contained in sections 178-179 of the *Workplace Relations Act (1996)(Cth)* (for the exact amount of fines see *Workplace Relations Act (1996)(Cth)* s. 178(4)-(4A)), while the enforcement procedure is still based on the "Separation of Power Doctrine".

Table 5.1: Minimum Wage in Australia, Weights, Sub-index Values and Scores in 1979 and 2000

Provision/Language	Provision Weight	Subindex Value (if coded other than 10 or 0)	Subindex scores (1979)	Subindex scores (2000)
1) Minimum Wage Level (as of 1 of May 2000)	.92			
GT or EQ AU$ 10.5		10.00		AU$ 10.53
AU$ 9-AU$ 10.4		8.57	AU$ 9.21	
AU$ 7.5-AU$ 8.9		7.14		
AU$ 6-AU$ 7.4		5.51		
AU$ 4.5-AU$ 5.9		4.28		
AU$ 3-AU$ 4.4		2.85		
AU$ 1.5-AU$ 2.9		1.42		
2)Sub-minimum Wage	.04			
Coded as 10 if jurisdiction has no sub-minimum, 0 otherwise			sub-minimum wage present (sub index value =0)	sub-minimum wage present (sub index value=0)
3) Fines Imprisonment	.02		fines present (sub index value =10)	fines present (sub index value=10)
Coded as 10 if fines or imprisonment are possible actions on violator, 0 otherwise				
4) Limits on Rights of Appeal of Agency Decision	.02		no limits (sub index value=0)	no limits (sub-index value=0)

Minimum wage 1979 (basic index): 8.08

Minimum wage 2000 (basic index): 9.40

5.2 Overtime

The weights, provisions, sub-index values and scores for overtime are shown in table 5.2. This section will measure and analyse overtime for 1979 and 2000 together, as the standard has remained unchanged in the two decades studied. Due to the peculiarities of the Australian Constitution, the Federal legislation does not directly regulate overtime (see section 4.2.1), thus arbitrated awards are the most relevant sources governing this standard.

The 1st component evaluates the level of overtime. A score of 10 is assigned if overtime rates are at least 1.5 times the ordinary pay rates and if they are triggered after 40 hours of ordinary work; a score of 8.57 is given if overtime rates are 2 times the ordinary pay rates but they start after 48 hours and so on. In 1979, the standard provision for overtime rates was time and a half for the first 3 hours and double time thereafter for work performed outside the "ordinary hours". This prescription, initially contained in the *Metal Industry Award (1971)* (clause 8(a)), was subsequently extended to all the other major awards. During the mid 1970s, there was a considerable push for double rate after two hours particularly in the construction industry and that "standard" was also extended to some other Federal awards (see for example *AWU v Huntley Projects Ltd. 1977).* However, at the Federal level the claim that there was an "emerging standard" of double time after two hours work was rejected[17], and consequently the rate of time and a half must be considered the legal "standard". The rate of time and a half for the first three hours and double time thereafter falls in the highest category of the scale and therefore a score of 10 was assigned to the sub-index value.

The 2nd component of this standard, the enforcement mechanism, was assigned a score of 0. As for minimum wage, overtime is regulated by awards. Hence,

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[17] See Justice *Goudron* in *Food Preservers Union v. All States Readi Foods 1977*

the enforcement procedure is "external" and the rights of appeal are not limited (see sections 4.2.3 and 5.1.1).

This standard has remained unchanged during the studied period; The *Metal Engineering and Associated Industries Award, (1998),* for example, still prescribes an overtime rate of time and a half for the first three hours and double time thereafter (CCH 2000(c), par. 30-481). However, it should be noted that the current level is slightly underestimated by the application of the scale represented in table 5.2. The standard provision for "ordinary" hours of work after which overtime rates are triggered, is now 38 (see for example *Metal, Engineering and Associated Industries Award 1998* (cl. 6.4.1 (c)), while 40 was the standard for "ordinary" hours in 1979 (see section 5.1.1).

Table 5.2: Overtime in Australia, Weights, Sub-index Values and Scores in 1979 and 2000

Provision/Language	Provision Weight	Subindex Value	Subindex scores(1979)	Subindex scores(2000)
1) Overtime	.95			
1.5x reg. rate after 40 hrs. per week		10	1.5x reg.rate for the first three hours and double time thereafter	1.5x reg.rate for the first three hours and double time thereafter
2x reg. rate after 48 hrs. per week		8.57		
1.5x reg. rate after 44 hrs per week		7.14		
1.5x reg. rate after 48 hrs per week		5.71		
1.1 to 1.5 reg. Rate after 40 hrs per week		4.18		
1.1 to 1.5 reg. Rate after 44 hrs per week		2.85		
1.1 to 1.5 reg. Rate after 48 hrs per week		1.42		
2) Limits on Rights of Appeal of Agency Decisions	.05		No (subindex value=0)	No (subindex value=0)

Overtime 1979 (basic index): 9.5

Overtime 2000 (basic index): 9.5

5.3 Paid Time Off

The weights, sub-index values and scores for holidays and paid time off are set in table 5.3. The standard for paid time off did not change in 1979 and 2000, thus this section considers the two years together.

The 1st provision evaluates the number of public holidays in one calendar year. The higher the number of public holidays the higher the score assigned to the sub-index value. There are 10 standard public holidays that apply to all employees in Australia: 1) New year's Day, 2) Australia Day, 3) Good Friday, 4) Easter Saturday, 5) Easter Monday, 6) Anzac Day, 7) Queen's Birthday, 8) Labour or Eight-Hour Day, 9) Christmas Day, 10) Boxing Day. These entitlements were consolidated in the early 1970s by awards and statutory legislation. The *Metal Industry Award (1971)* (cl. 12(a)), for instance, stated that the above listed holidays were public holidays and this prescription largely reflected similar obligations contained in States' legislation (CCH 2000(b): 42-950). This standard was recently upheld by the AIRC, which ruled that Federal Award employees are entitled to a minimum of 10 public holidays per year. The Commission also held that States or Territories can add but not subtract holidays from those included in this "safety net" (*Application by Electrical, Electronic, Plumbing and allied Workers Union of Australia & Ors 1994*). The standard for Australia falls in the third category of the scale (from 10 to 10.9 public holidays). Accordingly, a score of 6.7 was assigned to the sub-index value.

The 2nd component of the standard deals with the level of salary that employees are entitled to receive for public holidays that are not worked or for work performed on public holidays. A score of 10 is given if legislation or awards require employees to be paid for holidays not worked or be granted at least overtime for holidays worked, 0 otherwise. The standard prescription contained in awards states that the ordinary weekly rate or fortnightly rate be payable to the employee and that a

rate higher than overtime be granted for work performed on public holidays (CCH 2000(b): paragraphs 43-050 to 43-120). This prescription has been well established since late 1960s-early 1970s. For example, clauses 12(a) and 12(d)(ii) of the *Metal Industry Award (1971)* held that the public holidays mentioned above could be enjoyed "without loss of pay" and that an employee has to be paid at the rate of double time and half for work performed on public holidays. Most of the major Federal awards typically contain the clause that ordinary full-time employees should be paid at a rate of two and half times the ordinary rate for a minimum period of usually four hours up to the prescribed number of ordinary hours per day (usually eight hours). After this period, overtime rates apply (CCH 2000(b): 43-120). This prescription should be regarded as the "standard" although in some cases the Commission has refused to grant the full benefit[18] (CCH 2000(b):43-120). In addition, some awards grant the "standard" holiday penalty rate for the full period worked during the holiday. Given that the penalty rate is two and a half times the ordinary rate and that it is never lower than the overtime rate, a score of 10 was given to the sub-index value.

The 3rd provision evaluates the number of days of annual leave and the related loading rate. From the mid 1970s, employees under Federal awards have been entitled to 28 days leave (including Saturdays and Sundays) and a leave-loading of 17.5% of the ordinary rate for the period of leave. The 4 weeks standard and the 17.5% loading are the outcomes of two different processes that converged in 1974. On one hand, the four weeks annual leave has been widely recognised as the standard for Australia since August 1974 when the New South Wales Industrial Commission prescribed four weeks leave for all employees within its jurisdiction (*Annual Leave Case* 1974). This

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[18] For example in the *Retail, Wholesale and Distributive Employees (NT) Award 1980,* the Commission only granted a penalty rate of double time for work done on Christmas Day and New Year's Day instead of the "standard" rate of double time and half.

pronouncement was incorporated as an amendment in the *NSW Annual Holidays Act*, which extended this benefit to all employees in that State. This decision was promptly followed by similar pronouncements in Queensland and South Australia and was further upheld by the Federal *Metal Industry Award (1974).*[19] The conditions laid down in this award were subsequently extended to other Federal awards such as the *Clerks (Oil Companies) Consolidated Award 1978* and the *Transport Workers' (Industrial Commercial and Domestic Refuse) Award 1978* through the "flow on" mechanism described in section 4.2.2. The 28 days after 12 months of service must therefore be regarded as the Federal standard, a provision also recalled in the recent *Metal, Engineering and Associated Industries Award 1998.*

On the other hand, the 17.5% loading rate was recognised as the standard prescription at Federal level in November 1974, when a full bench of the Australian Conciliation and Arbitration Commission granted the 17.5% loading to an award involving Airport and Overseas Passenger Terminals employees (see *Federated Liquor and Allied Industries Employees' Union v. Ansett (1974)).* Such a prescription mirrored similar decisions adopted by other States such as Queensland (*1973 Annual Leave Test Case*), New South Wales (*1974 Annual Leave Test Case*) and South Australia (*1974 Annual Leave Test Case*) and was subsequently extended to all the other Federal awards (CCH 2000(c)). The 28 days and the 17.5% loading rate fall in the top category of the scale and consequently a score of 10 was assigned to the sub-index value.

The last component of the standard assesses the minimum period of service that is required before an employee becomes eligible to take four weeks paid annual leave. The less the time necessary the higher the score assigned to the sub-index

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[19] This award specified entitlements as follows:

- For a completed period of 12 months' service before 8 April 1974, 21 consecutive days' leave
- For a completed period of 12 months' service after 1 December 1974, 28 consecutive days' leave

value. The standard provision in Australia is 12 months. This prescription is contained in all of the major awards (see above) and it has also been endorsed by most of the States' statutes since 1974 (see above). 12 months falls in the second highest category of the scale and therefore a score of 6.67 was assigned to the sub-index value.

Table 5.3: Paid Time Off in Australia, Weights, Sub-index Values and Scores in 1979 and 2000

Provision/Language	Provision weight	Subindex Value	Subindex scores (1979)	Subindex scores (2000)
1) Holidays	.165			
12+days of holiday		10		
11-11.9 days		7.8		
10-10.9 days		6.7	10 days	10 days
9-9.9 days		5.6		
8-8.9 days		4.4		
7-7.9 days		3		
6-6.9 days		2		
5-5.9 days		1		
Less Than 5 days		0		
2) Pay for holidays not worked or over time for Holidays Worked	.335		Yes (subindex value=10)	Yes (subindex value=10)
3) Vacation Length\Pay Coding	.45			
4 Weeks Vacation, 10% or more of Pay Reg. Pay		10	4 weeks, 17.5% Reg. Pay	4 weeks, 17.5% Reg. Pay
4 weeks vacation 0% or 3 Weeks Vacation, 6% of Pay Reg. Pay		7.5		
3 weeks vacation 0% or 2 Weeks Vacation, 6% of Pay Reg. Pay		5		
2 Weeks Vacation, 4% of Pay Reg. Pay		2.5		
No Vacation, no Pay		0		
4) When entitled Coding	.05			
After 10 months with employer		10		
After 12 months with employer		6.67	12 months	12 months
After more than 12 months with employer		3.33		
No Provision		0		

Paid Time Off 1979 (basic index): 9.289

Paid Time Off 2000 (basic index): 9.289

5.4 Unemployment/Employment Insurance

The weights, sub-index values and sub-index scores for unemployment/employment insurance are shown in table 5.4. As there have not been significant changes in this index in the 1979-2000 period, 1979 and 2000 will be analysed together. The original scale for this index (see Block and Roberts forthcoming) was partly modified to better capture the features of Australia and Italy. The first component of the original scale (Taxable Wage Base, [Block and Roberts forthcoming]), which measures the consistency of the public or private fund from which benefits are drawn, was replaced by provisions assessing eligibility requirements. The scoring system of this new component of the index was based on the assumption that the less the requirements necessary to become entitled to receive unemployment benefits, the higher the standard, as access to benefits is available to a greater number of unemployed recipients. Jurisdictions in which eligibility can be gained exclusively on the ground of a person being unemployed was assigned a score of 10, an intermediate score of 5 was assigned if eligibility is conditional upon a person having been previously employed and a score of 0 was given if only employees who contribute to their unemployment funds are eligible. This departure from the original was necessary because, unlike the US and Canada, the systems of unemployment protection in Australia and Italy are not "insurance" based. The rates of payment and the duration of unemployment benefits in Australia and Italy are not tied to the employees' or employers' contributions to unemployment funds. The only other component of the standard that was partially modified was the maximum period of time a recipient is entitled to receive unemployment allowances (provision n.4). One more category (no limits of time a person is entitled to receive unemployment benefits) was added to the original 4; the scores of the sub-index values were re-calculated accordingly.

The 1st component of the standard assesses the eligibility requirements (see above). Under section 107 of the *Social Services Act (1947)(Cth)* these requisites were: 1) age: a man had to be 16 or older but less than 65, and a woman 16 or older but less than 60 (s. 107(1)(a)), 2) residence: the person had to be a permanent resident of the Commonwealth of Australia and have resided in Australia for at least 12 months (s. 107(1)(b)), 3) industrial action: a person had to demonstrate that his/her unemployment was not the result of the person being engaged in "Industrial Action" (s. 107(4)(a)), 4) work test: a claimant had to show that he\she "was capable of undertaking, and was willing to undertake, suitable paid work; and had taken reasonable steps to obtain such suitable paid work (s. 107(1)(c)). As the basic eligibility requirement was for an applicant to be unemployed, without any reference to previous working experiences, a score of 10 was assigned to the sub-index value for this provision.

The 2nd component of the standard evaluates the contribution of the employee to his/her own unemployment fund. The higher the tax rate the lower the standard. As previously mentioned, unemployment benefits in Australia have traditionally been drawn from a public fund while taxes have never been specifically deducted from the employee's salary for this purpose. This falls in the highest category of the scale (no employee tax) which is associated with a sub-index value of 10.

The 3rd component of the standard evaluates the ratio between the average weekly benefit and the average weekly wage. In Australia in 1979 this percentage ranged between 21% and 23%. Under section 45 of the *Social Services Act (1947)(Cth)*, as amended at 26 October 1978, payment rates for unemployment ranged between AU$ 36 for an unmarried, 18 years old or younger person (s. 45(1)(b)), and AU$ 53.20 for an unmarried, 18 years or older with a dependant children (s. 45 (1)(c)(ii)) while the average weekly earnings was AU$ 222.80 in March 1979 and AU$ 232.80 in June 1979 for a male employed in the private sector

(ABS 1979). The 21%-23% range falls in the lowest category of provision n.3 and therefore a score of 2 was assigned to the sub-index value.

Finally, the last component of the standard assesses the maximum period of time a person is entitled to enjoy unemployment benefits. In 1979 there was not a prescribed period of time after which payments of unemployment benefits were automatically suspended. Pursuant to section 131 of the *Social Services Act (1947) (Cth)*, payments could be cancelled, suspended, reduced or increased only in the occurrence of one of the following circumstances: a) variations in the income of the person receiving the benefit (s. 131(a)); b) failure of the person to comply with the notification requirements stated in sections 130 and 129 (s. 131(b)); c) any other reason (s. 131(c)). Benefits could also be cancelled if, in the Director-General's opinion, a person's unemployment was due to his/her voluntary act (without any good reason) or misconduct as a worker, and if a person had refused without good and sufficient reason to accept an offer of employment which the Director General considered acceptable (s. 120(a)(b)(c)). A score of 10 was assigned to the sub-index value as in 1979 there was not a prescribed period of time after which unemployment benefits could be suspended.

The *Social Services Act (1947)(Cth)* was replaced by the *Social Security Act (1991)(Cth)*, although the scores assigned to the components of this standard for the year 2000 did not change. The eligibility requirements were still not limited by

previous working experience[20], taxes were not specifically deducted from the employee's salary to contribute to unemployment funds, the average weekly benefit as a percentage of the Average weekly wages was in 2000 23%[21] and under the *Social Security Act (1991)(Cth)* there was not an established period of time after which unemployment benefits could be suspended. The main differences between the two years were: the repealing of section 107(4)(a) "Industrial Action" of the *Social Services Act (1947)(Cth)*; the tightening up of the way unemployment benefits were administered and the imposition of some contractual obligations on unemployed persons (for a detailed discussion on these obligations and their economic implications see OECD 2001 and section 6.4). In addition, unemployment benefits in 2000 were means-tested, which means that applicants' assets (including their partner) must not exceed a prescribed amount.

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[20] There are now 2 types of unemployment benefits in Australia: Youth Allowance and Newstart Allowance. Youth allowance is available to unemployed people aged 15-21 (who live independently) (*Social Security Act (1991) (Cth)* ss. 543 and 593(g)(i)). Restrictions apply to people less than 18 years old on the ground of their education status (*Social Security Act (1991)(Cth)* s. 543A(2)(a)(b)(ba)(c)). Newstart allowance is available to unemployed persons (*Social Security Act 1991(Cth)* s. 593(1)(a)) aged 21 and over (*Social Security Act 1991* s 593(2A)(g)(i)). In order to obtain Youth Allowance or Newstart Allowance applicants must satisfy certain requirements, particularly they must actively seeking suitable paid work (*Social Security Act* ss. 540 (a)(i) and 593 (1)(b)(i)) and their (or their partner) assets must not exceed a prescribed amount.

[21] The fortnightly payment varies according to the assets of the recipient. As at September 2000, the basic full rates were comprised between AU$ 344.90 per fortnight for a single person without children and AU$ 373.00 for a single person with children (Centrelink 2000). The Average ordinary weekly earnings for a full time adult in the private sector was as at May 2000 AU$ 754.6 with the total earning (inclusive of overtime) being AU$ 796.2 (ABS 2000). The best result that can be obtained is 23% which is calculated by utilising the highest weekly rate (Au$ 373/2) and the (lowest) average weekly full time adult ordinary rate.

Table 5.4: Unemployment/Employment Insurance in Australia, Weights, Sub-index Values and Scores in 1979 and 2000

Provision \ Language	Provision Weight	Subindex Value	Subindex scores (1979)	Subindex scores (2000)
1)Eligibility	.1			
Unlimited in relation to previous employment		10	Unlimited in relation to previous employment	Unlimited in relation to previous employment
Limited only in relation to previous employment		5		
Limited to the existence of an unemployment fund		0		
2)Employee Tax Rate	.3			
No Employee Tax		10	No Employee Tax	No Employee Tax
GT 0 but LT 1%		8.3		
1%-2%		6.7		
2%-3%		5		
3%-4%		3.3		
4%-5%		1.7		
3)Coding Avg. Weekly/monthly Benefit as a Percentage of Avg. Weekly/monthly Wages	.35			
45%-49%		10		
40%-44%		8		
35%-39%		6		
30%-34%		4		
LT 30%		2	between 21% and 23%	23%
4)Maximum Total Benefit/Extended Benefits	.25			
Unlimited		10	Unlimited	Unlimited
45 Weeks		8		
43 Weeks		6		
39 Weeks		4		
26 Weeks or less		2		

Unemployment/Employment Insurance 1979 (basic index):7.2

Unemployment/Employment Insurance 2000 (basic index):7.2

5.5 Workers' Compensation

The weights, sub-index values and sub-index scores for workers' compensation are shown in table 5.5. This standard reduced slightly in the 20 years studied. In order to analyse these changes, section 5.5.1 considers workers' compensation for 1979 while section 5.5.2 investigates the most important amendments brought to legislation during the 1979-2000 period.

The workers' compensation index was constructed following the recommendations of the US National Commission on State Workmen's

Compensation Laws (Block and Roberts forthcoming; US Department of Labor 1972). Each recommendation was weighted equally, except for those with sub-provisions (compulsory coverage and continuation of benefits to widow(er)). Except for the levels of appeal beyond first, for which intermediate scores were created (component n. 25), the sub-index values were assigned a score of 10 if legislation was in full conformity with the recommendations of the US National Commission on State Workmen's Compensation Laws, 0 otherwise.

The nature of the Australian constitution is such that Federal legislation on workers' compensation only applies to Commonwealth government employees (see section 4.2). Consequently, this index was constructed by utilising legislation enacted in Victoria. This arrangement does not affect the overall significance of the standard because all the States and Territories are provided with laws that are similar in content (CCH 1980; 1983; 2000(a)).

5.5.1 Workers' Compensation in 1979

The first two provisions of the scale assess the degree of compulsion of workers' compensation schemes. If it is compulsory for all employers to obtain an accident insurance policy and if waivers to this rule are not permitted, a score of 10 is assigned to the sub-index value, 0 otherwise. Under the *Workers' Compensation Act (1958)(Vic)* (Act n. 9297 (1979)) it was compulsory to obtain, either from the Insurance Commissioner or from an insurer approved by the Governor in Council, a policy of accident insurance or indemnity liability to pay compensation to any worker(s) (*Workers' Compensation Act (1958) (Vic)* s. 72(1)). As workers' compensation insurance was compulsory in 1979 and waivers were not permitted in any way, a score of 10 was assigned to the sub-index value for the first two components of the standard.

The following four provisions assess the eligibility requirements. The more extensive the coverage provided by workers' compensation schemes, the higher the standard. Thus, a score of 10 is assigned if each category of atypical worker (casual, household, farmworkers and government employees) is covered by a policy of accident insurance, 0 otherwise. Under the *Workers' Compensation Act (1958)(Vic)*, the basic requirement was for a claimant to be an employee or worker. Section 3(1) of the *Workers' Compensation Act (1958)(Vic)* defined a worker as "any person (including a domestic servant) who has entered into or works under a contract of service or apprentiship or otherwise with an employer whether by way of manual labour, clerical work or otherwise and whether the contract is expressed or implied is oral or in writing". This definition was further expanded in section 3(6A), which covered farmworkers, and section 4(1), which included government employees. As in 1979 farmworkers, households, casual and government employees were covered by workers' compensation schemes, a score of 10 was assigned to each provision.

The 7th provision further evaluates the coverage provided by workers' compensation laws for particular classes of workers such as outworkers, professional athletes and employees of charitable organisations. A score of 10 is assigned if all these classes are covered, 0 otherwise. The *Workers' Compensation Act (1958)(Vic)* sanctioned that the following categories of employees were excluded from the benefits of the Act: voluntary workers, outworkers (*Workers' Compensation Act (1958)(Vic)* s. 3 (1)) and professional athletes (*Workers' Compensation Act (1958) (Vic)* s. 3 (7A)). As some classes of employees were excluded from the coverage provided by the *Workers' Compensation Act (Vic) (1958)*, a score of 0 was given to the sub-index value.

In the 8th component a score of 10 is assigned if legislation provides full coverage for all work-related diseases, 0 otherwise. Although the juridical meaning of what constitutes a compensable injury has traditionally given rise to litigation (CCH

1980), the *Workers' Compensation Act (1958)(Vic)* provided for a comprehensive definition of "injury". The 1979 definition stated that "injury means any physical or mental injury, and without limiting the generality of the foregoing includes: a) a disease contracted by a worker in the course of his/her employment whether at or away from his/her place of employment and for which the employment was a contributing factor and contributed to a recognisable degree and b) the recurrence, aggravation, acceleration, exacerbation or deterioration of any pre-existing injury or disease where the employment was a contributing factor and contributed to a recognizable degree for that recurrence, aggravation, acceleration, exacerbation or deterioration..." (*Workers' Compensation Act (1958)(Vic)* s. 3(1)). Section 3(1) was integrated by section 5 which held that compensation was payable if a personal injury arose out of or in the course of employment. Given that all work-related diseases were covered by the *Workers' Compensation Act (Vic)(1958)*, a score of 10 was assigned to the sub-index value.

In the 9th component a score of 10 is given if temporary total disability benefits are at least 66 2/3% of the worker's gross weekly wage, while in the tenth provision a score of 10 is assigned if the maximum temporary total disability benefits are at least 100% of the worker's average weekly wage, 0 otherwise. The *Workers' Compensation Act (1958)(Vic)* stated that in case of total incapacity a worker was entitled to a weekly payment of AU$ 105 if adult or AU$ 78 if minor or the worker's average weekly earnings (if employed for at least 12 months) whichever was least (*Workers' Compensation Act (1958)(Vic)* s. 9), up to a statutory maximum of AU$ 36,960[22]. As the weekly benefits for total temporary disability benefits were in 1979 well over 66 2/3% of the worker's gross weekly wage but less than 100% of the employee's average weekly wage, a score of 10 was assigned to the ninth provision

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[22] However in case of total or partial (if major) and permanent incapacity the Board had the power to order the continuation of weekly payments beyond this amount (s. 9(1)(b)(i)-(ii)-(iii))

while 0 was given to the tenth. In the eleventh provision, a score of 10 was assigned to the sub-index value for both years 1979 and 2000 as this provision is not applicable to Australia and Italy.

Provisions 12 and 13 deal with permanent total disability benefits. A score of 10 is assigned if permanent total disability benefits are at least 66 2/3% of the worker's gross weekly wage and if the maximum permanent total disability benefits are at least 100% of the worker's average weekly wage, 0 otherwise. Under the *Workers' Compensation Act (1958)(Vic)*, permanent total disability was regulated in the same way as "total" incapacity (which could be temporary or permanent) and therefore the scores assigned to these two provisions are the same as those assigned to the ninth (10) and tenth provisions (0).

In the 14th provision a score of 10 is assigned if total disability benefits are paid for the entire duration of a worker's disability, or for life without any limitations as to monetary amount or time, 0 otherwise. As noted in the paragraph describing the benefits for total incapacity, the total employer's liability, in respect of compensation under either or both sections 9, cl. 1(b)(i) and (ii) of the *Workers' Compensation Act (1958)(Vic)*, did not exceed a prescribed amount of AU$ 36,960. This amount could be exceeded only in two cases: a) if the injury resulted in a permanent or total disablement and b) if the injury resulted in a permanent and partial disablement of a major degree. In these two cases the Board could award a lump sum or order the extension of weekly payments (*Workers' Compensation Act (1958)(Vic)* s. 9 cl. 1(b)(iii)-(v)). As in 1979 there was not a statutory provision prescribing that compensation benefits were payable for the entire duration of disability, a score of 0 was assigned to the sub-index value.

Provisions 15 and 16 evaluate death benefits. In provision 15 a score of 10 is assigned if death weekly benefits are at least 66 2/3% of the workers' weekly wage while in provision 16 a score of 10 is given if the maximum weekly death benefits are

at least 100% of the worker's average weekly wage, 0 otherwise. In 1979, weekly death benefits, payable to dependants, were not available. A lump sum of up to AU$ 33,160 was payable to full or partial dependants (*Workers' Compensation Act (1958)(Vic)* s. 9) plus an additional sum for each children under 16 years (or full-time student up to 21 years). Dependants were defined in section 3 as "such person as were wholly mainly or in part dependent upon the earnings of the worker at the time of the death...". As weekly payments were not provided by the *Workers' Compensation Act (1958) (Vic)*, a score of 0 was assigned to both these provisions.

Provisions 17, 18, 19 and 20 assess the tenure of death benefits to dependants. In provision 17 a score of 10 is given if death benefits must be paid to a widow or widower for life, 0 otherwise. In provision 18, a score of 10 is assigned if legislation provides for a lump sum to be paid in case of remarriage, 0 otherwise. Provisions 19 and 20 assign a score of 10 if legislation provides for death benefits to be paid continuously until a child reaches 18 or 25 (if student), 0 otherwise. As previously noted, the *Workers' Compensation Act (1958)(Vic)* only provided for a lump sum to be paid to the widow/widower plus a prescribed amount for each child under 16 years or 21 if student (*Workers' Compensation Act (1958)(Vic)* s. 9). As none of the requirements contained in provision 17, 18, 19 and 20 were met by the *Workers' Compensation Act (Vic) (1958)*, a score of 0 was assigned to each of these provisions.

Provisions 21 and 22 deal with medical and rehabilitation costs. Provision 22 assigns a score of 10 if medical and rehabilitation services are covered without any statutory limit for time and amount of money, 0 otherwise. Provision 22 gives a score of 10 to the sub-index value if medical and physical rehabilitation services can be claimed for an indefinite period of time after injury, 0 otherwise. In 1979, Victorian legislation did not contain statutory limits as for time or amount of money in relation to medical and rehabilitation services and an injured person could always claim compensation provided that the injury was work-related. The extent of medical,

hospital and ancillary costs covered by the *Workers' Compensation Act (1958)(Vic)* was set out in section 26(1) which held that they were "the reasonable costs of the medical, hospital, nursing and ambulance services incurred by reason of the injury...[or disablement caused by disease]". These services were defined extensively in section 26(2) and included medicines, medical, surgical and curative materials, appliances or apparatus; repair, adjustment or replacement of skiagrams, crutches, artificial eyes, teeth or spectacles or hearing aids...and nursing services and other aids rendered otherwise than in a hospital. As in 1979 there were no statutory limits of time and amount of money for medical services and given that these services could be claimed during the whole period of incapacity, a score of 10 was assigned to the sub-index value for provisions 21 and 22.

The last component of the workers' compensation index evaluates the enforcement mechanism. Provision 23 assigns a score of 10 if there is an internal dispute resolution process while provision 24 gives a score of 10 if the determinations arising out of the internal dispute resolution process cannot be internally appealed, 0 otherwise. In 1979, the administering body for the *Workers Compensation Act (1958) (Vic)* was the *Workers Compensation Board*. Its functions were listed in Div. 3 of the Act, sections 84-86 and 88-90. The *Workers Compensation Board*'s principal power and duty was to act as a tribunal with exclusive jurisdiction to "inquire into, hear and determine all matters and questions arising out of claims under the Act" (s. 84(1)(a)). The determinations of the *Workers Compensation Board* were conclusive and could not be "challenged, appealed against, reviewed, quashed or called into question by any court on any account whatsoever" (*Workers Compensation Act (1958)(Vic),* s. 56(1)). The only issue upon which the Board did not have jurisdiction was on a "question of law". In this case and only in this case the Board, of its own motion or at request of a party, had to refer the "question" to the Full Court of the Supreme Court (*Workers Compensation Act (1958)(Vic),* s. 56(1)). As the determinations of the

Workers Compensation Board were final and unappealable, a score of 10 was assigned to the sub-index value for provisions 23 and 24.

Finally, the last provision of the standard evaluates the levels of appeals beyond the internal one. For this provision, intermediate scores were created (see table 5.5). As described in the previous paragraph, in 1979 the decisions of the *Workers Compensation Board* were final and not appealable. This meant that the ordinary judicial system could not be involved at any stage in the dispute resolution process (except on a question of law) and therefore a score of 10 was assigned to the sub-index value.

5.5.2 Workers' Compensation in 2000

The standard for workers' compensation was reduced slightly in the period 1979-2000. This reduction was due to changes that affected workers' compensation legislation. In particular, the enforcement component of this standard was considerably higher in 1979 than in 2000 while the level of benefits have remained, overall, unchanged (see table 5.5).

The *Workers Compensation Act (1958)(Vic)* was amended substantially in 1985 (although it still applies to injuries suffered before 4 p.m 31 of August 1985) as a result of a generalised pressure for reforming workers' compensation schemes that arose in Australia during the mid 1980s (see further section 6.3). Those advocating a profound revision of workers' compensation systems, were mainly concerned with the high costs associated with the insurance premiums needed to cover employers' liability, and with some restrictive judicial interpretations. This induced governments to seek to minimise costs while trying to provide reasonable compensation to injured workers and their families (CCH 1988; 2000(a)). The pressure for reform was increased in Victoria by a major report entitled the "Report of the Committee of Inquiry into the Victorian Workers Compensation System 1983-1984" (also known as

"the Cooney Report"), which preceded the enactment of the *Accident Compensation Act (1985)(Vic)* and advocated substantial reform of workers' compensation schemes. The three primary areas of the standard affected by the enactment of the *Accident Compensation Act (1985)(Vic)* were: the structure and functions of the Authority administering workers' compensation, the insurance system, and the claim procedure.

The Authority administering the Act was renamed WorkCare in 1985 and WorkCover in 1992, with completely different functions to those performed by the Workers' Compensation Board under the previous Act[23]. The insurance system changed from a multiple private insurance system under the 1958 Act to a single, public system in 1985, and subsequently reverted back to a multiple private system in 1993. Finally, the claim procedure was transformed from an adversary, internal and non-appealable system under the 1958 Act to a conciliatory one under the new Act[24]. The latter reform was introduced to make the claim procedure more expeditious and less costly. Under the new *Accident Compensation Act (1985)(Vic)* the County Court and the Magistrates Court (for claims less than AU$ 40.000) share jurisdiction on matters relating to workers' compensation. However, before proceedings can be initiated in the County Court or Magistrates Court, the *Accident Compensation Act (1985)(Vic)* provides for a mechanism of compulsory conciliation. Under Part III of the *Accident Compensation Act (1985)(Vic)*, in the first instance, a claimant must refer the dispute for conciliation before commencing proceedings (*Accident Compensation Act (1985)(Vic)* ss. 49, 104(3)). After the conciliation process is exhausted, any party can appeal to the County Court and Magistrates' Court[25]. Any party to proceeding

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[23] The functions performed by the Workers' Compensation Authority and their changes over time are not the objective of this thesis. For more information, see CCH 1988; 2000(a).

[24] However if conciliation fails the claim proceeds to the ordinary judicial system.

[25] Section 39(1)(a) states that the County Court has exclusive jurisdiction in matters and questions arising out of decisions of the Authority or self-insurer or recommendations or directions of a *Conciliation Officer*.

before these Courts can also appeal to the Supreme Court on a question of law (*Accident Compensation Act (1985)(Vic)* s. 52(1)). The intention of appealing must be notified to the County or Magistrates' Court and to the other party within 21 days of the judgment being given or the decision being made (s. 52(2)). As under the *Accident Compensation Act (1985)(Vic)* it is possible to appeal the determinations of the Conciliation officer and given the fact that appeals are external as they can be heard by the County Court, a score of 0 was given to provision 24 and a score of 5 was assigned to provision 25.

Table 5.5: Workers' Compensation in Australia, Weights, Sub-index Values and Scores in 1979 and 2000

Provision	Rec. No.	Prov. Weight	Subindex Value	Subindex scores(1979)	Subindex scores(2000)
Compulsory Coverage	2.1				
1) Compulsory Coverage for Private Employment	2.1a	.024		Yes (subindex value=10)	Yes (subindex value=10)
2) No Waivers Permitted	2.1b	.024		No waivers permitted (subindex value=10)	No waivers permitted (subindex value=10)
3) No Exemption Based on Firm Size	2.2	.047		No exemption (subindex value=10)	No exemption (subindex value=10)
4) Farmworkers Covered	2.4	.047		Yes (subindex value=10)	Yes (subindex value=10)
5) Casual and Household Workers Covered	2.5	.047		Yes (subindex value=10)	Yes (subindex value=10)
6)Mandatory Government Worker Coverage	2.6	.047		Yes (subindex value=10)	Yes (subindex value=10)
7) No Exemption Based on Employee Class	2.7	.047		outworkers, professional athletes excluded (subindex value=0)	outworkers, professional athletes excluded (subindex value=0)
8) Coverage for All Work-Related Diseases	2.13	.047		Yes (subindex value=10)	Yes (subindex value=10)
9) TTD Benefits=66 2/3% Wages (s.t maximum)	3.7	.047		Yes (subindex value=10)	95% of pre injury wage for the first 13 weeks/ 75% thereafter up to a statutory maximum (subindex value 10)
10) Maximum TTD Benefit at Least 100% worker's average weekly wage	3.8	.047		No (subindex value=0)	Maximum 95% of workers' pre-injury wage (subindex value=0)
11) Retain Prevailing PT Definition	3.11	.047		Not applicable=10	Not applicable=10
12) PT Benefit = 66 2/3% Wages (s.t. maximum)	3.12	.047		Yes (subindex value=10)	95% of pre injury weekly wage for the first 13 weeks and 75% thereafter up to a statutory maximum (subindex value 10)
13) Maximum PT Benefit at Least 100% worker's average weekly wage	3.15	.047		No (subindex value=0)	Maximum 95% of workers' pre-injury wage (subindex value=0)
14) Benefit Duration =	3.17	.047		No (subindex value=0)	No (subindex value=0)

Disability Duration					
15) Death Benefits = 66 2/3% Wages	3.21	.047		No (subindex value=0)	95% of worker pre/death weekly wage for the first 13 weeks up to a statutory maximum and 50% for the following three years (subindex value=0)
16) Maximum Death Benefit at Least 100% worker's average weekly wage	3.23	.047		No (subindex value=0)	No (subindex value=0)
17) Continuation of Benefits to Widow(er)	3.25a	.024		No (subindex value=0)	No (subindex value=0)
18) Lump Sum to Widow(er) on Remarriage	3.25 b	.008		No (subindex value=0)	No (subindex value=0)
19) Continuation of Benefits to Dependent Children until 18	3.25c	.008		No (subindex value=0)	eligibility ceases when recipient turns 16(subindex value=0)
20) Continuation of Benefits to Dependent Children Until 25 if Student	3.25 d	.008		No (subindex value=0)	eligibility ceases when recipients turns 21(subindex value=0)
21) No Statutory $ Limit on Medical or Rehabilitation Services	4.2	.047		No statutory limit (subindex value=10)	No statutory limit (subindex value=10)
22) No Time limit on Right to Medical or Rehab Services	4.4	.047		No time limit (subindex value=10)	No time limit (subindex value=10)
Rights of appeal					
23) Internal First Level Agency		.05		Yes (subindex value=10)	Yes, compulsory conciliation(subindex value=10)
24) Internal Appeal Process		.05		Not appealable(subindex value=10)	Yes, it can only be appealed to the County Court or to the Magistrates Court (subindex value=0)
25) Level of Appeal Beyond First		.05			
No Appeal Beyond Internal Appeal Process			10	No appeal beyond internal	
After internal Process can go either to State Courts or to State Supreme Court, but not Both			7.5		
After internal Process can go to State Courts and then to Supreme Court			5		After conciliation it can go to County Court and then to supreme court (only on a question of law)
No internal Process but can Appeal administrative Decision at Either the State Court level or the State Supreme Court, but not Both			2.5		
No internal Process. Appeals can be held by the State and then the Supreme Court			0		

Workers' Compensation 1979 (basic index): 6.68

Workers' Compensation 2000 (basic index): 5.93

5.6 Collective Bargaining

The weights, sub-index values and scores for collective bargaining are set in table 5.6. This standard substantially decreased in the 1979-2000 period. In order to capture the changes brought to the legislative framework regulating collective bargaining over the two decades considered, section 5.6.1 analyses the index for 1979 while section 5.6.2 considers the year 2000.

5.6.1 Collective Bargaining in 1979

The 1st provision assesses whether legislation explicitly favours and protects collective bargaining. A score of 10 is assigned if legislation grants legal protection to collective bargaining and individual agreements are not permitted. An intermediate score of 5 is given if statutory protection for collective bargaining is available but individual agreements also represent a possible option. The latter score is based on the assumption that individual agreements have the potential to be less favourable to employees than collective agreements. Finally, a score of 0 is assigned if the right to collectively bargain does not receive specific legal attention. As described in section 4.2.1, the system of collective bargaining and industrial relations in Australia in 1979 was regulated by the *Conciliation and Arbitration Act (1904)(Cth)*. The main features of this system were: a) the encouragement of participation of representative groups (trade unions and employers' associations) (*Conciliation and Arbitration Act (1904)(Cth)* s. 2(e)) and b) disputes were dealt by way of conciliation and/or arbitration once a dispute was officially notified (*Conciliation and Arbitration Act (1904)(Cth)* ss. 18, 25, 27). Under the repealed *Conciliation and Arbitration Act (1904)(Cth)*, the system of collective bargaining in Australia was highly institutionalised due to the existence of compulsory Conciliation and Arbitration. Even when the parties genuinely and without the intervention of the arbitration machinery reached an agreement, such an agreement was still subject to a certification

process under the operation of section 28. This section held that, at the request of the parties, the Commission could "certify a memorandum of agreement" or make an award (consent awards) or order giving effect to the agreement reached. An award, order or agreement made under section 28 had the same force and effect as any other award made by the Commission (*Conciliation and Arbitration Act (1904)(Cth)* s. 28(3)). In 1979, legislation granted extensive protection not only to the right to engage in collective negotiations but also to the organisations necessary for its functioning: trade unions and employers' associations. The system of compulsory conciliation and arbitration encouraged the presence of collective organisations in order to facilitate the representation of employers and employees in proceedings for the settlement of industrial disputes. In addition, individual bargaining was not allowed under this system as an individual employee could not be a party to a Federal award because a dispute between one employee and his/her employer was considered a "personal" rather than an "industrial" dispute (see further section 4.2.1). This followed a High Court pronouncement which held that "Industrial disputes are essentially group contests, there is always an industrial group on at least one side. A claim of an individual employee against his employer is not in itself an industrial dispute..."[26]. Although it was not an absolute requirement for the existence of a dispute that a trade union be involved (in some cases an unorganised group of employees could give rise to an "industrial dispute"), this High Court decision greatly favoured the creation and registration of trade unions. There were also some explicit provisions in the *Conciliation and Arbitration Act (1904)(Cth)* granting protection to

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[26] See *Latham C.J. in Metal Trades Employers Association v. Amalgamated Engineering Union (1935) 54 C.L.R.* 387: 403-404.

collective organisations such as sections 2 and 47[27]. Given the extensive protection granted to the right to collectively negotiate and the difficulties associated with entering into individual agreements under the 1979 legislation, a score of 10 was given to the first provision of the index.

In the 2nd provision, a score of 10 is assigned to the sub-index value if a trade union can be registered without an election, 0 otherwise. The scoring of this provision is based on the assumption that an election favours the employer *vis a vis* the employee as it curtails the employee's rights to independently choose a bargaining agent and enhances the influence of the employer upon the employees (Block and Roberts 2000; Block 1994). Under the *Conciliation and Arbitration Act (1904)(Cth)* trade unions could be registered without the need for an election to be held. Section 132 of this Act specified those organisations that could apply for registration. If an organisation satisfied the criteria laid down in section 132, then it could make an application for registration. The procedural requirements were listed in regulation n.116 of the *Conciliation and Arbitration Act (1904)(Cth).* None of these requirements referred to a compulsory election. As an election was not compulsory, a score of 10 was assigned to the sub-index value.

In the 3rd component, a score of 10 is given if there are no statutory limits in relation to the matters that can be negotiated during the bargaining process, 0 otherwise. As noted in sections 4.2.3 and 4.3.1, awards and consent awards dealt with a large number of matters such as working hours, wages, overtime, and leave. No statutory limits were imposed by the *Conciliation and Arbitration Act (1904)(Cth)* on

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[27] In listing the objects of the Act, section 2(e) stated that one of the "chief" objects of the Act was "to encourage the organisation of representative bodies of employers and employees and their registration...", while section 47 enabled the Commission to direct preferences to an organisation or members of an organisation "for the maintenance of industrial peace and for the welfare of society" (*Conciliation and Arbitration Act 1904 (Cth)* ss. 47(1)(2)).

the issues which the parties were allowed to negotiate or on what matters could be arbitrated. Accordingly, a score of 10 was assigned to the sub-index value.

In the 4th component, a score of 10 is assigned if during the bargaining process, either the employer, the employees or their bargaining agents can request mandatory conciliation to the government, government agencies or a third party, 0 otherwise. As previously mentioned, once a dispute was notified by one of the parties, the involvement of industrial tribunals became compulsory. As in 1979 conciliation could be independently requested by one of the parties, a score of 10 was assigned to the sub-index value for this component of the standard.

In the 5th component, a score of 10 is given if legislation outlaws the discharge of workers involved in industrial action, 0 otherwise. In 1979, there was not a provision explicitly outlawing the discharge of employees involved in industrial action. This was due to the fact that the *Conciliation and Arbitration Act (1904)(Cth)* did not provide for a right to strike. The system of labour relations envisaged by the *Conciliation and Arbitration Act (1904)(Cth)* was based on the assumption that the benefits of compulsory conciliation and arbitration had to be balanced by moderation of the parties in relation to industrial action. The Commission, for instance, had consistently followed the policy of not dealing with unions or employers while their members were involved in strikes or lockouts (Punch 1981; 1983; 1995). However, it should be noted that by making the arbitral machinery easily accessible, the *Conciliation and Arbitration Act (1904)(Cth)* granted extensive protection to trade unions' members and their activities. In addition, the *Conciliation and Arbitration Act (1904)(Cth)* contained provisions protecting trade union members against victimisation. Section 5 listed the offences in relation to which the Commission could impose penalties upon the employer or order the reinstatement of an employee unlawfully dismissed. These offences, inter alia, included: a) victimisation on the ground that an employee was, or proposed to become, a member of a trade union; b)

victimisation on the ground that an employee was entitled to the benefit of an industrial agreement or award; c) victimisation on the ground that an employee had appeared, or proposed to appear, as a witness, in a proceeding under the *Conciliation and Arbitration Act (1904)(Cth)* and d) victimisation on the ground that an employee, being a member of an organisation which was seeking better industrial conditions, was dissatisfied with his/her conditions. Given the fact that compulsory conciliation and arbitration was easily accessible and that extensive legal protection against victimisation was granted, a score of 10 was assigned to the sub-index value for this provision.

The 6th provision assesses the presence of statutory mechanisms (first agreement arbitration contracts) that would secure the employer's acceptance of trade unions as legitimate bargaining agents. This is highly relevant in systems of industrial relations hinged on collective bargaining since in some countries, such as the US, the uncertain nature of these requirements is at the base of the high rate of trade union failures (25-30%) to successfully obtain contracts with the employer after winning the right to engage in negotiation (Cooke 1985; Weiler 1983; Block 1994; Chaison and Rose 1994)). In the US, this is mainly due to the delay associated with the National Labour Relations Board resolution process in relation to employer's objection to union election victories and discriminatory behaviours of the employers against union activists. First agreement arbitration protects small or fledgling unions. Thus, the presence of mechanisms that would force the employer to accept unions as legitimate bargaining agents and to bargain in good faith is given a score of 10, 0 otherwise (Block and Roberts forthcoming).

In 1979, trade unions were granted extensive protection to organise and to represent their members' interests. Trade union avoidance was very difficult due to the compulsory nature of conciliation and arbitration. The *Conciliation and Arbitration Act (1904)(Cth)* provided for the registration of employees and employers'

organisations. Emphasis was placed on the creation of trade unions as an essential prerequisite for the functioning of conciliation and arbitration (Punch 1983). This was achieved through the combined operation of specific provisions contained in the *Conciliation and Arbitration Act (1904)(Cth),* such as section 2(e) (encouraging the registration of employee and employer organisations), section 47 (preferences to organisations), and High Court decisions. In particular the *Burwood Cinema Limited v. The Australian Theatrical and Amusement Employees Association (1925)* and *Metal Trades' Employers' Association v. Amalgamated Engineering Union (1935)* decisions sanctioned the principle that a registered organisation was "a party principal" to an industrial dispute and was capable of seeking award benefits for its current members, future members and non-members who were eligible to join the organisation. One of the outcomes of this process was that an employer could not refuse to recognise a trade union as a legitimate agent during the conciliation and arbitration process. This system encouraged the employers to bargain in "good faith" and to recognise trade unions as a dispute could always be referred to the Commission for conciliation or arbitration. Disputes could arise as to which trade union was entitled to represent the employees in relation to a specific issue, in particular when employees were covered by two or more organisations (demarcation disputes). The Commission was granted wide jurisdiction over demarcation disputes by some High Court cases (see the *Container Depot Case* and the *Peko Mines* case) and by sections 4(p), 41(1)(d) and 142A of the *Conciliation and Arbitration Act (1904)(Cth).* The existence of demarcation disputes does not affect the primary requisite of this component of the standard, that relates to the presence of first agreement arbitration contracts. As employer avoidance of trade unions was very difficult in 1979, a score of 10 was given to the sub-index value.

In the last component of this standard a score of 10 is assigned if the legal framework regulating collective bargaining and labour relations provides for an "internal" resolution process mechanism (see section 3.4.1) and if the determinations

issued by the Authority administering this process are conclusive and cannot be appealed "externally", 0 otherwise. Under the *Conciliation and Arbitration Act (1904)(Cth)* the claim procedure was completely internal to the Commission and there were tight limits concerning the rights to appeal its decisions. After the Commission was notified of a dispute pursuant section 25, a single member of the Commission ascertained: a) whether a dispute actually existed; b) the parties to the dispute and c) the matters in dispute. Having done this, the member of the commission tried to settle the dispute by conciliation and if this attempt failed by arbitration. The decisions of the single member could be appealed to the a full bench pursuant to section 35(2)(a), which held that an appeal laid against "an award made by a member... a decision of a member not to make an award or a decision of a member by way of a finding as to the existence of, or the parties to an industrial dispute". Moreover, appeals could also be instituted against the following matters: a) the decision of a member refusing to certify, a memorandum under section 28 (s. 35(2)(b)) (Consent Awards); b) the decision of a member arising generally under section 41(1)(d) (usually demarcation disputes) (s. 35(2)(c)) and c) an order or the refusal to make an order, by a presidential member under section 142A (which affected the representation of employees by an organisation). The decisions of the full bench were final and conclusive; no further appeals were allowed. Under this system the judicial apparatus played a marginal role as it could only intervene in case of breaches of awards or orders of the Commission as it was empowered only with enforcement functions. As the claim procedure was internal and there were tight limits on the rights to appeal, a score of 10 was given to the sub-index value for this component of the standard.

5.6.2 Collective Bargaining in 2000

The enactment of the *Industrial Relations Reform Act (1993)(Cth)* and the *Workplace Relations Act (1996)(Cth)* substantially altered the legislative framework regulating labour relations (see further, sections 4.3.1 and 4.3.2). The demise of

compulsory conciliation and arbitration in favour of enterprise and individual bargaining significantly reduced the level of institutional protection accorded to trade unions and their right to engage in collective negotiations. The introduction of the *Workplace Relations Act (1996)(Cth)* particularly affected three components of the standard: the statutory protection accorded to collective bargaining, the availability of first agreement contracts and the enforcement mechanism.

The *Workplace Relations Act (1996)(Cth)* provides for two types of agreements: collective agreements (Certified Agreements) and individual agreements (Australian Workplace Agreements (AWAs)). Certified agreements are collective agreements negotiated between an employer and a group of employees. Employees can be either represented or not represented by a trade union (*Workplace Relations Act (1996)(Cth)* part VIB); however, this feature does not affect the real nature of these agreements, that is, that certified agreements must be negotiated collectively. Certified agreements must pass a "no disadvantage test" (*Workplace Relations Act (1996)(Cth),* s. 170LT), which means that employees must not be disadvantaged regarding their terms and conditions of employment in relation to arbitrated awards or relevant Commonwealth or State laws (ss. 170XA(1), 170XA(2)).

Along with certified agreements, the *Workplace Relations Act (1996)(Cth)* also introduced the possibility of concluding agreements between a single employer and an individual employee (*Workplace Relations Act (1996)(Cth),* s. 170VF). Like Certified Agreements, the employer and the employee may or may not appoint a bargaining agent (*Workplace Relations Act (1996)(Cth),* s. 170VK) and AWAs must also pass a no-disadvantage test (*Workplace Relations Act (1996)(Cth),* s. 170VPB). The introduction of individual bargaining, coupled with the equal protection granted to collective agreements and AWAs, undermines the effectiveness of statutory protection accorded to collective bargaining as employers, particularly in workplaces with low level of unionisation, can exercise pressure upon the employees to enter into

individual agreements. This is supported by the fact that an official complain has been lodged by the International Labour Organisation (ILO) criticising the introduction of AWAs. It is argued that AWAs are an infringement of the ILO Collective Bargaining Convention. As the *Workplace Relations Act (1996)(Cth)* provides legislative protection for both collective and individual agreements, a score of 5 was assigned to the sub-index value.

The 2nd component of the standard, which significantly decreased from 1979, relates to the availability of first agreement contracts. As noted in section 4.3.1, under the *Workplace Relations Act (1996)(Cth)* the arbitral functions of the AIRC are limited to 20 allowable matters[28] (*Workplace Relations Act (1996)(Cth)* s. 89A). This section was introduced with the clear purpose of compelling the parties to enter into contractual negotiations as declared by the Act in itself which states that one of the functions of the AIRC is "to prevent and settle industrial disputes: (i) so far as possible, by conciliation; and (ii) as a last resort and within the limits specified by this Act, by arbitration" (*Workplace Relations Act (1996)(Cth)* s. 89 (a)). However, the regulation of collective bargaining under the *Workplace Relations Act (1996)(Cth)* contains numerous loopholes that have the potential to encourage trade union

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[28] The allowable matters are: (a) classifications of employees and skill-based career paths; (b) ordinary time hours of work and the times within which they are performed, rest breaks, notice periods and variations to working hours; (c) rates of pay generally (such as hourly rates and annual salaries), rates of pay for juniors, trainees or apprentices, and rates of pay for employees under the supported wage system; (d) piece rates, tallies and bonuses; (e) annual leave and leave loadings; (f) long service leave; (g) personal/carer's leave, including sick leave, family leave, bereavement leave, compassionate leave, cultural leave and other like forms of leave; (h) parental leave, including maternity and adoption leave; (i) public holidays; (j) allowances; (k) loadings for working overtime or for casual or shift work; (l) penalty rates; (m) redundancy pay; (n) notice of termination; (o) stand-down provisions; (p) dispute settling procedures; (q) jury service; (r) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work; (s) superannuation; (t) pay and conditions for outworkers, but only to the extent necessary to ensure that their overall pay and conditions of employment are fair and reasonable in comparison with the pay and conditions of employment specified in a relevant award or awards for employees who perform the same kind of work at an employer's business or commercial premises. (*Workplace Relations Act (1996) (Cth)*, s.89A).

avoidance or at least dilute the dispute resolution process. First, employers have the capacity to choose the union with which they wish to negotiate, although they cannot discriminate against employees on the ground that they are (or are not) members of the chosen union (*Workplace Relations Act (1996)(Cth)* s. 170NB(1)). Second, the powers of the Commission to impose sanctions upon the parties (in particular upon the employer) for failure to "genuinely" reach an agreement are limited. Section 170MW(1) of the *Workplace Relations Act (1996)(Cth)* enables the AIRC to suspend or terminate a bargaining period in a set of circumstances set out in section 170MC(2)-(7). Two of these circumstances can be used to make an arbitrated award while the others put the parties back in the position they were in before the bargaining period was initiated. Section 170MW(3) enables the AIRC to terminate a bargaining period if "...industrial action that is being taken to support or advance claims in respect of the proposed agreement is threatening: a) to endanger the life, the personal safety or health, or welfare, of the population or part of it; or b) to cause significant damage to the Australian economy or an important part of it" while section 170MW(7) deals with situations where employment is regulated by paid rates award and where "there is no reasonable prospect of the negotiating parties reaching an agreement under Division 2 or 3 during the bargaining period"[29]. If a bargaining period is terminated under either section 170MW(3) or 170MW(7), the AIRC must first begin to exercise the conciliatory powers mentioned in section 170MY and if the dispute is still unresolved it can arbitrate (s. 170MX(3)). In exercising the arbitral powers, the Full Bench of the Commission (s. 170MX(4)) is not constrained by the operation of section 89A: in other words the AIRC can arbitrate in relation to non-allowable matters (s.170MY(2)). Sections 170MW(3) and 170MW(7) are compounded by section 170MW(2) that holds that a bargaining period can be

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[29] This section will loose significance in the future as all paid rates awards are now meant to be converted into minimum rates awards (*Paid Rates Review* Decision, AIRC, Full Bench, Print Q7661, 20 October 1998).

suspended by the AIRC where a negotiating party has not genuinely tried to reach an agreement with the other parties or has failed to comply with any relevant direction or recommendation of the Commission. When a bargaining period is suspended the parties are put back in the position they were before the commencement of the bargaining period. This disputes resolution process has the potential to favour the employers as the *Workplace Relations Act (1996)(Cth)* does not contain an effective mechanism that would force the parties to bargain in "good faith" and the powers of the Commission to exercise the arbitral functions are limited to the circumstances listed in sections 170MW(3) and 170MW(7) (Creighton and Stewart 2000; Pittard 1997). As first agreement contracts in Australia receive little statutory protection, a score of 0 was assigned to the sub-index value.

The last component of the standard which decreased when viewed against 1979, is the enforcement mechanism. It has already been seen that the *Workplace Relations Act (1996)(Cth)* drastically reduced the access to conciliation and arbitration. The Act, by curtailing the power of the AIRC, has enhanced the relevance of the judicial system. Claims related to collective bargaining, such as breaches of freedom of association provisions, must now be dealt with by the ordinary judicial system due to the presence of the *Separation of Power Doctrine*, while the umbrella provided by compulsory conciliation and arbitration and its internal system of appeals has been drastically reduced through the introduction of sections 89A, 170MX and 170MZ. As most of the complaints concerning collective bargaining are now dealt with through the judicial system, a score of 0 was assigned to the sub-index value.

Table 5.6: Collective Bargaining in Australia, Weights, Sub-index Values and Scores in 1979 and 2000

Provision/Language	Prov. Weight	Subindex Value	Subindex scores(1979)	Subindex scores(2000)
1) Statutory Protection for Collective Bargaining	.15			
Full statutory protection		10	Compulsory conciliation and arbitration was compulsory once a dispute was notified and individual agreements were not allowed	
Statutory protection but Individual agreements available		5		Equal protection granted to collective and individual agreements
Absence of statutory protection		0		
2) Election not Required if Evidence that Majority Support Union	.2		Election not required (subindex value=10)	Election not required (subindex value=10)
3) Unlimited Subjects of Bargaining	.1		Unlimited subject of bargaining (subindex value=10)	Unlimited subject of bargaining (subindex value=10)
4) Conciliation During Negotiations Compulsory at Request of Government or at Request of One Party	.2		Conciliation always available (subindex value=10)	Conciliation always available (subindex value=10)
5)Striker Permanent Replacements Prohibited	.1		Strikers' replacement prohibited (subindex value=10)	Strikers' replacement prohibited (subindex value=10)
6)First Agreement Arbitration Available	.1		Yes: conciliation and arbitration compulsory once a dispute is notified (subindex value=10)	No: arbitration limited by sections 89A and 170MC(2)-(7) (subindex value=0)
7) Limits on Rights of Loser to Appeal	.15		Yes (subindex value 10)	No: must be dealt mainly through the judicial (subindex value 0)

Collective Bargaining 1979 (basic index): 10

Collective Bargaining 2000 (basic index): 6.75

5.7 Equal Employment Opportunity/Employment Equity

The weights, sub-index values and sub-index scores for Equal Employment Opportunity/Employment Equity are set out in table 5.7. This standard substantially increased over the period considered. As a result, section 5.7.1 discusses 1979 while

5.7.2 will analyse legislation for the year 2000. Except for the fifth component of the standard (age), where intermediate scores for the sub-index value were generated, a score of 10 was assigned if legislation was in full compliance with the relevant provision, 0 otherwise.

5.7.1 Equal Employment Opportunity/Employment Equity in 1979

In the first two provisions a score of 10 is assigned to the sub-index value if legislation outlaws discrimination based on race and national origin, 0 otherwise. In 1979 the only anti discrimination law enacted by the Federal Parliament was the *Racial Discrimination Act (1975)(Cth)* [30]. This Act was passed to give effect to the *International Convention on the Elimination of All Forms of Racial Discrimination* which was ratified by the Whitlam government on the 15th of June 1973. The *Racial Discrimination Act (1975)(Cth)*, applies also to the States as it derives its constitutional legitimacy from the External Affairs power. This Act makes racial discrimination unlawful. Section 9(1) clearly states that:

> It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life

Discrimination based on race or national origin was outlawed in 1979 and therefore a score of 10 was assigned to the sub-index value. All the remaining components of the standard, except for the enforcement mechanism, were not covered by Federal legislation and therefore a score of 0 was assigned to the sub-index value.

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[30] The *Racial Discrimination Act (1975) (Cth)* was integrated by the following legislation enacted by the States: *Sex Discrimination Act 1975 (South Australia), The Racial Discrimination Act 1976 (South Australia), The Anti-Discrimination Act 1977 (New South Wales), The Equal Opportunity Act 1977 (Victoria).*

The claim procedure under the *Racial Discrimination Act (1975)(Cth)* was rather weak and enforced through the Judiciary. In 1979 any claim had to be initially submitted to the Commissioner for Community Relations. The Commissioner was to conduct inquiries after a claim was lodged (s. 21(1)(b)) and could decide not to further proceed if the complainant withdrew the claim or if a complaint was "trivial", "frivolous", "vexatious" or "not made in good faith" (ss. 2(b)(i), 2(c)(i)). In conducting the inquiry, the Commissioner could organise a compulsory conference in order to settle the claim through conciliation. If conciliation failed, the Commissioner had to issue a certificate stating that conciliation could not settle the matter, although the Commissioner could not make any specific recommendation. Only after such a certificate was issued, the complainant could institute proceedings in a State or Territory Court (s. 24(a)) and, as for any other Court action, the complainant had to bear the *onus of proof.* As in 1979 the *Racial Discrimination Act (1975)(Cth)* did not provide for an "internal" disputes resolution process, and violations of anti-discrimination legislation could only be enforced "externally" through the Judiciary, a score of 0 was assigned to the sub-index value for this component of the standard.

5.7.2 Equal Employment Opportunity/Employment Equity in 2000

During the mid 1980s to the early 1990s anti discrimination and equal employment opportunity legislation began to be enacted with greater frequency in Australia at Federal level. By the end of 1992, the *Racial Discrimination Act (1975)(Cth)* was flanked by three other pieces of legislation: *The Sex Discrimination Act (1984)(Cth) the Human Rights and Equal Opportunity Commission Act (1986)(Cth)* and the *Disability Discrimination Act (1992)(Cth).* These Acts were passed to give effect to international conventions. Most of the provisions included in table 5.7, which were not covered by the *Racial Discrimination Act (1975)(Cth)* (see section 5.7.1), now receive legal protection.

The 3rd component of the standard, discrimination based on gender, is the primary focus of the *Sex Discrimination Act (1984)(Cth).* This act expressly prohibits any form of discrimination based on "sex, marital status, pregnancy or potential pregnancy in the areas of work, accommodation, education..." (s. 3(b)). The act broadly outlaws sex-based discrimination without preference for one particular gender (*Sex Discrimination Act (1984)(Cth),* s. 5(1)(a)(b)(c). The *Sex Discrimination Act (1984)(Cth)* was enacted to give effect to the *Convention on the Elimination of all Forms of Discrimination Against Women* (see for example *Sex Discrimination Act (1984)(Cth)* s. 3(b) and Ronalds 1998). As gender is fully covered by anti-discrimination laws, a score of 10 was assigned to the sub-index value.

The 4th provision assesses whether or not legislation prohibits discrimination based on religion. Discrimination on the ground of religion is outlawed by section 3 of the *Human Rights and Equal Opportunity Commission Act (1986)(Cth),* and therefore a score of 10 was assigned to the sub-index value.

In the 5th component, a score of 10 is assigned if legislation outlaws discrimination based on age, 0 otherwise. Neither the *Racial Discrimination Act (1975)(Cth)* nor the *Human Rights and Equal Opportunity Act (1986)(Cth)* contain provisions that sanction discrimination based on age. Given that Federal legislation does not directly cover age, a score of 0 was assigned to the sub-index value.

The 6th component of the standard evaluates whether or not legislation allows discrimination on the basis of a person's sexuality. At the Federal level there is no legislation that proscribes discrimination on the ground of sexual preferences and sexuality in general. This lacuna led the Human Rights and Equal Opportunity Commission (HREOC) to urge the Federal Parliament to pass more comprehensive legislation in this area (see *Report on Inquiry into Sexuality Discrimination,* 1997). However, so far legislation has not been passed to prevent discrimination based on

sexuality (for a detailed discussion see Ronalds 1998). Hence, a score of 0 was assigned to the sub-index value.

The 7th provision relates to discrimination on the ground of disability. Discrimination based on disability is outlawed by the *Disability Discrimination Act (1992)(Cth)*, which was introduced expressly to eliminate all forms of discrimination "arising out/or related to disability" (ss. 3(a), 5(1)(2))[31]. As discrimination on the ground of a person's disability or impairment is expressively prohibited, a score of 10 was assigned to the sub-index value.

In the 8th provision, a score of 10 is given if legislation outlaws discrimination based on political belief, 0 otherwise. This ground of discrimination is expressively proscribed by section 3 of the *Human Rights and Equal Opportunity Commission Act (1986)(Cth)* and therefore a score of 10 was assigned to the sub-index value.

In the 9th provision a score of 10 is assigned if legislation grants to an employee at least 20 weeks of paid leave for pregnancy or to take care of members of their immediate family or household, 0 otherwise. Australia is one of the few countries in the world, which does not provide for paid parental leave. Since 1979, many awards have granted to female employees up to 12 months unpaid leave (*Federated Miscellaneous Workers Union of Australia v ACT Employers Federation* (1979) 21 AILR). This standard was upheld in 1990 by the AIRC during the *Parental Leave Test Case*, which also indicated that male employees should be allowed to take

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31 Disability is defined in section 4(1) as: (a) total or partial loss of the person's bodily or mental functions; or (b) total or partial loss of a part of the body; or (c) the presence in the body of organisms causing disease or illness; or (d) the presence in the body of organisms capable of causing disease or illness; or (e) the malfunction, malformation or disfigurement of a part of the person's body; or (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour; and includes a disability that: (h) presently exists; or (i) previously existed but no longer exists; or (j) may exist in the future; or (k) is imputed to a person.

up to 12 months unpaid paternity or adoption leave, provided that any couple do not take more than 12 months' leave between them. This standard now constitutes the core of parental and adoption leave as enshrined in Federal law (*Workplace Relations Act (1996)(Cth)* Pt. VIA Div. 5, Sch. 14, regs. 30E-30ZD). The entitlements granted by the *Workplace Relations Act (1996)(Cth)* derive their constitutional legitimacy from the ILO's *Workers with Family Responsibilities Convention 1981* (n. 156). In addition, family leave is also granted. The standard provision in Australia for family leave was established through a national *Family Leave Test Case (1994)* that was divided into two stages (stage 1 November 1994, stage 2 November 1995). This test case granted up to 40 hours of personal paid leave each year to care for members of a person's immediate family or household who are ill. As the 52 unpaid weeks and 40 paid hours entitlement is lower than the 20 paid weeks prescribed by table 5.7, a score of 0 was assigned to the sub-index value.

The 10th provision assigns a score of 10 if sexual harassment is a proscribed ground of discrimination, 0 otherwise. Sexual harassment is considered a form of sex discrimination under section 28A Div.3 of the *Sex Discrimination Act (1984)(Cth).* Accordingly, a score of 10 was assigned to the sub-index value.

In the 11th component of the standard, a score of 10 is given to the sub-index value if the principle of "equal pay for work of equal value" receives statutory protection, 0 otherwise. The *Workplace Relations Act (1996)(Cth)* provides statutory protection for this principle: section 93 states that the AIRC is required, in carrying out its functions, to "take account" of the principles contained in the *Racial Discrimination Act (1975)(Cth),* the *Sex Discrimination Act (1984)(Cth),* and the *Disability Discrimination Act (1992)(Cth).* This provision is integrated by Division 2 section 170 (BD) of the *Workplace Relations Act (1996)(Cth)* which enables an employee, a relevant trade union or the Sex Discrimination Commissioner to apply to the AIRC for an order to ensure that "for employees covered by the orders, there will

be equal remuneration for work of equal value" (*Workplace Relations Act (1996) (Cth)*, s. 170BC(1)). As the Federal legislation contains basic principles that provide protection in relation to equal pay for work of equal value, a score of 10 was assigned to the sub-index value.

The 12th component of the standard assesses whether or not legislation requires an employer to provide reasonable accommodation for disabled employees. Australian legislation takes an indirect approach to this issue as it does not define "Reasonable Accommodation" or "Reasonable Adjustments". However, under section 6 of the *Disability Discrimination Act (1992)(Cth)* there is a general obligation to remove unreasonable requirements that would disadvantage people with a disability. This section defines indirect discrimination and is integrated by sections 5(2) and 15(4) of the same Act. Section 5(2) holds that the fact that a person requires different "accommodation or services" does not in itself constitute a material difference to "justify less favourable treatment of a person with a disability". Moreover, under section 15(4) it is not unlawful to dismiss or refuse to employ a person who, because of disability, cannot perform the inherent requirements of the job without additional services or facilities - but only provided that those services or facilities would impose "unjustifiable hardship". These provisions, coupled with common law cases such as *Humphries and Humphries v Department of Education, Employment, Training and Youth Affairs*[32], indicate that there is an obligation at both statutory and common law level to provide for reasonable accommodation to disabled employees and therefore a score of 10 was assigned to the sub-index value.

Finally, the last component of the standard evaluates the enforcement mechanism. The enforcement procedure was changed in 1986, although it remains

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[32] In this case, it was ruled that discrimination occurred as a result of failure on part of the employer to make the "reasonable adjustments" necessary for job performance and for equal opportunity for promotion.

weak The *Human Rights and Equal Opportunity Commission* (HREOC) is the body administering equal opportunity and anti discrimination complaints at Federal level. After a claim is lodged, it is investigated by the HREOC and subsequently there will be an attempt to settle the matter by conciliation. If the conciliation process fails to settle the claim, the dispute will proceed to a formal inquiry that can result in the issuing of "determinations" by the HREOC. However, the determinations issued by this body are not legally binding. In order to enforce a HREOC determination, action must be taken to the Federal Court that is free to comply or not with the relevant determination. Between 1993 and 1995 the determinations of the HREOC were given the status of orders of the Federal Courts. However, such practice was declared unconstitutional by the High Court in the *Brandy v HREOC* case. Thus, the Federal Court is the only body that has actual enforcement powers. The present enforcement mechanism is rather weak as a claimant must initially proceed to the HREOC for conciliation or in order to obtain a determination, and then to the Federal Court for enforcement. The rights of appeal are "external" as a HREOC determination can only be enforced by the Judiciary, and therefore a score of 0 was assigned to the sub-index value.

Table 5.7: Equal Employment Opportunity/Employment Equity in Australia, Weights, Sub-index Values and Scores in 1979 and 2000

Provision/Language	Provision Weight	Subindex Value	Subindex scores(1979)	Subindex scores(2000)
1) Race, Visual Minorities, Aboriginal People	.15		Race, visual minorities and aboriginal people covered (subindex value=10)	Race, visual minorities and aboriginal people covered(subindex value=10)
2) National Origin/Ancestry	.1		National origin/ancestry covered (subindex value=10)	National origin/ancestry covered (subindex value=10)
3) Gender	.15		Gender not covered (subindex value=0)	Gender covered (subindex value=10)
4) Religion	.1		Religion not covered (subindex value=0)	Religion covered (subindex value=10)
5) Age	.1			
No Exceptions		10		
Retirement Plan Exception		5		
Age Not Covered		0	Age not covered	Age not covered
6) Sexual Preference/Orientation	.05		Sexual preference/orientation not covered (subindex value=0)	Sexual preference/orientation not covered (subindex value=0)
7) Disability	.1		Disability not covered (subindex value=0)	Disability covered (subindex value=10)
8) Political Beliefs/Org. Membership	.05		Political beliefs not covered(subindex value=0)	Political beliefs covered (subindex value=10)
9) Family leave due to pregnancy, Illness of Family Member or Serious Health Problem at least 20 paid weeks	.05		Not covered (subindex value=0)	52 weeks unpaid Parental leave. Family leave due to pregnancy, Illness of Family Member or Serious Health Problem, 40 hours per each calendar year (subindex value=0)
10) Sexual Harassment Covered	.03		Sexual Harassment not covered (subindex value=0)	Sexual Harassment covered (subindex value=10)
11) Equal Pay Covered	.03		Equal Pay not Covered (subindex value=0)	Equal Pay Covered (subindex value=10)
12) Reasonable Accommodation for Disabled Employees	.04		Reasonable Accommodation for Disabled Employees not covered (subindex value=0)	Reasonable Accommodation for Disabled Employees covered (subindex value=10)
13) Limits on Rights of Appeal	.05		If conciliation failed could only be enforced through Court (subindex value=0)	After conciliation The HREOC can issue non-binding determination that can be enforced only in Court (subindex value=0)

Equal Employment Opportunity/Employment Equity 1979 (basic index): 2.5

Equal Employment Opportunity/Employment Equity 2000 (basic index): 7.5

5.8 Unjust Discharge

Weights, sub-index values and sub-index scores for unjust discharge are shown in table 5.8. The scale is divided into two main parts. The first section, that includes the first four provisions, relates to contractual exceptions to the employment at will doctrine at common law level. The second part (component 5: dismissal limited to serious misconduct, incompetence, negligence, redundancy and in any case subject to "just cause") refers to statutory protection accorded to unjust discharge. This classification was necessary because the legal system of some countries (such as the US, Britain and to some extent Australia) is either dominated by common law, or common law plays an important role, while in other nations (typically civil law countries), statutory legislation governs termination of employment. In the first four components of the standard, a score of 10 is given if common law cases definitely ruled in favour of the exception, 5 if there is no final Court decision and 0 if Courts ruled against the exception. In the statutory component of the standard, a score of 10 is assigned if legislation restricts the grounds upon which an employee can be dismissed, 0 otherwise.

The first two common law exceptions are quite similar. The implicit contract derogation to the employment at will doctrine holds that if the employer and the employee have agreed (either implicitly or explicitly) that the contract of employment will not be terminated at will, then that agreement should have "force and effect" (Wolkinson and Block 1996). On the other hand, the handbook exception relates to customs, practices and procedures contained in firms' manuals provided to the employees. For example, if an employee is dismissed without "just cause" but it is the enterprise's policy to discharge employees "for just cause only" and this clause is included in the firm's handbook, then the discharge can be held to be unjust (Wolkinson and Block 1996). The rationale underpinning these two exceptions is basically the same, being that employers should be held to the promises they make.

The public policy exception is rooted in tort law and common sense. It states that an employee cannot be dismissed for refusing to violate a public policy or a law or for exercising an employee's right such as joining a trade union or filing a workers' compensation claim (Wolkinson and Block 1996). Finally, the covenant and fair dealing exception holds that employers must act in good faith *vis a vis* their employees. The covenant and fair dealing exception protects the employees from discharges based on the employer's desire to avoid the payment of benefits already earned by the employee. This situation typically arises in situations in which employees are paid on a performance basis over a period of time (Wolkinson and Block 1996).

The index for unjust discharge significantly increased in Australia over the two decades due to the enactment of statutory provisions regulating unfair dismissal. In order to evaluate these changes, section 5.8.1 analyses 1979 while section 5.8.2 will consider the year 2000.

5.8.1 Unjust Discharge in 1979

In 1979, statutory and common law remedies provided little protection against unjust discharge. As noted in section 4.2.2, common law in Australia has traditionally played a marginal role in establishing labour standards and it has never been used to create a clear and indisputable doctrine in relation to termination of employment. There are two reasons why this was so: a) the rise in the importance of compulsory conciliation and arbitration (see section 4.2.2) and b) the fact that the relationship between award obligations and the individual contract of employment has never been the subject of systematic judicial interpretation (Creighton and Stewart 2000).

In 1979 common law cases in Australia were still based on the traditional British doctrine of "freedom of contract" which, in its crudest form, holds that an employer is neither required to show cause when exercising a contractual power of

termination (unless the contract itself imposes that condition), nor that there is an obligation to grant the employee the basic procedural requirements suggested by the rules of "natural justice"[33]. None of the four exceptions (Implicit Contract, Handbook, Public Policy and Covenant of Good Faith) to the "employment at will" doctrine had received extensive Courts interpretation and, as a consequence, a score of 5 was assigned to the sub-index value for each of the first four provisions.

If common law remedies in 1979 were of little use in relation to unjust discharge, statutory legislation did not offer more extensive protection. The *Cociliation and Arbitration Act (1904)(Cth)*, did not contain any provision concerning unfair dismissal although it prohibited the dismissal of employees on certain grounds (unlawful dismissal). The circumstances making a dismissal unlawful were listed in section 5 of the Act[34]. This section sought to prevent the victimisation of union officials while performing their duties. The introduction of section 5 was necessary in order to encourage the creation of employees' organisations and for the effective functioning of compulsory arbitration and conciliation. However, besides this section, the *Conciliation and Arbitration Act (1904)(Cth)* did not prescribe any statutory remedy against discharge that was "harsh, unreasonable or unjust" (unfair dismissal).

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[33] See for example *Ridge v Baldwin [1964]* AC 40 at 65, *Thorpe v South Australian National Football League (1974)* 10 SASR 17 at 29-33.

[34] An employer cannot dismiss an employee or threaten to dismiss an employee if the employee: (a) is or has been, or proposes, or has at any time proposed, to become, an officer delegate or member of an organization, or of an association that has applied to be registered as an organization; or (b) is entitled to the benefit of an industrial agreement or an award; or (c) has appeared, or proposes to appear, as a witness, or has given, or proposes to give, evidence, in a proceeding under this Act; or (d) being a member of an organization which is seeking better industrial conditions, is dissatisfied with his conditions; or (e) has absented himself from work without leave if- (i) his absence was for the purpose of carrying out his duties or exercising his rights as an officer or delegate of an organization; and (ii) he applied for leave before he absented himself and leave was unreasonably refused or withheld; or (f) being an officer, delegate or member of an organization, has done, or proposes to do, an act or thing which is lawful for the purpose of furthering or protecting the industrial interests of the organization or its members, being an act or thing done within the limits of authority expressly conferred on him by the organization in accordance with the rules of the organization. (*Arbitration and Conciliation Act (1904) (Cth)* s.5).

Also, clauses inserted in arbitrated awards were of little value. Despite the fact that arbitrated awards often contained provisions regulating termination of employment and unfair dismissal, the Commission had traditionally been hesitant to resolve unfair dismissal claims through arbitration due to the presence of three fundamental constitutional objections: a) It was difficult to establish the element of interstateness for the purpose of section 51(xxxv) of the Australian Constitution in cases involving the dismissal of individual employees; b) It was not clear whether or not unfair dismissal disputes were "industrial matters" in the constitutional sense and c) the resolution of such disputes could result in the Commission exercising judicial powers (for a detailed discussion on these objections see for example Creighton and Stewart 2000; Punch 1981). As a result, until the mid 1980s, when a series of High Court decisions partly readdressed these problems[35], unfair dismissal cases were often unofficially referred to individual members of the Commission who handed down non-binding decisions. Such decisions were usually accepted by the parties (Creighton and Stewart 2000) even though they did not have legal force and could be easily evaded.

Although in 1979 two States, New South Wales and South Australia, had enacted legal provisions prescribing remedies for the reinstatement of employees whose employment had been unfairly terminated[36], at the Federal level there were no provisions regulating unfair dismissal, nor could this matter be resolved through the operation of conciliation and arbitration. As a result, a score of 0 was assigned to the statutory component of this standard.

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[35] See *Ranger Uranium Mines Pty Ltd; Ex Parte Federated Miscellaneous Workers Union of Australia* (1987) 163 CLR 656. In this case the High Court held that the Commission could order the reinstatement of an employee who was unfairly dismissed without exercising "judicial" powers.

[36] See *Industrial Arbitration Act 1940 (NSW)* ss. 5(1) and 20A(1), *Industrial Conciliation and Arbitration Act 1972 (S.A)* s. 15(1)(e).

5.8.2 Unjust Discharge in 2000

As previously mentioned, the "unjust discharge" index significantly increased in the 1979-2000 period. This is the result of the enactment of statutory legislation that protects employees from dismissals that are "harsh, unjust, unjustifiable", while the common law component of the standard has remained unchanged[37]. The *Workplace Relations Act (1996)(Cth)* contains provisions regulating termination of employment. This is the result of a process that started in 1988 and that aimed to give effect to the ILO convention 158 on termination of employment. Although the stringency of the original Division 3 Part VIA of the *Industrial Relations Reform Act (1994)(Cth),* which took effect on the 30th of March 1994, was weakened by the enactment of Division 3 part VIA of the *Workplace Relations Act (1996)(Cth),* the latter still provides some form of protection.

The *Workplace Relations Act (1996)(Cth)* distinguishes between unfair and unlawful dismissals. Under section 170CE, employees can apply to the AIRC for relief in respect to their termination in case such termination was "harsh, unjust or unreasonable". In determining if a dismissal was "unfair" under section 170CE, the Commission must take into account the merits of the case (substantive fairness) and the methods used by the employer to reach the decision to dismiss a particular employee and the manner in which the dismissal was carried out (procedural fairness). Substantive and procedural fairness are explained in section 170CG3 which

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[37] It should be noted that termination of employment was the subject of some judicial interpretations at common law level during the late 1980s-mid 1990s. In *Gregory v Philip Morris Ltd*, (1988) 80 ALR 455, for example, it was held that awards provisions prohibiting harsh, unjust or unreasonable dismissal should be taken to be incorporated into individual employment contracts. This pronouncement had the effect to impose a contractual obligation upon the employers bound by such awards to observe both procedural and substantive fairness. This decision was subsequently overruled in 1995 in *Byrne v. Australian Airlines Ltd.*

states that in determining if termination was harsh, unjust or unreasonable the Commission must have regard to:

> (a) whether there was a valid reason for the termination related to the capacity or conduct of the employee or to the operational requirements of the employer's undertaking, establishment or service;
> (b) whether the employee was notified of that reason; and
> (c) whether the employee was given an opportunity to respond to any reason related to the capacity or conduct of the employee; and
> (d) if the termination related to unsatisfactory performance by the employee—whether the employee had been warned about that unsatisfactory performance before the termination; and
> (e) any other matters that the Commission considers relevant

It should be noted that the existence of a "valid reason" to dismiss an employee is one of the aspects to be considered by the AIRC when considering whether or not a termination was "harsh, unjust or unreasonable" (s. 170CG(3)(a)). Claims for "unfair dismissal" are only accessible to some categories of employees such as "federal award employees", Commonwealth public sector employees, employees in a Territory, waterside workers, maritime employees and flight crew officers employed in international or interstate trade and commerce or trade and commerce involving a territory (s. 170CB(1)). Furthermore, section 170CC further constrains the access to the AIRC's unfair dismissal procedure as it excludes casual, probationary and training workers.

In addition to unfair dismissal provisions, Part. VIA Div. 3 Subdiv. C of the *Workplace Relations Act (1996)(Cth)* contains specific prohibitions in relation to termination of employment. These prohibitions are minimum requirements that, unlike unfair dismissal provisions, apply to all employees (s. 170CB (3)). Dismissal

of an employee in breach of these requirements is unlawful[38]. As Federal legislation constrains the freedom of employers to discharge employees, a score of 10 was assigned to the sub-index value for the statutory component of the standard.

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[38] Section 170CK lays down the list of reasons that make a dismissal unlawful: (a) temporary absence from work because of illness or injury within the meaning of the regulations; (b) trade union membership or participation in trade union activities outside working hours or, with the employer's consent, during working hours; (c) non-membership of a trade union; (d) seeking office as, or acting or having acted in the capacity of, a representative of employees; (e) the filing of a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities; (f) race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; (g) refusing to negotiate in connection with, make, sign, extend, vary or terminate an AWA; (h) absence from work during maternity leave or other parental leave.

Table 5.8: Unjust Discharge in Australia, Weights, Sub-index Values and Scores in 1979 and 2000

Provision/Language	Provision Weight	Subindex Value	subindex scores (1979)	subindex scores (2000)
1) Discharge Prohibited if Employee has implicit Contract	.05			
Definitive State Ruling in Favour of Exception		10		
No Court Decision		5	No Court Decision	No Court Decision
Definitive State Ruling Against Exception		0		
2) Handbook Exception	.05			
Definitive State Ruling in Favour of Exception		10		
No Court Decision		5	No Court Decision	No Court Decision
Definitive State Ruling Against Exception		0		
3) Public Policy Exception	.1			
Definitive State Ruling in Favour of Exception		10		
No Court Decision		5	No Court Decision	No Court Decision
Definitive State Ruling Against Exception		0		
4) Covenant of Good Faith Exception	.1			
Definitive State Ruling in Favour of Exception		10		
No Court Decision		5	No Court Decision	No Court Decision
Definitive State Ruling Against Exception		0		
5) Limited, except for Misconduct, Incompetence, or "Just Cause"	0.7		Unjust discharge not limited (subindex value=0)	Unjust discharge limited to just cause or serious misconduct (subindex value=10)

Unjust discharge 1979 (basic index): 1.5

Unjust discharge 2000 (basic index): 8.5

5.9 Occupational Health and Safety

The weights, sub-index values and sub-index scores for occupational health and safety are shown in table 5.9. This standard dramatically increased in the two decades studied. In order to capture these changes, section 5.9.1 analyses 1979 while section 5.9.2 will consider the year 2000. As for workers' compensation, Victorian legislation

was used to construct this index as the Federal government does not have jurisdiction over the States in relation to occupational health and safety (see section 4.2.1).

5.9.1 Occupational Health and Safety in 1979

In 1979 the legislation operating in Victoria was still based on the model established by the British *Factory and Workshop Act (1878).* This system did not provide for a general framework for the prevention of accidents at the workplace; rather, it established procedures and administrative bodies to enforce health and safety standards laid down by the legislature. The operation of this system created a plethora of specific rules and regulations, some of them overlapping, and often applying to different employees at the same workplace. By the end of 1979 in Victoria there were 26 separate pieces of legislation dealing with various aspects of occupational health and safety and dozens of regulations introduced under these laws. Prosecution was possible only for breaches of specific regulations and was usually pursued by independent public agencies through the courts (Creighton 1983). The two most relevant laws in Victoria in 1979 were: The *Labour and Industry Act (1958)(Vic)* and The *Health Act (1958)(Vic).* These two Acts not only laid down regulations for specific industries and hazards, but also provided general rules in relation to enforcement procedures and personal liability.

In the 1st component of the standard, a score of 10 is assigned if legislation compels the employer to provide work and a place of employment that are free from hazards, whether or not the health and safety authority has promulgated specific regulations (general duty clause), 0 otherwise. The effect of general duty clauses is that, by extending the liability of the employer, they encourage the prevention of accidents. Neither the *Labour and Industry Act (1958)(Vic)* nor the *Health Act (1958)*

(Vic) contained a general duty clause and therefore a score of 0 was given to the sub-index value[39].

In the 2nd component, a score of 10 is assigned if a workplace can be inspected without the need for a warrant to be issued, 0 otherwise. The powers of the inspectors were regulated by part X Division 1 of the *Labour and Industry Act (1958) (Vic)*. Section 186(1) of this Act conferred on inspectors the right to "enter, inspect and examine at all reasonable times by day or night any factory or premises". As the issue of a warranty was not compulsory, a score of 10 was given to the sub-index value.

Components 3 to 8 evaluate the strength of the maximum penalties for offences against health and safety legislation. Intermediate scores for the sub-index values were created and these are shown in table 5.9 in the component "maximum penalty for a wilful violation of statute" (component n. 3). The scale generated for "maximum penalty for a wilful violation of statute" was applied to components 3,4,5,7 and 8, while in component 6 a score of 10 was assigned if fines for repeated offences can be increased by a factor of 10, 0 otherwise. In 1979, penalties were imposed for breaches of specific rules and regulations. In addition, the *Labour and Industry Act (1958)(Vic)* provided for two statutory maxima for those cases in which no penalties were established. These penalties amounted to AU$ 2000 for breaches of Divisions 1 and 2 of Part VI (carriage of goods) and a considerably lower AU$ 300 for offences against any provision of the Act for which no penalties were expressively provided (*Labour and Industry Act (1958)(Vic)*, s. 205(2)). Both penalties fall in the second lowest category of the scale (between AU$ 50 and 33,999) even when they are

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[39] Although Common law cases generally sanction the principle that employers have a general duty "to care" (Creighton and Stewart 2000, Sykes et al. 1972; Sykes 1980), prosecutions under this system have been rarely successful as they are costly and subjected to the arbitrary interpretations of the term "duty to care".

expressed at the 2000 level. Moreover, the *Labour and Industry Act (1958)(Vic)* did not contain provisions sanctioning either the voluntariness of breaches of the Act or their repeated violations. As a result, a score of 1.7 was assigned to components 3,4,5,7 and 8 while component 6 was given a score of 0.

The 9th component of the standard assesses the severity of penalties in the case of an employer failing to comply with an order of the authority. Such an order was usually issued after an inspector reported a contravention of the Act and/or specific regulations and required the offender to abate or correct the hazard. As previously noted, the maximum fines provided by the *Labour and Industry Act (1958) (Vic)* were AU$ 2000 or AU$ 300. Both the penalties fall in the second lowest category of the scale[40] and therefore a score of 1.7 was assigned to the sub-index value.

In the 10th component, a score of 10 is assigned if legislation does not provide for a reduction in penalties for firms with less than 250 employees, 0 otherwise. The *Labour and Industry Act (1958)(Vic)* did not provide for any reduction in penalties and therefore a score of 10 was given to the sub-index value.

The 11th component of the standard assigns a score of 10 if legislation does not contain provisions that reduce penalties if a firm has a written health and safety policy, 0 otherwise. The *Labour and Industry Act (1958)(Vic)* did not provide for such reductions and therefore a score of 10 was given to the sub-index value.

In the 12th component a score of 10 is assigned if legislation does not provide for reductions in penalties for absence of violations of health and safety regulations during a specified period of time, 0 otherwise. As previously mentioned, the *Labour*

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[40] For the scoring scale see "maximum penalty for a wilful violation of statute".

and Industry Act (1958)(Vic) did not provide for any reduction in penalties and therefore a score of 10 was assigned to the sub-index value.

The 13th component assigns a score of 10 if all the firms are required to keep information and accidents-related records, 0 otherwise. The *Labour and Industry Act (1958)(Vic)* did not provide for any exemption and therefore a score of 10 was given to the sub-index value.

In provision n. 14 a score of 10 is assigned if the States can set stricter standards than the Federal government, 0 otherwise. As noted in section 4.2.1 the nature of the Australian Constitution is such that occupational health and safety legislation has been traditionally enacted by the States. Given that in 1979 the States could set stricter standards than the Commonwealth, a score of 10 was assigned to the sub-index value.

In the 15th component, a score of 10 is given if legislation requires compulsory employer/employee committees on occupational health and safety, 0 otherwise. In 1979, under both the *Labour and Industry Act (1958)(Vic)* and the *Health Act (1958)(Vic)*, employer/employee committees were not compulsory and therefore a score of 0 was assigned to the sub-index value for this provision.

The 16th component evaluates the maximum imprisonment possible for violation of health and safety regulations. Under the *Labour and Industry Act (1958) (Vic)*, the maximum imprisonment possible was 6 months. Such a punishment could be imposed against a person who counterfeited a certificate or gave false information to inspectors (*Labour and Industry Act (1958)(Vic)* s. 203 (1)), or in case of threatening or intimidating inspectors (*Labour and Industry Act (1958)(Vic)* s. 187 (4)). Six months falls in the third category of this component and therefore a score of 6 was assigned to the sub index value (see table 5.9).

Components 17, 18, 19 and 21 were all given a score of 1.7 to the sub-index value because, as previously stated, the statutory maxima in 1979 were AU$ 2000 or AU$ 300, while component 20 was given a score of 0 because the *Labour and Industry Act (1958 (Vic)* did not provide for any other additional fine.

Finally, a score of 0 was given to the sub-index value for the enforcement component because in 1979 the enforcement procedure was "external" as the Department of Labour, the statutory body administering and enforcing occupational health and safety, could not directly impose sanctions and offenders had to be prosecuted through the "ordinary" judicial system. Under section 191(2) of the *Labour and Industry Act (1958)(Vic)* legal proceedings could be initiated by the Minister of Labour, any other officer or inspector of the Department of Labour, police force and authorised officers of employers or employees' organisations. Any legal proceeding had to be conducted before an ordinary Court and could be appealed to the State's High Court (*Labour and Industry Act (1958)(Vic)*, s. 191 (2)).

5.9.2 Occupational Health and Safety in 2000

As previously mentioned, the standard for occupational health and safety dramatically increased in the two decades considered. The legal framework regulating occupational health and safety described in section 5.9.1 was fully operative in Victoria until 1981, when the *Industrial Safety, Health and Welfare Act (1981)(Vic)* began implementing the recommendations of the *Robens' Report (1972)*, that aimed to create a more unified, effective and integrated system of health and safety regulation. The *Robens' Report* has exerted a profound influence upon the development of occupational health and safety laws in many parts of the world, including the ILO Occupational Safety and Health Convention (n. 155). The dominant philosophy underpinning the Robens' Report is that repression and punishment by themselves are effective means to prevent industrial accidents only if they are accompanied by collaborative measures between

employees and management aimed at securing compliance with the general duties and the detailed standards (Creighton and Stewart 2000, Creighton and Rozen 1997). The recommendations of the Robens' Report are generally implemented by the *Occupational Health and Safety Act (1985)(Vic)*. Several relevant changes were introduced to the legislative framework in the two decades studied.

First, the *Occupational Health and Safety Act (1985)(Vic)* provides in section 21(1) for a "general duty clause"[41]. Accordingly, a score of 10 was assigned to component n.1 of this standard. Second, the sanctions for violations of Occupational Health and safety regulations increased considerably. The *Occupational Health and Safety Act (1985)(Vic)* distinguishes between non indictable (normal) and indictable (serious) offences. In addition, the following serious offences are considered wilful: a) obstructing an inspector for the purposes of section 42; b) failing to comply with a prohibition notice under section 44(3) and c) discrimination against employees, within the meaning of section 54. The maximum "penalty units" that can be imposed for normal offences (minor offences) is 400 penalty units for corporations and 100 penalty units for anyone else (s. 47(2)(a)(b)) while serious offences attract a maximum of 2500 penalty units for a corporation and 500 in all of the other cases (s. 47(2)(a)(b)). A penalty unit is presently worth AU$ 100 (*Sentencing Act (1991) (Vic)* s. 110). Thus, the statutory maximum for non-indictable offences is AU$ 40000 for corporations and AU$ 10000 for anyone else while the maximum for indictable offences is AU$ 250000 for corporations and AU$ 50000 in other cases. AU$ 40000 falls in the third last category of the scale while 250000 falls in the highest category of

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[41] This section states: "An employer shall provide and maintain so far as is practicable for employees a working environment that is safe and without risks to health".

the scale. Therefore, components 3,4,5,7 and 8 were assigned a score of 10 to the sub-index value, while components 18[42] and 19 were given a score of 3.33.

The maximum imprisonment possible has also increased considerably over the 1979-2000 period. Under the *Occupational Health and Safety Act (1985)(Vic)*, the maximum imprisonment possible is now 5 years. This penalty applies to the following "indictable" offences: a) obstructing, etc an inspector for the purposes of section 42; b) failing to comply with a prohibition notice under section 44(3) and c) discrimination against employees, etc within the meaning of section 54. As the maximum imprisonment possible in Victoria is much higher than the highest category (24 months) contained in the scale, a full score of 10 was given to the sub-index value for provision 16. In addition, the *Occupational Health and Safety Act (1985)(Vic)* provides for additional penalties in case a person or a corporation has been previously condemned for the same or other offences (s. 53). Under section 53(b) an additional penalty can be imposed for a summary offences (minor or normal offence) ranging from 50 to 400 penalty units for body corporate and from 10 to 200 in other cases. Furthermore, a person can be imprisoned for up to a maximum of two years for a repeated summary offence. As additional fines can be imposed for "minor" violations of health and safety standards, a score of 10 was given to the sub-index value for component 20.

The penalties for failure to comply with inspectors' orders have also been strengthened considerably. Under the *Occupational Health and Safety Act (1985)(Vic)*

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[42] This component refers to breaches of the Health and Safety standards committed by individuals. The penalty system under the *Occupational Health and Safety Act* is divided into penalties against corporations and penalties in all the other cases. Section 47(2)(b) establishes penalties for individuals and provides for a statutory maximum of 500 penalty units (AU$ 50000) for indictable offence and 100 (AU$ 10000) for non-indictable offences. The maximum penalty for any contravention by anyone is AU$ 50000). This figure falls in the category AU$ 34000-67999 and therefore a score of 3.33 was assigned to the sub-index value.

inspectors can issue improvement and/or prohibition notices (ss. 43(1)-44(1)). Improvement notices are issued in any situations where the inspectors believe that there is a contravention of the Act or regulations or a person has contravened such a provision in the past in circumstances that make it likely that the contravention will continue or be repeated. The offender is required to comply with the improvement notice and to correct the hazard. Prohibition notices go a stage further as they prohibit "the carrying on of the activity until an inspector certifies in writing that the matters which give or will give rise to the risk are remedied" (*Occupational Health and Safety Act (1985)(Vic)*, s. 44(1)). Breaches of both improvement and prohibition notices are offences against the Act and penalties can be imposed. While the amount of penalty units is not specified in relation to an improvement notice (which is therefore regulated by the operation of s. 47(2)(a)(b)), breaches of prohibition notices are sanctioned up to a statutory maximum of 2500 penalty units for corporations and 500 otherwise (s. 44(3)(b)). Failure to comply with an inspector's order attracts a maximum penalty of AU$ 250000, and therefore a score of 10 was assigned to the sub-index value for provisions 9 and 21. It should be noted that component 17 (Maximum Penalty for Contravening Direction of Safety Officer/Inspector) was still assigned a score of 0. This is due to the fact that failure to comply with a "direction" under section 45(1)[43] is not an offence if the notice has otherwise been complied with. Section 45(2) holds that a "direction" offers a "choice" of ways in which to remedy the contravention but there is not compulsion to strictly follow the "direction". It is the employer's choice to comply with the "direction" or present his\her own solution to the problem, provided that the remedy is satisfactory to the inspector's (and ultimately a Court's) judgement.

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[43] This section defines "directions" as measures "to be taken to remedy any contravention, likely contravention, risk, matters or activities to which the notice relates".

Along with the "general duty clause" and the level of fines that can be imposed for breaches of occupational health and safety regulations, the last component of this standard, which has considerably increased in the two decades, relates to the presence of occupational safety committees. It should be re-stated here that the Robens' Report emphasised the relevance of collaboration between employers and employees in order to guarantee the safety of the workplace. Section 29 of the *Occupational Health and Safety Act (1985)(Vic)* conforms to the Recommendation of the Robens' Report on health and safety committees. Under this section, an employee has the right to negotiate with an employer in order to establish "designated work groups of employees in respect of the workplace" (s. 29(1)). The composition of the designated work groups (DWG) must be determined through negotiation between the employer and the employees (s. 29(2)). The *Occupational Health and Safety Act (1985)(Vic)* also prescribes important duties for the employers, such as the duty to "...do everything that is reasonably possible to ensure" that such negotiations commence within 14 days of the request under sub-section (1) (s. 29(3)). The Act also contains provisions in case the parties cannot reach an agreement. Section 29(5) holds that if negotiation fails, then the employees or the employer may apply to the Authority for conciliation. The establishment of designated work groups for occupational health and safety is compulsory and therefore a score of 10 was assigned to the sub-index value for provision n. 15.

Table 5.9: Occupational Health and Safety in Australia, Weights, Sub-index Values and Scores in 1979 and 2000

Provision/Language	Provision Weight	Subindex Value	Subindex scores (1979)	Subindex scores (2000)
1) Subject to General Duty Clause	.02		No (sub index value=0)	Yes (sub index value=10)
2) Inspection Warrant Can be Demanded Prior to Inspector Entry	.053		No (sub-index value=10)	No (sub-index value=10)
3) Maximum Penalty for a Wilful Violation of Statute	.053			
GT or =AU$ 170000		10		AU$ 250,000

AU$136000-AU$169999		8.33		
AU$102000-AU$135999		6.7		
AU$ 68000-AU$101999		5		
AU$34000-AU$67999		3.33		
AU$50-AU$ 33999		1.7	AU$ 2000 or 300	
No Penalty		0		
All Dollar Amounts are Australian Dollars				
4)Maximum Penalty for a Serious Violation of Statute	.053		AU$ 2000 or 300 (sub-index value=1.7)	AU$ 250,000 (sub-index value=10)
See Coding on "Maximum Penalty for a wilful violation of Statute."				
5)Maximum Penalty for a Wilful Repeat Violation of OSHA	.053		AU$ 2000 or 300 (sub-index value=1.7)	AU$ 250,000 (sub-index value=10)
See Coding on "Maximum Penalty for a wilful violation of Statute."				
6) Repeat Violation Penalties May Be Increased by a Factor of 10	.053		No (sub-index value=0)	No (sub-index value=0)
7) Penalty for First Offence, Wilful Violation Causing a Death	.053		AU$ 2000 or 300 (sub-index value=1.7)	AU$ 250,000 (sub-index value=10
See Coding on "Maximum Penalty for a wilful violation of Statute."				
8) Penalty for Second Offence, Wilful Violation Causing a Death	.053		AU$ 2000 or 300 (sub-index value=1.7)	AU$ 250,000 (sub-index value=10
See Coding on "Maximum Penalty for a wilful violation of Statute."				
9) Maximum Penalty for Failing to Abate a Hazard Until Corrected	.053		AU$ 2000 or 300 (sub-index value=1.7)	AU$ 250,000 (sub-index value=10)
See Coding on "Maximum Penalty for a wilful violation of Statute."				
10) Reduction in Penalties for Firms with up to 250 Employees	.02		No reduction (sub-index value =10)	No reduction (sub-index value =10)
11) Reduction in penalties for Written Health and Safety Program	.02		No reduction (sub-index value =10)	No reduction (sub-index value =10)
12) Reduction in Penalties for Absence of Violations During a Specified Time	.02		No reduction (sub-index value =10)	No reduction (sub-index value =10)
13) Record keeping Exemptions for Small Firms or Specified Industries	.02		No exemption (sub-index value=10)	No exemption (sub-index value=10)
14) State\Provinces May Set Stricter Standards Than federal Government	.053		Yes (sub-index value=10)	Yes (sub-index value=10)
15) Occupational Safety Committee or Representative Required	.053		No (sub-index value=0)	Yes (sub-index value=10)
16) Maximum Imprisonment Possible	.053			

24 Months		10		5 years
12 Months		8		
6 Months		6	6 months	
3 Months		4		
1 Month		2		
No imprisonment		0		
17) Max. Pen. for Contravening Direction of Officer/Inspector	.053		No penalty (sub-index=0)	No penalty (sub-index=0)
See Coding on "Maximum Penalty for a wilful violation of Statute."				
18)Maximum Penalty for any Contravention by Anyone	.053		AU$ 2000 or 300 (sub-index value=1.7)	AU$ 50000 (sub-index value=3.33)
See Coding on "Maximum Penalty for a wilful violation of Statute."				
19) Maximum Penalty for Minor Offences	.053		AU$ 2000 or 300 (sub-index value=1.7)	AU$ 40,000 (sub-index value=3.33)
See Coding on "Maximum Penalty for a wilful violation of Statute."				
20) Additional Fines Possible (for minor offences)	.053		No (sub-index value=0)	Yes (sub-index value=10)
21)Daily Penalty Assessed for Failing to Abate a Second Hazard Until Corrected	.053		AU$ 2000 or 300 (sub-index value=1.7)	AU$ 250,000 (sub-index value=10)
See Coding on "Maximum Penalty for a wilful violation of Statute."				
22)Limits on Appeal of Agency Decisions	.052		No limits (sub-index value=0)	No limits (sub-index value=0)

Occupational Health and Safety 1979 (basic index): 2.989

Occupational Health and Safety 2000 (basic index): 7.71

5.10 Advance Notice of Plant Closings/Large-Scale Layoffs

The weights, sub-index values and sub-index scores for large-scale layoffs are shown in table 5.10. This standard significantly increased over the considered period. Thus, in order to capture these changes, section 5.10.1 investigates the year 1979 while 5.10.2 will consider 2000.

5.10.1 Advance Notice of Plant Closing/Large-Scale Layoffs (Redundancy) in 1979

Redundancy had been an area traditionally neglected by the system of labour protection created by the *Conciliation and Arbitration Act (1904)(Cth).* As for "unjust discharge", this system proved to be highly ineffective due to restrictions imposed upon the jurisdiction of the Federal Commission. The main restriction related to the definition of "industrial matter". Industrial matters have typically been circumscribed to those issues arising in the course of employment (see R. *v. Hamilton Knight; Ex Parte Commonwealth Steamship Owners Association* (1952) 86 C.L.R. 353 (Para. 16.25) and further sections 5.8.1 and 5.8.2). Consequently, the Conciliation and Arbitration Commission had been granted only limited powers to make orders dealing with termination of employment. These legal constraints severely limited the capacity of the Commission to establish general rules and schemes of compensatory payments or income maintenance to be included in awards. The ability of the Commission to deal in a systematic way with redundancies was further weakened by the attitude of the High Court, which has traditionally not allowed awards to interfere with the employer's prerogative to select, promote and dismiss employees (Sykes and Glasbeek 1972; CCH 2000(c)). The main consequence of these judicial constraints was that the activity of the Commission in relation to large-scale layoffs had been fragmented and directed to make prescriptions for specific companies and industries rather than promulgating rules of general nature and creating a "general" standard for redundancies and large-scale layoffs (Sykes 1972; Creighton et al. 1982; CCH 2000(c)). This attitude began to change in 1978 when clauses dealing with redundancies started to be incorporated in Federal awards, and was definitely abandoned in 1984 when, as a result of a national *Termination, Change and Redundancy Test Case (TCR),* such clauses were extensively applied to awards and

collective agreements[44]. In addition, rules governing redundancy were inserted in the *Industrial Relations Reform Act (1993)(Cth)* and in the *Workplace Relations Act (1996)(Cth)* (see section 6.10.2). In 1979, neither statutory legislation nor awards provided for a comprehensive system of labour protection in relation to redundancies. Except for provision 5 (notice to affected employees), which received protection at ommon law level, all the components of the standard were assigned a score of 0[45].

5.10.2 Advance Notice of Plant Closing/Large-Scale Layoffs (Redundancy) in 2000

As revealed in section 6.10.1, the *Workplace Relations Act (1996)(Cth)* contains provisions dealing with large-scale layoffs. The 1st component of the standard concerns the minimum number of employees that is required for the application of redundancy legislation. The lower the number of employees, the higher the sub-index value. Section 170CL of the *Workplace Relations Act (1996)(Cth)* establishes procedures an employer must follow for discharging 15 or more employees. This section applies: "...if an employer decides to terminate the employment of 15 or more employees for reasons of an economic, technological, structural or similar nature...". The minimum number of employees to which large-scale layoff legislation applies is 15. This figure falls in the top category of the scale (10 or more employees but less than 25) and therefore a score of 10 was assigned to the sub-index value.

The 2nd component of the standard measures the maximum time period within which discharge must occur once notification has been given to the employee. The

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[44] These clauses usually make it compulsory for the employers to notify and consult with the employees and their unions over proposed introduction of technological and organisational changes that could produce redundancies. Clauses inserted in awards also provide various forms of assistance to dismissed workers such as severance payment and time off during the notice period to look for new employment.

[45] For the exact meaning of these components see section 5.10.2.

scores of the sub-index value are based on the assumption that, the shorter the time elapsing between notification and dismissal, the higher the standard as a shorter time results in increased certainty for the employee. Thus, a score of 10 is assigned if there is not a maximum time limit but the employer must specify the exact date when the dismissal will occur, a score of 6.7 if dismissal can occur within 4 to 5 weeks and so on. Section 170CL(2)(c) of the *Workplace Relations Act (1996)(Cth)* requires an employer who desires to dismiss 15 or more employees to give notice to the Commonwealth Employment Service[46]. Such a notice must also include "the time when, or the period over which, the employer intends to carry out the terminations". This period can extend over an indefinite spell of time. As legislation does not specify the maximum time-limit within which a proposed large-scale layoffs must take place, a score of 0 was assigned to the sub-index value for this provision.

The 3rd component of the standard evaluates advance notice of termination of employment. The longer the notice, the higher the scores assigned to the sub-index value. Under the *Workplace Relations Act (1996)(Cth)*, the same conditions which apply to an individual employee also apply to collective dismissals and redundancy. Section 170CM(2) establishes the following conditions:

Employee's period of continuous service with the employer	Period of notice
Not more than 1 year	At least 1 week
More than 1 year but not more than 3 years	At least 2 weeks
More than 3 years but not more than 5 years	At least 3 weeks
More than 5 years	At least 4 weeks

The maximum period to which an employee is entitled is thus 4 weeks if the affected employee has completed at least 5 years of continuous service with the

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[46] This function is now performed by the National Social Security Service (Centrelink) which replaced the Commonwealth Employment Service as a result of a "service agreement" that was reached between the two bodies

employer. This falls in the 4 to 8 weeks category of the scale and therefore a score of 2.5 was assigned to the sub-index value.

In the 4th component, a score of 10 is assigned if government or governmental agencies must be informed before a large-scale layoff takes place, 0 otherwise. As previously noted, under section 170CL(2)(c) notice must be given to the National Social Security Service in case an employer wishes to discharge 15 or more employees. As under the *Workplace Relations Act (1996)(Cth)*, there is a formal requirement to inform governmental agencies of the intention to proceed to large-scale layoffs, a score of 10 was given to the sub-index value for this provision.

In the 5th component, a score of 10 is given if notice must be given to the affected employee, 0 otherwise. Section 170CM(1)(a) states that "an employer must not terminate an employee's employment unless: the employee has been given the required period of notice". As under the *Workplace Relations Act (1996)(Cth)* there is a formal requirement to inform the employee of the intention to proceed to terminate his/her employment, a score of 10 was assigned to the sub-index value.

In the 6th provision, a score of 10 is given if legislation requires an employer to inform a union, 0 otherwise. Under the *Workplace Relations Act (1996)(Cth)* there is a specific duty upon the employer to consult with the trade unions over proposed redundancies. Pursuant to section 170FA the AIRC can make orders to give effect to articles 12 and 13 of the ILO Termination of Employment Convention. Article 13 of this Convention deals with the employer's obligation to provide unions with information about proposed redundancies. This section compels an employer to consult with the relevant trade union in relation to such redundancies. Furthermore, section 170GA provides the AIRC with the power to issue remedial orders where an employer has failed to consult with the relevant trade union. However, these orders can only be issued following an application from an employee whose position will be affected by the proposed redundancy or a "relevant" trade union (*Workplace*

Relations Act (1996)(Cth) s. 170GB). As a trade union must be consulted in relation to large-scale layoffs, a score of 10 was given to the sub-index value for this provision.

In the 7th provision a score of 10 is assigned if legislation provides for severance pay, 0 otherwise. Section 170FA also applies to severance pay. Article 12(a) of the Termination of Employment Convention states that "a severance allowance or other separation benefits [should be paid], the amount of which shall be based inter alia on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contributions...". The amount of severance pay to which an employee is entitled can be specified in awards or the AIRC can make an order (s. 170FA). Usually severance pay allowances are calculated on the prescriptions contained in the *TCR* test case (1984). Such decision prescribed a severance payment of up to a maximum of 8 weeks' pay for a worker of more than 4 years' standing. Furthermore, section 89A(m) authorises the AIRC to arbitrate in relation to "redundancy pay". Under the *Workplace Relations Act (1996)(Cth)*, there is an obligation to provide the employee with severance payments and therefore a score of 10 was assigned to the sub-index value.

Finally, the last component evaluates the enforcement mechanism. If an employer fails to comply with section 170(CL) (redundancy) an employee, a trade union representing that employee or an inspector may apply to the AIRC for relief under section 170CF. The AIRC will initially try to settle the matter by conciliation (s. 170CF) and if conciliation fails a certificate to that effect will be issued (s. 170CF(2)(a)). An applicant who wants to pursue the matter must then begin proceedings in the Federal court (s. 170CR(3)). If the Federal Court finds that there has been a contravention of redundancy provisions (s. 170CL) it may make an order imposing a penalty of up to AU$ 1000 (s. 170CR(3)(a)) and/or require the employer not to discharge the employee "except as permitted by the order" (s. 170CR(3)(b)).

The Commission can only conciliate in relation to redundancy and if this attempt fails, the matter is dealt externally through the Federal Court. As the enforcement process is external and there are not limits on the right of the loser to appeal, a score of 0 was given to the sub-index value.

Table 5.10: Large-Scale Layoffs in Australia, Weights, Sub-index Values and Scores in 1979 and 2000

Provision/Language	Provision Weight	Subindex Value	Subindex scores(1979)	Subindex scores(2000)
1) Number of employees	.2			
10 or more		10		15
25 or more		6.7		
50 or more		3.3		
Not Present		0	Not present	
2) Max Time Period in Which Layoffs Must Occur	.04			
No Max Time		10		
4-5 weeks		6.7		
8 weeks		3.3		
NP		0	Not specified	Not specified
3) Advanced Notice Required (maximum period)	.2			
More than 16 weeks		10		
12 to 16 weeks		7.5		
8 to 12 weeks		5		
4 to 8 weeks		2.5		4 weeks
No notice required		0	No Notice	
4) Notice to Minister of Labour or Government	.01		No Notice (sub-index value=0)	Yes (sub-index value=10)
5) Notice to Affected Employees	.2		Yes (subindex value=10)	Yes (subindex value=10)
6) Notice to Union	.1		No (subindex value=0)	Yes (subindex value=10
7) Severance Pay	.2		No (subindex value=0)	Yes (subindex value=10)
8) Limits on Appeal of Agency Decisions	.05		No (subindex value=0)	No (subindex value=0)

Advance Notice of Plant Closing/Large-Scale Layoffs (Redundancy) 1979 (basic index): 2

Advance Notice of Plant Closing/Large-Scale Layoffs (Redundancy) 2000 (basic index): 7.6

5.11 Conclusion

In this chapter Australian labour standards were analysed and quantified in two different years: 1979 and 2000. Four standards, minimum wage, overtime, paid-time off and unemployment/employment insurance remained substantially unchanged in the 1979-2000 period while the others were subjected to modifications. The legal protection accorded to two standards, workers' compensation and collective bargaining, diminished while the standards for equal employment opportunity, unjust

discharge, occupational health and safety and large-scale layoffs increased considerably. The reduction which occurred to workers' compensation is due mainly to the "externality" of the enforcement mechanism prescribed by the *Accident Compensation Act (1985)(Vic)*, while the decrease of the index for collective bargaining largely reflects the downgrading of compulsory conciliation and arbitration and the increasing individualisation of the bargaining locus (see section 4.3.2). The increase occurred to equal employment opportunity, unjust discharge and occupational health and safety is mainly due to the ratification of international ILO conventions during the mid 1980s-early 1990s and to the subsequent enactment of statutory legislation, while the rise of the large-scale layoffs index is the result of a process which also involved High Court decisions and a national test case. Table 5.11 provides a summary of the findings of this chapter.

Table 5.11: Labour standards in Australia in 1979 and 2000; Basic Indexes

Standard/Year	Min. Wage	Overtime	P.T. Off	U. Insurance	Work. Comp.	Coll. Barg.	Equal. Empl.	Unf. Dismissal	Occ. Health & Safety	L. Scale Layoffs
1979	8.08	9.50	9.29	7.2	6.68	10.00	2.50	1.5	2.989	2
2000	9.40	9.50	9.29	7.2	5.93	6.75	7.5	8.5	7.71	7.6

CHAPTER SIX

THE EMPLOYMENT PROTECTION REGIME IN AUSTRALIA: MARKET FORCES, LABOUR STANDARDS AND THE INDUSTRIAL RELATIONS PROCESS (1979-2000)

6.1 Introduction

In chapter 5, it was shown that four labour standards increased (large-scale layoffs, occupational health and safety, equal employment opportunity and unfair dismissal) while the legal protection accorded to two standards (collective bargaining and workers' compensation) reduced over the two decades studied.

This chapter aims to explain this outcome by exploring the industrial relations process, through the period studied, and the continuing interaction between the countervailing demands for marketisation and employment protection. It is argued that the shift to the market was driven by the perception that enhanced competitiveness could be achieved through an increasing reliance on market forces while the countervailing trend was nourished by worker and union concerns in relation to the negative effects the strengthening of market relations was likely to produce on those employees with little market power. It is also argued that the nature of the trade offs made as part of the "Accord" were often inappropriate as far as the union movement was concerned, given the latter was negotiating with social partners and politicians intent on enhancing the market's domain. In particular, the trade-offs resulted in unions' bargaining power being diluted at a time when market forces were allowed a freer hand and hence the capacity to bargain was an attribute of increasing significance.

In addition, this chapter will show that the relative importance accorded the market and employment protection did not remain constant through the 1979-2000

period. Contextual factors, such as the adoption of corporatist practices and the election of conservative governments, altered the market-employment protection mix over time while the endorsement of a limited corporatism greatly influenced the evolution of labour standards. In particular, the increased political power of trade unions led to the enactment of a legislated floor of minimum labour standards that should have partially compensated Labour for the losses deriving from the weakening of its bargaining power.

In order to investigate the process through which labour standards were changed, this chapter will consider: the economic problems of the late 1970s to the early 1990s and the inception of "globalisation" in Australia, the first phase of the Accord (1983-1986) and the initial dismantling of the traditional system of labour protection, the second phase of the Accord (1987-1995) and the transformation of Australia's employment protection system, and finally the election of the conservative Coalition government, the abandonment of Corporatism and the hybrid neo-liberalism endorsed by this new executive and the particular emphasis it placed on further labour standards reform.

6.2 The Internationalisation of the World Economy and its Impact on Australia: Labour Standards and the End of the "Australian Settlement"

In section 3.2, it was seen that the theoretical framework developed by Kochan, Katz and McKersie places the labour standards process in the top tier of industrial relations activity, which embraces long-term strategies and policy making at institutional level (Kochan et al. 1994:23). In this tier, labour standards are modified through a process that involves negotiation between governments, trade unions and employers (or their combination) at peak level. Moreover, in sections 2.3 and 3.2 it was also shown that turbulence affecting the economic environment has the potential to influence the

dynamic character and structure of an industrial relations system and, as a consequence, the level and type of protection accorded to labour standards.

The latter development was certainly true of Australia. From the mid 1970s, this country experienced poor economic performance only occasionally interrupted by short-lived recoveries. From 1979 to 1983 price inflation ranged between 9.4% (1980) to 11.5% (1983) while wage inflation was 9.9% in 1979 and 11.2% in 1983 (Dabscheck 1995:25). Both these indicators significantly reduced in subsequent years to the point that by 1993 price inflation had decreased to 1% and wage inflation to 0.7% and then ranged between 1.8% and 5% (OECD 1999). However, the good results achieved with inflation were not accompanied by equivalent success in other areas. Unemployment remained over 6% through the two decades studied (with the exception of the 1980-81 period when it was 5.8%) peaking over 10% in three occasions: 1983, 1992 and 1993 (OECD 1999).

The economic slow-down also affected the exchange rate. The value of the Australian dollar declined from 1974 in relation to other major currencies. In 1974, one Australian dollar was worth US$ 1.48 while in 1985 was worth US$ 0.60 and in 2000 only slightly over US$ 0.50. There was an even steeper decline in relation to both the Deutsch Mark and the Japanese Yen.

The turning point that initiated this long slide in the Australian economy was the first oil price shock of 1973 that heralded a worldwide recession. The 1973 shock was compounded by a second oil shock in 1979. Once again, the industrial countries entered into a period of recession and world growth was reduced. However, while the 1973 and the 1979 oil shocks certainly affected the world economy and Australia, they were not the only factors that induced governments to modify their approach to the management of macroeconomic policies and to proceed to labour market reforms. Another important factor was what is sometimes ambiguously referred to as globalisation. While the different meanings of globalisation were discussed in section

2.4.1, starting from the late 1970s Australia has been increasingly exposed to international economic pressure. In this respect, the "domino effect" of the two oil shocks may be interpreted as one of the symptoms of the increasing inter-dependence of capitalist economies. This is the view of Dyester and Meredith (1990:299) who claim that the three decades to 1990 was a period in which Australia became increasingly less isolated from the effects of the international economy and less able to adjust to global market volatility by recourse to the traditional political and economic instruments that were utilised through the years of the "long boom".

Governments, particularly in Britain, the US and New Zealand, reacted to the economic slide of the 1970s by abandoning Keynesian macroeconomic policies and the commitment to full employment. This change in economic fashion was accepted enthusiastically by many within the ranks of governments, among policy advisers and key parts of the bureaucracy and this move helped make the neo-liberal paradigm appear as ineluctable destiny (Groenewegen 1982; Hughes 1998; Friedman and Friedman 1980; Pusey 1991). Once again, Australia was not an exception. Neo-classical economics not only captured the majority of the intelligentsia of both the Australian Labor Party (ALP) and the Coalition parties. It also became popular among senior bureaucrats (Pusey 1991). In Australia, the adoption of neo-classical economics appeared under the label of economic rationalism. Though this concept has many and complex dimensions (see for example: Pusey 1991; Rees, Rodley and Stilwell 1993; Rees 1994; Groenewegen 1994; Henderson 1995; King and Lloyd 1993) its most relevant manifestation, for the purpose of this study, is a shift in the mix between social protection and economic liberalism in favour of the latter. However, economic rationalism was not entrenched in the political tradition of either the Labor Party or the Coalition and both parties had to recast their approach to keep pace with the new events and the increasing internationalisation of the Australian economy.

The main distinctions between the Labor Party and the Coalition parties have traditionally been drawn along the lines of other western countries governed by a bipartisan political system. Some unique elements of the Australian polity were shared by all the main parties (Kelly 1994; Hughes 1998). These included a set of policies, dating from the first decade of the century, often defined the "Australian Settlement". Supported by "general agreement in the society as a whole" (Hughes 1998:77), it was generally understood that the Settlement comprised five elements: White Australia, Industry Protection, Wage Arbitration, State Paternalism and Imperial Benevolence (Kelly 1994). These elements were flanked by the acceptance of the capitalist mode of production. However, while Imperial Benevolence had only a marginal influence in determining the traditional features of the Australian employment protection system, Industry Protection, Wage Arbitration, State Paternalism and the White Australia policy greatly influenced its characteristics and the way in which labour standards were established for nearly 80 years. Hence, emphasis will be placed here mainly on these four components of the "Australian Settlement".

Industry had traditionally benefited from high levels of protection. The economic policy in Australia had been based on an export sector of efficient and competitive farmers and miners and an internal economy of import-replacing manufacturers that were highly protected. Given Australia's heavy reliance on commodity exports, the fall in commodity prices and international demand following the two oil shocks were severe (Stutchbury 1990:54). The second pillar, upon which the Australian Settlement was constructed, was a system of wage fixation and labour standards regulation underpinned by compulsory conciliation and arbitration. Industrial tribunals have changed their approach to the principles of wage fixation and labour standards regulation several times since the *Conciliation and Arbitration Act* was first enacted in 1904 (see for example Niland 1984; Dabscheck 1984; Nieuwenhuysen 1984). The history concerning these principles and their change over

time is far too complex to be discussed here (for a summary see Hancock 1979(a); 1979(b)). However, it should be noted that the main criterion followed by the Commission in establishing basic award wages has been traditionally based on the capacity of the economy to sustain increases rather than on productivity considerations and this was a principle never completely abandoned (Nieuwenhuysen 1984; Hughes 1998; Isaac 1975; 1986; Butlin, Barnard and Pincus 1982).

Industry protection and compulsory conciliation and arbitration were part of an explicit understanding between governments and employers in which the former pledged themselves to protect Australian manufacturers by means of tariffs in return for higher wages and better conditions of employment. Under this framework, employment protection and social policy were dominated by the operation of compulsory arbitration and conciliation. This model, which places compulsory arbitration at the center of the Australian social protection system, is often referred to as the "wage-earners' welfare state"[47] (Castles 1985; 1987; 1988; 1989). The crucial feature of this regime was that the interaction between high tariff barriers, industrial tribunals and the White Australia Policy ensured that the realm of the market was constrained. Under this framework, the system of welfare-unemployment benefits was residual and based on selective and restrictive criteria designed to provide a minimum of protection to those who could not benefit from the umbrella provided by compulsory arbitration and conciliation. Given the high degree of protection embedded in this institutional context, the common law of employment, which is commonly associated with *laissez-faire* ideology (see sections 2.2.1; 4.2.2; Epstein 1983; 1984; Epstein and Paul 1984), has traditionally been underdeveloped in Australia. Finally, the last component of the Australian Settlement was what Kelly (1994) calls State Paternalism. This refers to the tendency of governments, to be

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[47] The "wage earners' welfare state" model has been recently subjected to a series of criticism; see in particular Watts 1997; Ramia 1998.

directly involved in the management of the national economy by means of public enterprises in key areas such as utilities (in particular telecommunications, public transports and banking).

The economic policies of the Australian Settlement have never ceased to exercise a significant influence on the nation's political parties. This influence ensured that the inception of economic rationalism has been slow and contradictory. The first major step away from the Australian Settlement was a 25% tariff cut introduced by the Whitlam Labor government in 1974. This measure was adopted to counteract the dramatic fall in commodity prices that followed the first oil shock in 1973 and to make Australian manufacturers more competitive. The sudden 1974 tariff cut was received by the employers and the conservative opposition with open hostility and it was held responsible for the subsequent rise in unemployment and the bankruptcies of many enterprises (Hughes 1998).

With regard to labour standards, the Whitlam government took some important initiatives including the adoption of the *Racial Discrimination Act*, the abandonment of the White Australia Policy and support for Aboriginal land rights. The *Racial Discrimination Act* signalled the beginning of a new and more active collaboration between Australia and international regulatory institutions as the enactment of this legislation followed ratification of the relevant ILO convention (see section 5.7.1). Whitlam was dismissed in 1975 by the Governor General and was replaced by the conservative Fraser government. This administration should be probably regarded as the swan song of the Australian Settlement. Fraser resisted further tariff cuts and supported compulsory conciliation and arbitration while his internal political economy was mainly concerned with the tightening of welfare and the cutting of the expenditures of the previous government (Hampson 1997; Head 1983; Thompson 1989; Watts 1989; Cass and Whiterford 1989:294).

In face of Fraser's "return to the past", the economic indicators continued to deteriorate and this trend generated the perception, amongst large segments of the electorate and interest groups, that drastic reforms were necessary to restructure the Australian economy though there was uncertainty regarding the best direction to be taken. This ambiguity was compounded by the high level of industrial conflict generated by the economic austerity imposed by the Fraser government which was "seen by many as fuelling inequalities and thereby adding to social tensions and conflicts" (Stilwell 1986:9).

At the 1983 election, the ALP was led by the former ACTU president Bob Hawke who presented himself as a leader able to "draw together the parties to the industrial relationship and undertake the task of national reconciliation rather than the intensification of divisiveness" (Bob Hawke 1982 in Stilwell 1986:9). The ALP was successful in convincing the electorate that the crisis could only be overcome through a broad collaboration between the major interest groups. This led Hawke, and his treasurer Paul Keating, to establish formal collaboration with the ACTU in what was for Australia an unprecedented corporatist experiment. This agreement, which came under the name of the Accord, radically changed the character of the system of labour protection and standards setting in Australia.

6.3 Labour Standards and the First Phase of the Accord (1983-1987)

In 1983, the Accord was portrayed, by Hawke, as a means of revitalising economic growth while simultaneously reducing unemployment, inflation and industrial conflict. The Accord endured for 13 years until 1995 and was renegotiated eight times during this period. The initial focus was the re-establishment of full employment and the control of inflation while reform of the employment protection system was not explicitly mentioned. Under the Accord Mark I, the ACTU accepted wage restraint in return for job creation and increases in the social wage (Medicare, superannuation and

occupational health and safety) (Singleton 1990:96-154; Stilwell 1986:10-11; Boreham 1990:43).

The Accord Mark I contained four main elements: the establishment of a pricing authority to control inflation, the return to a system of centralised wage fixation with the level of wages adjusted in line with changes in the cost of living and national productivity, reform of the taxation system to shift the burden from low to high income earners and increases in government expenditure on the social wage (Stilwell 1986; 1993; Dabschek 1995). The main element of this agreement was a trade off between social wage increases and real wage restraint (Peetz 1985; Burgess 1988; Watts 1989:113-129).

The Accord Mark I and Mark II represented a major departure from previous policies as on no previous occasion had industrial relations and social policy been traded-off against each other in such an explicit fashion (Ramia 1998:230). The centralisation of wages seemed to be the appropriate response to control inflation in an attempt to "temper wage justice with 'capacity to pay' considerations" (Stilwell 1986:11). However, as the Constitution confers to the Commonwealth only indirect powers in relation to incomes policy, the Federal government could only make submissions to the Commission in relation to wages. Despite these limitations, the Commission promptly followed the guidelines established by the government and the ACTU and in 1983 granted a six-monthly CPI-based increase on the condition that increases in wages or other benefits from other sources be kept to a minimum.

The policy of wage restraint and centralisation was adhered to by the great majority of the actors in the industrial relations arena. The Commission reported that, between September 1983 and December 1985, 96% of all award wage increases were determined by national wage case decisions. It is also interesting to note that, according to some commentators, the Accord Mark I served as a substitute for

monetarist policies because, by constraining the activity of trade unions it acted as a de-facto restrictive monetary policy (Gruen and Grattan 1993:129).

However, the achievement of wage restraint was conditional upon the government's commitment to making concessions in relation to the "social wage" (Stilwell 1986; Gruen and Grattan 1993; Taylor 1990; Beilharz 1983; 1994). Amongst these concessions was the pledge to improve occupational health and safety at the workplace. This was probably the most concrete step towards the reform of labour standards undertaken by the Labor government in this period. In sections 4.2.1, 5.9.1 and 5.9.2 it was seen how, given the limitations imposed by the Australian Constitution upon the Federal government, occupational health and safety has traditionally been a prerogative of the States. Since the Robens Report was released in the U.K. in 1972, there has been a slow but constant process within the Australian States to modernise occupational health and safety legislation. Pre-Robens legislation operating in Australia was inadequate in many aspects (Bohle and Quinland 2000:262). South Australia introduced the first very tentative reforms in 1972, followed by Tasmania in 1977, Victoria in 1981 and New South Wales in 1983 (Creighton 1986).

One of the factors that help explain the introduction of these reforms was the enhanced attention placed on occupational health and safety by trade unions. This was an area traditionally neglected by Australian unions but came onto the political agenda during the mid 1970s (Pearse and Refschange 1987:638). In 1979, the ACTU endorsed a comprehensive occupational health and safety policy and during the early 1980s attempted to negotiate health and safety agreements directly with employers (Carson 1989:9). Encouraged by the formal inclusion of occupational health and safety policies in the "social wage" embraced by the Accord Mark I and by the election of Labor governments in several States during the early 1980s, new laws were enacted that were more effective than previous reforms. Western Australia and

the Australian Capital territory were first in 1984, followed by Victoria in 1985, South Australia in 1986 and Queensland and Tasmania in 1995 (the latter two States were governed by the Labor Party only from the early 1990s).

The Robens-style occupational health and safety legislation not only provided for trade union demands but also complied with economic considerations informed by neo-classical orthodoxy. The reform of occupational health and safety and workers' compensation schemes was part of a broader project designed to increase the competitiveness of the States' trade sector by reducing employer costs (Carson and Henenberg 1988; Carson 1989). In the case of Victoria, for example, the Labor government was committed to increase the State's trade performance and "change the structure of the Victoria economy" through the promotion of the export sector and the strengthening of Victorian producers in relation to interstate and overseas imports (Economic Strategy 1984). In order to do so, the government identified those factors that were hampering the competitiveness of Victoria's producers. On top of the list came the operating costs associated with workers' compensation schemes and the high rate of injuries at the workplace (Economic Strategy 1984). According to this report, "whole sections of the business sector were paying out at least 10% of wages and salaries" and increasing workers' compensation premiums were reducing the competitiveness of Victorian business (Carson and Henenberg 1988:10).

In this scenario, the Victorian government (preceded by New South Wales in 1983 and followed by all other State governments and the Federal government) promptly reformed its workers' compensation schemes and occupational health and safety legislation. The reform of workers' compensation schemes in Victoria was initiated in 1984 when levies started to be imposed on employers according to a band of risks (with a maximum rate that could not exceed 10% of wages and salaries in any circumstance) and was completed in 1994 by the conservative Kennett administration.

This process was assisted by the enactment of laws, modelled on the Robens type, which emphasised the prevention of accidents at the workplace.

While the most visible effect of the Accord on labour standards in this period was the enactment of occupational health and safety legislation, the Hawke government also proceeded to introduce new anti-discrimination legislation (with particular emphasis placed on discrimination against women). This was the result of a process that paralleled the Accord although it was not directly related to it. Since the late 1960s-early 1970s, the women's movement in Australia had gained an increased capacity to lobby political parties to improve the working conditions of women and other disadvantaged groups such as migrants. Aborigines and homosexuals (see for example Gardner and Palmer 1997; Sawer 1990). In particular, the emergence of the Women's Electoral Lobby (WEL) in 1972 signalled the beginning of the direct involvement of the feminist movement in politics, a development that translated the aspirations of this movement "into concrete public policy demands" (Sawer 1990:1). Amongst these demands was the enactment of anti discrimination and equal employment opportunity legislation. This was particularly urgent given the complete absence of any legal protection against discrimination in Australia before 1975 and the existence of gross inequalities in wage determination institutionalised in the *Harvester Decision (1907)*[48].

After the 1983 election, Labor women "were quick to insist that the ALP had won government through the swing of women voters" and to demand the enactment of anti-discrimination legislation (Sawer 1990:69). The immediate reaction of the Hawke government was the ratification of the UN Convention on the Elimination of All Forms of Discrimination against Women in 1983 and the subsequent enactment of

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[48] The *Harvester Decision* referred to a male worker who had to cater for the needs of the whole family. As a result industrial tribunals in Australia have consistently fixed minimum wages for women at a fraction of those of males.

the Federal *Sex Discrimination Act* in 1984 and the *Human Rights and Equal Opportunity Commission Act (Cth)* in 1986. The latter legislation made the complaint process more effective and extended the proscribed grounds of discrimination (see section 5.7.2) while, in 1992, the *Disability Discrimination Act (Cth)* prohibited discrimination based on physical and intellectual disabilities (see section 5.7.2).

It is interesting to note that although anti-discrimination laws were not formally included in the Accord, the ACTU supported the enactment of these legislative initiatives. In 1977, for example, it advanced a *Maternity Leave Test Case* campaigning for 12 weeks paid maternity leave and up to 52 weeks unpaid maternity leave for all eligible workers.

The synergy achieved between the ALP, the ACTU and the women's movement helps explain why, in the initial stage of the Accord, the labour standards that most increased were occupational health and safety and equal employment opportunity/employment equity. It is important to note that both anti-discrimination and occupational health and safety legislation were perceived by the Hawke government as having neutral to positive effects in relation to the costs of production. As a consequence, the enactment of legislation on occupational health and safety and discrimination would not have interfered with the core objective of the Accord that remained the control of inflation by means of wage restraints. In short, during the first years of the Accord, the increase in the protection accorded labour standards was more due to the ALP's commitment to its electoral sponsors than to a precise economic and political project.

That the gains in labour standards protection, delivered by the ALP in the first two years of government, were not part of a well defined political strategy designed to improve standards emerges from the analysis of the process that led to the improvement of two other standards: unfair dismissal and large/scale layoffs. In August 1984, the Australian Conciliation and Arbitration Commission handed down

its decision concerning the *Termination, Change and Redundancy Case.* This decision granted wide benefits on job security in relation to redundancy payments, unfair dismissal and imposed the duty on the employers to consult with trade unions with regard to the introduction of technological changes at the workplace. The benefits provided by the *Termination, Change and Redundancy Case* were subsequently included in all the major awards and constituted the backbone of job security legislation enacted at the Federal level in 1993 and 1996 (see sections 5.8.2; 5.10.2). The *Termination, Change and Redundancy Case* was an initiative of the ACTU that had begun in 1981 and was prompted by developments in job protection overseas and by heavy job losses that occurred in Australia due to technological changes introduced at the workplace and the general economic downturn (see section 6.3). The ACTU vigorously campaigned for an extension of the advance notice of dismissal (at that time the standard included in Federal awards was one week), the introduction of clauses in awards concerning the reinstatement of unfairly dismissed employees redundancy payments and the requirement that employers must consult with trade unions before introducing technological changes (Nolan 1988:256).

Despite some uncertainties about its jurisdictions (see further section 4.2.1), in 1982 the Commission ruled it had jurisdiction over virtually all the issues and that it could hear and determine the ACTU claims (with a few exceptions). This was more than a simple legal exercise; it was an acknowledgement that the reform of the system of job protection in Australia was long overdue and that the economic circumstances were of such severity to justify the adoption of vigorous measures. In granting periods of notice ranging between two and five weeks, the Commission, for example, commented that "...the traditional week notice of termination included in Federal awards provides no practical opportunity for those who have been in a particular job for some time to adjust to the proposed change in circumstances, reorganise their lives and seek alternative employment" (*Termination, Change and Redundancy Case* 1982:19). This decision was the result of a process that started well before the ALP

won the election in 1983, and involved institutions only indirectly linked with the political constituencies. When this case was initiated, the Fraser government did not support it. However, when the final decision was delivered, the ALP was already holding office and, as part of the Accord process, it welcomed the new entitlements.

The *Termination, Change and Redundancy Case* was unsuccessfully challenged on constitutional grounds in the High Court, which in 1984 ruled that claims that would require an employer to consult with his/her employees over proposed technological changes constituted industrial matters and subsequently (1987) ruled that the Commission could order the reinstatement of an unfairly dismissed employee without exercising judicial powers (*Ranger Uranium Mines P/L v Federated Miscellaneous Workers Union of Australia*). This highlights the fact that the improvement in labour standards protection, achieved in the first years of the Accord, was the result of a process that involved different actors and institutions, sometimes with little connection between them. While the relation between the enactment of legislation on occupational health and safety legislation and sex discrimination and the political process is quite straightforward, improvements in job security were achieved through a process that was only indirectly linked to the political arena. With the reform of occupational health and safety, the enactment of the *Sex Discrimination Act*, and the adoption of the standards laid down in the Termination, Change and Redundancy Test Case, the first phase of labour standards reform was concluded. In the second phase, labour standards became directly linked to broader objectives of political economy and labour market reform. This process will be discussed in more detail in the next section.

6.4 Sowing the Seeds for Further Reforms: Labour Standards, the Second Phase of the Accord and the Transformation of the Australian System of Labour Protection

The most important issues dealt by the Accord Mark I were the control of inflation, the fight against unemployment and the recovery of the Australian economy. The Accord Mark I represented a major departure from traditional political patterns and it invoked an unprecedented embrace of economic liberalism. At that stage the move towards increased market governance was embodied in the floating of the currency, the deregulation of the financial sector (Leung 1989; Stutchbury 1990:57-58; Davis 1989:97-99), the corporatisation of public sector organisations and the privatisation of government assets (Schwartz 1994(a) and (b); Boston and Uhr 1996; Wiltshire 1990). The advance of labour standards was mainly due to concessions made by the ALP to its electoral sponsors. During this phase of the Accord, the system of labour protection and industrial relations remained firmly hinged on the functioning of compulsory conciliation and arbitration and on the decisions laid down by industrial tribunals.

Yet, more drastic reforms were in store. Starting from the mid-1980s, a debate took place in Australia on whether the prevailing system of industrial relations and employment protection needed to be modified. This debate eventually led to a drastic reduction in the relevance of awards and the adoption of a system of labour protection based on collective bargaining underpinned by statutory labour standards. In order to investigate these changes, it is necessary to outline a series of events that took place in Australia from 1984 and the position of key actors in the industrial relations arena. The strong devaluation of the currency that followed the floating of the Australian dollar produced a deterioration of the balance of payments and a substantial increase in the level of international debt. Criticisms began to be directed to the core of the Accord, wage indexation, and pressures mounted to abandon it. The ALP reacted by seeking a discount from the ACTU in the forthcoming national wage case (September

1985) in order to contain the effects on prices deriving from the devaluation of the Australian dollar but the ACTU argued that such discounting would threaten the existence of the Accord itself. An agreement was eventually reached in September 1985 known as the Accord Mark II.

The Accord Mark II comprised two parts: in the first part the Government agreed not to argue for any discount of wage indexation increases in the forthcoming national wage case decision, while the ACTU would defer a claim for a productivity increase (to which it was entitled under the Accord Mark I). In the second part, the social partners agreed to further discount the wage indexation increase in return for more tax income cuts that would take effect from 1 September 1985. In addition, the productivity case was to be converted into an improvement of superannuation for the Australian workforce equivalent to 3% of wages (Stilwell 1993:71-73; Groenewegen 1993:52-57). Although the Accord was saved, the employers began to criticise not only the new superannuation measures, but also the centralisation of wages, the "inflexible" nature of Australian industrial relations, and the extensive protection of the legal right to bargain that compulsory conciliation and arbitration guaranteed to trade unions (Dabscheck 1989:99; Kelly 1994:67; Macdonald, Campbell and Burgess 2001; Sheldon and Thornthwaite 2001). Leading this challenge were prominent employer bodies such as the Business Council of Australia and activist bodies such as the H.R. Nicholls Society.

The Business Council of Australia (BCA) wished to see the adoption of an enterprise-based system of industrial relations and a dilution of wage indexation to reduce wage increases. These two measures were consistent with the BCA's deregulatory and pro-market agenda (Business Council Bulletin (BCB) 1985:12 and 1986:10). That the reform of the system of industrial relations was an urgent necessity to improve the competitiveness of Australian employers was also the opinion of the H.R. Nicholls Society. This body was founded in 1986 as a response to the Accord by

prominent Coalition leaders, business people and neo-classical economists (Dabscheck 1995). The agenda of the Society was even more radical than that espoused by the BCA. In its inaugural conference, entitled *Arbitration in Contempt*, the Society vehemently criticized the supposed inflexibility of industrial tribunals and advanced a series of measures aimed at decentralising the industrial relations system. Amongst these were the use of individual contracts of employment and the strengthening of sanctions against trade unions or individuals involved in industrial actions (Dabschek 1989; Stone 1986).

The views and criticisms expressed by the BCA and the H.R. Nicholls Society were generally supported by the Coalition. In May 1986, for example, the shadow spokesman on employment and industrial relations, Neil Brown, made it clear that the reform of the legal framework regulating industrial relations could not be postponed and that the Commission should have immediately pursued a flexible approach in making awards and regulating labour conditions that reflected the needs of individual enterprises and their employees (Neil Brown 1986). The Coalition also encouraged the use of voluntary agreements at the enterprise level as a way to by-pass industrial tribunals (Coalition Policy on Industrial Relations 1984).

While pressure from the business community was mounting for a drastic reform of the system of industrial relations and employment protection and to weaken the powers of the Commission, the government received, in 1985, the final draft of the Hancock Report. This report was commissioned, in 1983, by the then Minister for Employment and Industrial Relations to investigate possible reforms of the legal framework regulating industrial relations. This was part of a side agreement of the Accord Mark I which stated that the Labor Party was committed to establish "...in consultation with the ACTU and employers, an inquiry into the *Conciliation and Arbitration Act* and Regulations to conduct a total review of Federal industrial legislation to improve that legislation" (Statement of the Accord:8). The inquiry was

entrusted to a committee chaired by Professor Keith Hancock. Although it is beyond the scope of this chapter to analyse in great detail the recommendations of this report (for an exhaustive overview see for example Dabscheck 1989:69-88) it is important to point out that the Hancock Report proposed few changes and strongly supported wage indexation, the functioning of compulsory conciliation and arbitration, and the awards system of labour protection. Unfortunately for Hancock, his report was released at a time when Australia was once again hit by an economic storm. As observed by Dabscheck "before the ink on the report was dry Australia's international and balance of payments problems combined to move Australia away from the wage indexation assumptions of the Accord...and the Hancock Report" (Dabscheck 1989:88). This development gave even more voice to those, within both the governing lobbies and the opposition groups, advocating the abandonment of conciliation and arbitration and the substantial decentralisation of the bargaining locus.

The severity of the 1986 economic crisis allowed the Treasurer, Paul Keating, to talk in alarmist tones about the future of Australia. Keating referred to the risk of Australia becoming a "banana republic" arguing that "if the government can't get the internal economic adjustment, get the manufacturing going again and keep moderate wage outcomes and a sensible policy, then Australia is done for" (Keating cited in *The Sidney Morning Herald* 17.5.1986). Following this statement, the Australian dollar plunged by another 2% against the trade-weighted index of international currencies. The chaos that followed this statement enabled the government to accelerate the move away from wage indexation and more broadly from compulsory conciliation and arbitration. The views of the BCA and the H.R. Nicholls Society gained consensus even amongst the ALP. The first step that the Hawke government took was to break most of the commitments contained in the Accord Mark II. The Prime Minister announced the measures he believed necessary to overcome the crisis that Keating had consciously deepened:

1) The government supported the current ACTU wage claim (already discounted by 2%) on the condition that the next wage claim (to be heard in September 1986) was postponed and the first 1987 wage case was further discounted.

2) The government supported the ACTU claim for a share in the national productivity increases to be obtained in the form of an improved superannuation scheme but this benefit had to be phased in over the following two years.

3) The promised tax cuts for low income earners were to be postponed to a some unspecified date before December 1986.

This announcement made things even worse. The employers claimed the measures the government had delivered were weak and inadequate and they campaigned for further wage and expenditure cuts while the feeling amongst trade unions was that the government measures were enacted to please the business community (Dabscheck 1989). There was a strong push by trade unions with industrial muscle to abandon wage centralisation, while both the Federal government and the ACTU were under pressure from within their own ranks to reform the Accord and the wage indexation experiment (Briggs 2001:29-37). This proved to be a crucial development because it created a fracture within the union movement and paved the way for the future dismantling of compulsory conciliation and arbitration and the dilution of Labour's capacity to bargain. Trade unions with strong market power, such as the metalworker and the maritime unions, began to be persuaded they would obtain better conditions of employment through direct negotiation with the employers rather than relying on the determinations issued by the Commission (Briggs 200!). By so doing, they clashed with unions with limited market power which had traditionally relied on the operation of industrial tribunals to sustain their capacity to bargain.

Wage centralisation was officially abandoned on the 23rd of December 1986 by the Commission. This decision was preceded by a Summit, in September, between

representatives of the government, the ACTU, the Confederation of Australian Industry (CAI), and the BCA to examine new practices at work. During this Summit, Bob Hawke made it clear that he believed Australian industry had to "meet the remorseless challenge of an increasingly competitive international environment" and that this required unions and employers to explore new ways to meet this challenge (Hawke 1986). In the final statement of this summit the parties agreed that efficiency could only be improved by consultation between management and employees at plant or enterprise level and that this should be the focus of future industrial relations reforms (Work Practices Summit 1986). The road to decentralisation was laid open and following the end of the Summit Bob Hawke announced the end of wage indexation and the adoption of a two-tiered system of wage fixation.

While it is not the aim of this chapter to explore in great detail all the renegotiations of the two-tier system introduced in 1987 (for a detailed overview see for example Dabscheck 1989; 1995; Rimmer and Zappala 1988; Teicher and Grauze 1996; Macklin, Goodwin and Dochery 1992), certain features are relevant to explain the subsequent process of labour standards reform. The two-tier system was a mix of centralisation and decentralisation. The first tier consisted of an across the board national wage case increase to be granted by the Commission in one or more decisions per year. The second tier represented the decentralised part and involved increases granted on an industry by industry or award by award basis. Such increases were granted to those sectors which achieved improvements in efficiency including work-value streamlining and removal of anomalies and inequalities. In general, second tier increases (that were always subjected to an upper limit) were granted in accordance to a restructuring and efficiency principle, to those sectors that tried to improve their competitiveness.

All the renegotiations of this new system of wage fixation were substantially endorsed by the Commission, although its decisions were received with criticism

often by more than one side. This contributed to nourish the perception amongst the social partners that the Commission was an obsolete institution and that the award system of labour protection was inflexible and inadequate for the new economic environment (for a detailed discussion on the operation of the Commission under the two-tier system and the criticisms to its decisions brought by the government, employers and trade unions see Dabscheck 1995:43-77).

Notwithstanding the widespread perception that flexibility in establishing labour conditions should be achieved at enterprise level, and despite the mounting criticisms directed to the decisions of the Commission, between 1987 and 1992 the government hesitated to reform the legal framework governing labour standards. During this period, labour standards were still firmly hinged on the award system and the Commission, although weakened in its independence by the Accord, was the body charged with the duty to establish and regulate employment conditions.

The most important step, taken by the Hawke government in this phase, was the enactment of the *Industrial Relations Act (Cth)* in 1988. This was little more than a cosmetic exercise because the government was still influenced by the recommendations contained in the Hancock Report (see above) and continued to support compulsory conciliation and arbitration. Moreover, although the ALP was coming to perceive the adoption of neo-liberal economic policies as an ineluctable necessity, there were numerous Labor Party and union leaders who still believed in Keynesian economics and in the beneficial effects that derive from a centralised system of employment protection. Further, there was uncertainty amongst the government and the ACTU on how and to what extent the awards system could be replaced. Although the notion, advanced by trade unions with extensive market power, that better employment conditions could be obtained through free collective bargaining rather than relying on the Commission was gaining consensus amongst senior ACTU bureaucrats, the division within Labour ensured that at this stage the

ACTU did not fully endorse enterprise bargaining as its preferred policy. Most importantly, it was unclear what means could be adopted to protect those with little bargaining power should the power of the Commission be severely eroded.

In this scenario, the government chose to pursue flexibility through the Accord and the restructuring principle (the two-tier system of wage fixation) while leaving the awards system of labour protection virtually untouched. Paradoxically, during this phase, it was the award system and the Commission, which had been so vehemently criticised by employers and trade unions, that became the most important vehicles to implement the decentralisation of industrial relations and achieve more flexibility.

Consultation between the government and the ACTU on how to introduce enterprise bargaining while at the same time providing a reasonable level of protection intensified after 1988. In November 1989, Paul Keating explained the process through which enterprise bargaining should be adopted. In his speech, Keating emphasised the centrality of the Accord and of the Commission in this process:

> it is the Accord process, along with the industrial Relations Commission that can bring this [enterprise bargaining] about. There is a consensus developing amongst employer groups and the ACTU to rationalise and restructure awards to create a framework which can handle greater wage flexibility without generally destabilising flow-ons and wage break-outs. The consensus model is a powerful and effective force to change. Confrontation and draconian legislation will not change the structure of unions nor build an environment where employees can sit down with management to devise working conditions which are in everyone's best interests (AFR 6 November 1989).

This speech was echoed by the then secretary of the ACTU Bill Kelty who, during the negotiation of the Accord MarkVI, made it clear the ACTU was ready to negotiate over profits and productivity at the enterprise level and in general over the introduction of new industrial relations legislation. However, once again it was not

clear what would be the role of the system of labour standards regulation under the enterprise bargaining regime, nor the place and the role of the Commission during the period of transition. The uncertainties about the characteristics of this new system emerged in a speech, delivered by Kelty, in February 1990 when he stated that

> the issue...is not whether or not there will be enterprise bargaining but what sort of enterprise bargaining, what sort of relationship. There are two options for enterprise bargaining. Mature arrangements between unions and employers looking at productivity, profit sharing, the application of restructuring, the development of better relationships between unions and employers. That is good enterprise bargaining. Then there is enterprise bargaining where you bargain...for whatever you can get. That is collective bargaining. Now the ACTU has never supported the view that it is the most desirable way for this country to regulate its industrial affairs by just free collective bargaining (AFR 14th of February 1990).

Although both the government and the ACTU continuously emphasised the necessity to adopt a form of enterprise bargaining that gave unions an active and central role during the bargaining process while simultaneously providing for the basic needs of all workers, no serious steps were taken at this stage to design a legal framework able to reconcile enterprise bargaining with the need for minimum standards. In addition, the March 1990 election was approaching and both the ALP and the ACTU felt the urgency to find a new platform to re-launch the Accord and defeat the Coalition. An agreement was eventually reached on the 21st of February 1990 known as the Accord Mark VI. In line with the two-tier principle, the Accord Mark VI, envisaged a wages-tax-superannuation trade off in combination with support for award restructuring based on the efficiency principle (for a detailed description of the Accord Mark VI see for example Dabscheck 1995:63-75). The Hawke government won the 1990 election but the reform of labour standards was only delayed.

Just as compulsory arbitration and conciliation came under pressure, to allow the market a freer hand in determining employment conditions via bargaining

decentralisation, the social security system was also subjected to political and economic pressures. This led to a substantial reform concerning the principles governing the way in which unemployment benefits were granted, with such reform being influenced by neo-liberal orthodoxy. This was the most drastic modification concerning labour standards in the 1987-1991 period. In section 5.4, it was shown that the index for unemployment/employment insurance did not significantly change. However, the scale applied does not capture certain aspects of the new legal framework such as an increased emphasis on the need for unemployment recipients to pursue work-like activities and the tightening of penalties for failure to comply with their obligations. In 1985, the Social Security Minister, Brian Howe, established the *Social Security Review* charged with reviewing the main social, economic and demographic changes which had occurred since the mid 1970s and with identifying further reforms to the social security system (Cass 1986; Gunn 1989; 1990; Watts 1990). The review focused on a broad range of issues such as income support for families with children, income support for the aged and unemployment benefits (Cass 1986:11). Here we focus on unemployment benefits.

Unemployment allowances were basically maintained (see section 5.4) but there was a shift towards the encouragement of active job-search. In 1987, the unemployment benefit was abolished and replaced by the job-search allowance (JSA). While the old system did not differentiate between the beneficiaries, the new allowance provided different conditions of eligibility to the young, the long-term and the medium term unemployed. In addition, for those over 18 who were unemployed for less than twelve months, the unemployment benefit was more tightly administered requiring evidence of regular work tests, periodic job applications or enrolment in training programs. Failure to comply with the work activity test was sanctioned with the suspension of payments. The same penalty was introduced for not attending interviews or responding to correspondence from the then Commonwealth Employment Service (CES) or the Department of Social Security. From 1989, those

who had been unemployed for over twelve months were transferred to the Newstart program. In addition to the activity-test the recipients were subjected to under the JSA, Newstart allowance payments were conditional upon the signing of a special contract with the CES (and its successor Centrelink). This contract could require the beneficiary to undertake activities such as job-search, vocational training, special labour market programs, paid work experience, job-search training or training to reduce labour market disadvantage (Daniels 1995:9; Bryson 1994:300; Kalisch 1991:8; Saunders and Whiteford 1991:161-171). Although the basic allowances were maintained, the system of unemployment benefits, in accordance with the recommendations of the *Social Security Review*, imposed a series of contractual obligations upon the beneficiaries.

The critical point here is that the principles which guided the reform of unemployment benefits in Australia were neo-liberal in character and they undermined the bargaining position of workers in that the reserve wage was made more difficult to access. The recommendations of the Social Security Review were heavily influenced by the OECD Active Society project (OECD 1987; 1988; 1989; 1990; for its application in Australia see for example Kalisch 1991; Dean 1995; Cass 1986; 1988; Carney and Hanks 1994:164-165; Saunders 1994:21; Mellers 1995; OECD 2001). The starting point of the Active Society is that the demise of full employment in the 1970s made the post-war welfare state unsustainable. Consequently, the Active Society agenda encourages work and work-like activity among the unemployed and supposedly infuses a sense of (economically) enterprising participation to all its citizens. Post-war passive benefits were to be replaced by active benefits to be granted only to those who demonstrate diligent participation in activities such as job-search, education, training, labour market programs or a combination of the latter. It is the duty of the State to ensure the participation of the unemployed to the various programs and to penalise resistance. There is widespread agreement that this conception of unemployment benefits is perfectly compatible with

economic liberalism (see Ramia 1998:248). As Walters points out, the active society is:

> Structured by a fundamentally neo-liberal axiom. For it is "a concept that associates the well-springs of job growth and economic and social well-being with wider participation in society and growth in the entrepreneurial culture" (OECD 1992). The argument is that the market is the only true source for satisfaction of human desires and needs, just as participation in paid employment is the key to personal fulfilment, self-development and membership in society (Walters 1997:224).

The expansion of the realm of the market during the 1987-1991 period proceeded through the partial decentralisation of the locus of bargaining, further cuts in tariffs and the adoption of the social security "active society" model. Yet, it was not a fundamental advance. The decentralisation, which occurred under the two-tier system, was only marginal and the Commission continued to exercise its functions, while the restructuring of the unemployment benefits, although significant, maintained approximately the same share of beneficiaries and level of allowances (Saunders 1994; section 5.4). More was still to come, for the double movement was yet to fully unleash its effects.

Along with the weakening of workers' ability to access a reserve wage, the debate on labour market reforms centered primarily on how to adopt an enterprise bargaining system while providing an effective level of standards protection for workers with little bargaining power. Although the exact meaning of enterprise bargaining remains contentious (see for example Suitcliffe and Callus 1994; for its application in Australia see Rimmer 1998; Wooden 2000; Macdonald et al. 2001), it is useful to briefly analyse the enterprise bargaining model envisaged by the conservative forces. The BCA and the other conservative groups were not directly bound by the Accord and therefore, during the late 1980s-early 1990s, were able and free to propose a series of labour market reforms far more specific than the ones

endorsed by the ALP and the ACTU. The BCA officially supported the adoption of enterprise bargaining from 1984 and in 1987 released a paper entitled "Towards an enterprise-based industrial relations system". In this document the BCA laid down the two main features of the desired reforms:

1) the re-orientation of the system away from centralisation and towards enterprise-based units.

2) the development of mutual trust and interest at the workplace between management and the workforce in order to strengthen the direct relationship between employers and employees. (BCA 1987:1).

In order to investigate the ways in which these targets could be achieved, and the precise features of the new system of industrial relations and employment protection, the BCA appointed a Study Commission to analyse, amongst other, the following issues:

1) The institutional framework required for the development of enterprise agreements including the nature of Federal and State laws and their interaction.

2) The role and nature of conciliation and arbitration in support of the enterprise oriented system. (BCA 1987:8).

The Study Commission issued three reports: *Enterprise Bargaining Units: a Better Way of Working* (July 1989), *Avoiding Industrial Action: a Better Way of Working* (1991) and *Working Relations a Fresh Start for Australian Enterprises* (1993). All these reports emphasised the virtues of enterprise bargaining providing the political arm of the conservative forces, the Coalition, with a detailed model of institutional reforms (for a review of the discussion and critiques to these reports see Dabscheck 1995; Frenkel and Peetz 1990(a); Frenkel and Peetz 1990(b), Rimmer 1988). This framework was made public in 1992 by a Coalition blueprint, *Jobsback!*. This policy

advocated the abolition of awards, the end of compulsory conciliation and arbitration and the introduction of workplace agreements negotiated between an employer and an individual or group of workers. Under this model, labour standards were confined to a minimum safety net legislated, in some cases, with reference to awards. *Jobsback!* specified a number of minimum terms and conditions of employment that had to be contained in workplace agreements: a minimum hourly rate linked to a relevant award, a minimum hourly rate of AU$3 or AU$3.50 for youths depending on age, four weeks annual leave, two weeks cumulative sick leave and unpaid maternity leave after twelve months of continuous service. According to this proposal, labour standards were to be established mostly via legislation thus precluding employees from the benefits that derive from the regular re-negotiation of awards and the subsequent flow-on effect. By abolishing compulsory conciliation and arbitration this proposal sought to drastically reduce trade unions' legal capacity to bargain and this development could prove extremely dangerous for Labour at a time when Capital was gaining an increased market power.

The process of legislative change was on its way also at the State level. In 1991, New South Wales enacted an *Industrial Relations Act* that provided an alternative route to awards while Tasmania enacted in 1992 the *Industrial Relations Amendment (Enterprise Agreement and Workplace Freedom) Act* which closely resembled New South Wales legislation. Under the New South Wales and Tasmanian laws industrial tribunals retained a considerable role in ascertaining that the new contracts would not erode the existing conditions of employment while awards were used to provide a safety net that would be regularly updated (see for example Rimmer 1989(a) and (b); Niland 1989; 1990; Jamieson 1992; Garnham 1994). A more radical model of enterprise bargaining, which closely resembled the proposal contained in *Jobsback!* and aimed to substantially reduce the influence of industrial tribunals, was adopted in Victoria by the conservative Kennett government in 1992. The *Employee Contracts Act (1992) (Vic)* allowed individual as well as collective contracts,

abolished the Victorian Industrial Relations Commission and ruled all the awards would come to an end on the 1st of March 1993 although their terms and conditions would continue to operate until the negotiation of new contracts (Fox and Teicher 1994). The *Employee Contracts Act (1992) (Vic)* established that the new agreements should contain minimum terms and conditions of employment similar to those provided by Tasmanian and New south Wales legislation (Creighton 1993). In this way, labour standards would have been protected via legislation rather than through awards and this move anticipated future developments at Federal level.

The model of enterprise bargaining developed by the Coalition, coupled with the move towards decentralisation adopted by many States, put further pressure on the Accord partners to reform the Federal system of industrial relations and labour standards. The Coalition presented its reform proposal as the only effective measure to create new jobs and reduce unemployment. This seemed particularly appealing to large segments of the public as unemployment plunged to 10.4% during the 1991-92 period and 11% in 1992-1993, the highest rate in Australia since the Second World War (Dabscheck 1995). Within the ALP and the ACTU this crisis compelled the forging of a consensus that the reform of the *Industrial Relations Act (1988)(Cth)* could be postponed no longer.

The main problem the Accord partners were facing concerned the role of awards in the new system of employment protection. Both the ALP and the ACTU agreed that conciliation and arbitration should be retained and charged with preserving minimum award rates and the provision of "a safety net below which employees cannot fall". This was in line with legislation enacted in New South Wales and Tasmania and represented a major move away from the model endorsed by the Coalition (see above). That industrial tribunals were to play a relevant role in certifying enterprise agreements and awards were to be maintained to ensure a minimum level of protection was firmly supported by Keating in a keynote speech to

the International Industrial Relations Association's ninth world Congress (Sydney 1992). On this occasion Keating stated that in this new model the Commission will "have an important role in helping the parties to reach enterprise or industry agreements, in vetting single-enterprise agreements to make sure the employees have not been disadvantaged..." (Keating 1992) [49]. The plan of the government and the ACTU was becoming clearer: labour standards (although as minima only) would be safeguarded through the award system and the decisions laid down by the Commission in national test cases. This process culminated with the Accord Mark VII when labour standards became officially part of the agreement reached between the ALP and the ACTU on the 19th of February, just three weeks before the Federal election. The Accord Mark VII, which was developed to counteract the Coalition's *Jobsback!*, reconfirmed the commitment to compulsory conciliation and arbitration and to the award system of labour protection. This clearly emerges from clause 4.3 which states:

> The accord partners support the continuation of an award system to underpin workplace bargaining. Such awards should be periodically adjusted so that they remain relevant over time and protect the rights of workers. Access to arbitration is an integral part of such a system (Putting Jobs First 1993:4).

But the Accord Mark VII went even further in relation to labour standards. *Putting Jobs First* contained clauses that committed the government to establish a legislated safety net of labour standards based on ILO conventions that applied to all States and Territories (see further section 4.3.2). This was stated in clause 4.4:

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[49] The government's commitment to the maintenance of awards should not be accepted at face value. Just one year after this statement, Minister Keating, in addressing an important meeting of the business fraternity, supported "extending the coverage of [enterprise] agreements from being add-ons to awards...to being full substitutes for awards" (Keating cited in Hawke and Wooden 1997:29). This indicates mixed feelings within the government.

> The provision of a permanent and reliable safety net is the essential foundation upon which industrial relations reform should proceed. To ensure that all Australian workers are protected by this safety net, regardless of the State or Territory they live in, the government has decided to legislate under international conventions to guarantee award right to:

1) minimum award wages

2) equal pay for work of equal value by men and women

3) protection against unfair dismissal including the requirement for an employer to offer a valid reason for dismissal, severance pay and appeal to an impartial tribunal against unfair dismissal

4) unpaid parental leave

> Further, the Government will give consideration to legislation to protect other internationally recognised standards, such as annual leave, maternity leave and hours of work. (Putting Jobs First 1993:4).

The last issue, the role of the Commission in framing the new system of employment protection, received attention in clause 4.5. Under this clause the parties

> consider that in future the role of industrial tribunals should be increasingly focused on safety net provisions, test case standards, conciliation and dispute settlement. In coming years the Accord partners anticipate that the majority of the workforce will be covered by workplace agreements...However, industrial tribunals will retain as a key function the oversighting of the operation and maintenance of the award system including the continuation of the minimum rates adjustment process...They should [also] ensure that certified agreements do not disadvantage employees and that other requirements spelt out in the legislation have been met (Putting Jobs First 1993:5).

The system of labour standards, envisaged by this proposal, was one where awards and statutory legislation largely co-existed. With this new agenda the ALP and the ACTU won the 1993 election while this new model became operative with the

enactment of the *Industrial Relations Reform Act* in 1993 (for the analysis of the features of this act, in relation to labour standards, see further section 4.3.1). At this point it is imperative to highlight the fact that despite the declared commitment of the social partners to maintain Labour's capacity to bargain by means of compulsory arbitration and conciliation, the Accord Mark VII began to erode the collective bargaining standard through the introduction of a non-union stream of certified agreements (Enterprise Flexibility Agreements (EFAs)) and a further emphasis on the decentralisation of the locus of bargaining. As previously observed, the views of trade unions with "industrial muscle" finally persuaded the ACTU to accept a compromise which enhanced the role of the market in the bargaining process and decreased the relevance of legislation.

Alongside the *Industrial Relations Reform Act (1993)(Cth)* were further reforms to social security and unemployment benefits. This came under the *Working Nation* agenda. *Working Nation* was introduced in 1994 and partially implemented until 1996 when the Labor government lost office. In line with the recommendations contained in the *Social Security Review*, this project sought to reduce long-term unemployment and placed emphasis on training and education for the unemployed. The central objective of *Working Nation* was to reduce the unemployment rate to 5% by the year 2000. Its main features included: a reliance upon economic growth to facilitate job creation; the "jobs compact", a set of strategies aimed at creating jobs for the long-term unemployed; changes to labour market training and assistance with particular attention placed on women, the disabled and Aboriginal and Torres Strait Islanders and changes to the social security system designed to increase the incentives to work (Stilwell 1994:111-112; Finn 1997; 1999; Campbell 1994; Junankar and Kapuscinski 1997; Harbridge and Bagley 2002:181-186).

At the heart of the *Working Nation* package laid the Jobs Compact. Through this scheme the government offered all long-term unemployed people and those at

risk of becoming long-term unemployed, a temporary job and case-management (Jones 1996; Finn 1997; 1999; Harbridge and Bagley 2002). The job offered was subjected either to a wage subsidy or to a special (lower) training wage with wage subsidies. In return, the beneficiary was compelled to accept the scheme and the conditions under which it was offered. This sense of duty and "reciprocal obligations", which was initially adopted by the Social Security Review, further fostered discussion concerning the emergence of "quasi-contractualism" in the administration of unemployment assistance (Eardley 1997; Carney 1996; 1997; Yeatman 1995).

The crucial point here is that as the domain of the market was expanded, through the introduction of EFAs (see further section 4.3.1) and the adoption of the *Working Nation* program, reforms designed to limit this process were enacted by the ALP. The no-disadvantage test ensured that the objective of enterprise flexibility agreements, namely the achievement of tailored arrangements at workplace level, was constrained, while the retention of awards prolonged the function of the Commission which could deal not only with traditional award regulation, but also with workers whose conditions of employment were determined through enterprise bargaining. But the countermovement went even further: traditional constitutional constraints were challenged to provide more protection. Legislation on unfair dismissal and redundancy, parental leave, minimum wage, equal pay for work of equal value was introduced and applied to all employees through Australia. Such provisions acted as a bulwark to contrast and challenge the very nature of EFAs. At this stage, collective bargaining was still receiving considerable institutional protection though the powers of the Commission began to be eroded through the introduction of a non-union stream of enterprise agreements (EFAs). The trade-off achieved between the ALP and the ACTU envisaged the adoption of statutory protection in return for a partial restriction of the Commission's powers. The latter feature is particularly relevant as it foreshadowed developments that took place in the subsequent phase and led to a

drastic reduction in the role of conciliation and arbitration and in the legal protection accorded to collective bargaining. Starting from 1996, a new phase in employment protection began, with this phase more clearly favouring the market.

6.5 The Coalition and the Australian System of Employment Protection.

One of the reasons that enabled the ALP to win the Federal election in 1993, was the emphasis placed by *Putting Jobs First* on the relevance of an affective and far reaching system of employment protection to counter the potential negative effects associated with the adoption of enterprise bargaining. This stood in striking contrast to the Coalition proposal that encouraged the complete abandonment of compulsory conciliation and arbitration and awards. It was also hoped that the new system would assist in reducing unemployment. This proved to be wrong with unemployment ranging between 9.46% (1994) and 8.33% (1996). The time was ripe, for the Coalition, to win office.

However, there was widespread perception amongst Coalition leaders that it was necessary to prepare a project of labour market reforms more balanced in relation to labour standards than the one envisaged by *Jobsback!*. In this climate, the Liberal party prepared a blueprint entitled *Better Pay for Better Work*. Despite the fact that this document was dominated by neo-liberal economic theories, it fell short of the prescriptions contained in *Jobsback!*. In line with the reforms introduced under the *Industrial Relations Reform Act (1993)(Cth), Better Pay for Better Work* envisaged a role for the Commission and awards albeit a reduced role.

The main difference between the reforms introduced by the Keating government and the Coalition proposal lay in the fact that the Commission would be allowed to arbitrate only on 18 allowable matters while all other issues were to be negotiated at the workplace level. Also, the certification powers of the Commission were to be curtailed as the AIRC would be required to certify enterprise agreements

that met a list of 10 minimum standards. In addition, the Coalition committed itself to reform legislation on unfair dismissal by restricting access to the Federal jurisdiction (see section 4.3.2). According to *Better Pay for Better Jobs*, the relevance of the Commission would be further reduced by the introduction of individual agreements administered and certified by a different body, the Office of the Employment Advocate (see section 4.3.2). The downsizing of the Commission was to be achieved in two ways: directly through specific statutory provisions and indirectly by excluding the AIRC from the certification of AWAs thus exposing this body to the competition of the Employment Advocate (Dabscheck 2001:284-288). Overall, this proposal aimed to minimise the reliance upon Federal tribunals while at the same time providing a residual level of protection. This was done to attract a part of the electorate that voted for the ALP in 1993 (Dabscheck 1995).

In March 1996 the Coalition won office. However, they did not attain a majority in the Senate and this required the support of the Australian Democrats to pass legislation. While the Howard government was not bound by any corporatist arrangement with the ACTU, the situation in the Senate meant that the Coalition's neo-liberal zeal was tempered by the necessity to compromise with the Democrats (see for example Naughton 1997; Rubinstein 1998; Rimmer 1997; Sloan 1997). Whereas the move towards increased market-governance proceeded relatively unopposed in the financial sector, the labour market reforms were once again under scrutiny. In relation to labour standards the emasculation of the Coalition proposal was particularly striking. On May the 26th 1996, the *Workplace Relations and other Legislation Amendment Bill* was introduced into Parliament. This Bill attempted to give affect to the project envisaged by *Better Pay for Better Jobs*. A Senate Inquiry, comprising representatives of all parliamentary parties, was established to receive submissions in relation to the proposed amendments to industrial relations legislation. The Senate inquiry took evidence from 1431 submissions over 18 days of public hearing and reported to the Parliament on the 22nd of August 1996. After almost two

months of intense negotiations, the government reached an agreement with the Democrats in October 1996 and the amended Bill passed both Houses on 18th November.

The compromise inherent in the *Workplace Relations Act (1996)(Cth)* is clear when this piece of legislation is compared with the original Coalition proposal. The number of allowable matters was increased from 18 to 20. In addition, the Commission was allowed to include in awards matters that were incidental to the listed ones and it was also empowered to deal with a non allowable matter where the AIRC was satisfied that it was an exceptional matter. Finally, the ability of Industrial tribunals to certify agreements was not confined to the 10 standards conceived in *Better Pay for Better Jobs* but agreements had to satisfy a comprehensive no-disadvantage test that was similar to the one operating under the *Industrial Relations Reform Act (1993)* and this extensively referred to the standards established in awards (see further section 4.3.2). Individual agreements (AWAs) were also introduced though they were subjected to a no-disadvantage test. The *Workplace Relations Act (1996)(Cth)* represented a further move towards the decentralisation of the employment relationship, which was initiated by the Labor governments during the years of the Accord, and this explains the decrease in the collective bargaining index shown in section 5.6.2. Yet, a significant level of employment protection was maintained. Just as the no-disadvantage tests for EFAs, introduced under the *Industrial Relations Reform Act (1993)(Cth)*, clashed with the objective of increasing the domain of the market, the no-disadvantage test for AWAs contrasted with the primary purpose of AWAs, the decentralisation of the locus of bargaining. For awards continued to serve as benchmarks during the certification of AWAs.

The influence of the Democrats continued to constrain the ability of the Coalition to further deregulate labour standards in subsequent years. In 1998 the Howard government called an election in order to enable it to pass a package of

financial and industrial relations reforms. The proposed reforms included the introduction of a tax on goods and services (GST) and the further deregulation of industrial relations (see the Coalition proposal *More Jobs, Better Pay*). The Coalition won the election but once again it needed the support of the Democrats who strenuously opposed any further reduction of the AIRC powers. The Howard government eventually traded the Democrats' support for the GST with the abandonment of any plan to curtail the powers of the Commission although an agreement was reached to dilute the effectiveness of unfair dismissal legislation[50]. Consequently, the system of labour protection remained, in the main, the same as it was in 1996.

A conclusive remark concerns a further reform that occurred to the way unemployment benefits were administered. The *Working Nation* project was weakened while a further move towards the policy of mutual obligations, recommended by the Social Security Review and partly adopted through the *Working Nation* program, was promoted by the Howard government (Harbridge and Bagley 2002:187; Macintyre 1999:103; Hawke 1998; OECD 2001; Goodin 2001; Moss 2001; Bessant 2000). In 1998, a formal policy of mutual obligations was introduced. This came under the label of the *Work for the Dole* scheme. This policy initially targeted young people but has subsequently been extended. The core of this scheme rests on the compulsion, of an unemployed person, to fulfil his/her mutual obligation by undertaking voluntary or part-time work, or education or training while receiving unemployment benefits. Alternatively, the beneficiaries are required to accept a place in the Work for the Dole scheme. This means that the recipient must undertake work

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[50] This agreement led, in August 2001, to the introduction of a number of amendments to the termination of employment provisions. Under the *Workplace Relations Amendment (Termination of Employment) Act (2001) (Cth)* a series of obligations are imposed upon employees and the AIRC that restrict access to unfair dismissal legislation.

to be entitled to the unemployment allowance. Failure to comply with the Work for the Dole scheme is sanctioned with the reduction or suspension of allowances.

6.6 Conclusion

The economic crisis that followed the two oil shocks in the 1970s and the inception of globalisation affected the Australian system of employment protection. The severity of the economic downturn led to the abandonment of a set of policies, denominated the Australian Settlement, that centered upon conciliation and arbitration and the award system of labour protection. This crisis induced the main Australian political parties, the ALP and the Coalition, to explore new policies to face the economic turmoil and to embrace, with different degrees, neo-classical economics. The drift towards economic liberalism was more pronounced within the Coalition since the ALP was bound to the ACTU by a corporatist agreement.

Australian politics was dominated, from 1983 to 1995, by an atypical form of corporatism that resembled practices adopted in continental Europe. In this scenario, the reform of labour standards began to take place. In the first phase of the Accord (1983-1987) labour standards generally increased as a result of the pressure of interest groups affiliated with the ALP (such as the women's movement). In the second phase, labour standards became part of a broader project which aimed to increase the reliance upon market forces. Economic-liberalism was initially endorsed through the deregulation of the financial sector, the reduction of tariffs and the selling and privatisation of public assets. Within the labour market, such reforms aimed to decentralise the locus of bargaining and reduce the power of industrial tribunals. The inception of economic liberalism, in relation to employment regulation, proceeded slowly initially through the enactment of the *Industrial Relations Act (1988)(Cth)* and a reform of unemployment benefits that resembled the model envisaged by the OECD "active society". This trend accelerated in subsequent years.

Through the 1979-2000 period, there was a constant tension between market-liberalisation and employment protection. The debate that labour market reform proposals sparked amongst political and trade unions leaders focused on what level and type of protection was to be provided to workers with little bargaining power and the role of awards. The compromise eventually reached between the ALP and the ACTU in the Accord Mark VII retained, in the main, the traditional functions of the Commission and led to the adoption of a legislated minimum floor of labour standards based on ILO conventions. Labour standards generally increased under the Accord although one standard, workers' compensation, decreased (see further section 5.5.2) following the election of a Liberal government in Victoria. However, it is important to stress that under the Accord the basis was laid to reduce the protection accorded to the legal right of unions to bargain. This took the form of EFAs under the *Industrial Relations Reform Act (1993)(Cth)* and the adoption of the two-tier system of wage fixation. Paradoxically, this development was encouraged by trade unions with industrial "muscle" dissatisfied with the Commission's activity during the phase of centralised wage indexation.

The election of a Federal conservative government in 1996, which more drastically adopted a neo-liberal approach and was not bound by any partnership with the ACTU, and the subsequent reform of the legal framework regulating industrial relations, negatively impinged upon labour standards (in particular collective bargaining; see section 5.6.2). In particular, the introduction of AWAs, the weakening of provisions concerning first agreement arbitration and the constraints imposed on industrial tribunals to arbitrate on 20 matters, drastically affected the capacity of unions (in particular those with little market power) to bargain. Yet, the expansion of the market was contrasted. In order to win the 1996 election, the Coalition had to moderate the neo-liberal breadth of the labour standards' reforms originally envisaged in their 1992 proposal. In addition, the need for the support of the Democrats ensured that deregulatory tendencies were further tempered. As a result, most of the statutory

protection enacted in 1993 was retained although this development was accompanied by a consistent weakening of Labour's market power.

Having considered the evolution of labour standards in Australia, the thesis will now move to consider the Institutional framework regulating employment protection in Italy and the changes that occurred to this framework during the 1979-2000 period.

CHAPTER SEVEN

LABOUR STANDARDS IN ITALY: THE INSTITUTIONAL FRAMEWORK (1979-2000)

7.1 Introduction

Traditionally, labour standards have been established in Italy through a system that involves statutory legislation and collective agreements. In particular, the latter have been consistently used as benchmarks to provide a safety net below which labour conditions cannot fall. This is the result of Italy being governed by a civil law legal system[51] while labour standards protection is entrenched in the Republican Constitution. These sources of labour standards regulation have been increasingly integrated and largely supplemented by legislation enacted at the European level in the past two decades.

The main finding of this chapter is that, although the Italian institutional context differs markedly from that in Australia, its features are inherently protective and have traditionally sheltered workers from the operation of market forces. This characteristic endured during the period studied. In particular, it will be argued that institutional reforms involving the regulation of part-time, fixed-term contracts and the shift from "*garantismo giuridico*" to "negotiated labour law" reflects the interaction between the perceived need to allow the market a freer hand and the necessity to shelter Labour. More specifically, institutional reforms expanding the market's domain were accompanied by a strengthening of Labour's legal right to control Capital's activity. This marks a significant point of departure in comparison with Australia as changes that affected the institutional protection accorded to labour conditions in Italy did not undermine workers' capacity to bargain.

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[51] As a result Common law is not available in this country.

In order to investigate the main institutional features of labour standards regulation and their changes over time, this chapter will consider: the Constitution and the protection granted to labour standards by this Charter, the evolution of Italian legislation and finally the ascent of the European Union and European labour law.

7.2 Labour Standards and the Republican Constitution

Italy is governed by a civil law legal system. The legal sources are hierarchically ranked with the Constitution prevailing over all other sources. An important feature of a civil law legal system, for the purpose of this thesis, is that the capacity of the Judiciary to independently produce legal norms is limited. An act acquires the force of law only if its legitimacy is legally sanctioned. In Italy, the supreme body performing the legislative function is the Parliament while the Judiciary only interprets and applies the law. Hence, legislation is the main tool through which working conditions are legally established. Labour law, like any other law enacted by the Parliament, is subjected to a process of constitutional conformity performed by the Constitutional Court (*Corte Costituzionale*) (on this process see further Crisafulli 1976). This stands in striking contrast to common law countries where the Judiciary is granted wide legislative power and the principle of the "*stare decisis*" ensures that previous Court cases become legally binding (see for example Caretti and De Siervo 1998:14). In this way, and in the absence of statutes enacted by the Parliament, the courts perform legislative activity. However, this basic distinction between common law and civil law systems has faded over time (Carinci, Tosi, De Luca Tamajo and Treu 1999:15). While common law countries have increasingly enacted legislation[52], in nations governed by civil law legal systems the Judiciary has often extended its functions by

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[52] In Australia, for instance, Compulsory Conciliation and Arbitration superseded Common Law while since the early 1990s statutory legislation has been increasingly used to regulate labour standards (see sections 4.3, 4.3.1 and 4.3.2)).

filling the gaps left by the Parliament. Although legislation remains the primary tool through which labour standards are established, it is important to point out that the Judiciary has often contributed to shape the features of the Italian system of labour protection (Giugni 1999:19). For example, the Judiciary and not the Parliament established a number of the principles of labour standards protection that are embedded in the Constitution (such as section 36; see later in this section).

The primacy of the Constitution over all the other legal instruments has important implications for labour standards. If a specific aspect of the employment relationship receives constitutional protection, it compels the Parliament, and to a lesser extent the Judiciary, to ensure the implementation of that constitutional right. The Republican Constitution, which was enacted after the end of the Second World War, contains principles that directly protect labour standards. In this way the constitutional significance of labour law has been enhanced in comparison with other branches of the jurisprudence such as civil or commercial laws (Ghera 2000:17; Carinci et al.1999:7; Pera 1996:61). But the Republican Constitution goes even further. It acknowledges the existence of an inherent imbalance of power in the employment relationship and establishes principles to re-address this imbalance (Ghera 2000(a):19; Carinci et al. 1999:8). For example, section 3 paragraph 1 grants equal legal rights to individuals by stating "All citizens possess an equal social status and are equal before the law without distinction as to sex, race, language, religion, political opinions, personal or social conditions". This paragraph is reinforced by paragraph 2 that commits the "Republic" to "remove all economic and social obstacles which, by limiting the freedom and equality of citizens, prevent the full development of the individual and the participation of all workers in the political, economic, and social organisation of the country". Section 3 paragraph 2 formally recognises the need to grant extensive protection to the weakest social classes.

This concept is strengthened, in more general terms, also by other sections. Section 35 states that the "Republic" "shall protect labour in all its forms and applications and...shall enhance the skills of workers. [The Republic] also supports the international organisations and agreements that promote workers' rights". In addition, section 4 proclaims that everyone is entitled to employment and that the "Republic" is committed to achieving full employment. The social reformist zeal inherent in these provisions is tempered by the acceptance of private property and the capitalist mode of production as sanctioned by sections 41 and 42. Section 41 holds that "the economic initiative is free [but] it cannot be performed in ways that conflict with the public interest and it cannot harm safety, freedom and human dignity" while section 42 proclaims that "property can be public or private and private property is safeguarded by the law which also establishes...limits in order to guarantee its public function". This complex network of provisions that limit the economic freedom of individuals and aim to achieve social objectives is called the *Costituzione Economica* (Economic Constitution). Unlike most of the pre-war (liberal) constitutions, which normally granted only individual rights and limited their scope to the regulation and distribution of power between different constituencies of the State, the Italian Constitution contains principles that protect collective rights. These rights are used not only to readdress social inequalities but also to grant protection to organisations that are deemed necessary for the advancement of workers' rights. Two examples illustrate this function. The Constitution grants protection to collective associations such as trade unions (section 39 paragraph 1) and to the right to strike (section 40) while employers' right to lockout is outlawed. As noted by Caretti et al. (1998:15) "The Italian Constitution recognises that social inequalities cannot be re-balanced only through the operation of free market forces and as a consequence puts in place mechanisms to protect the weakest social classes".

Within this framework, the Constitution grants specific collective and individual rights that are of primary significance for labour standards regulation. The

individual rights are: the right to a sufficient wage and to weekly time off, the right to paid annual leave (section 36 paragraphs 1 and 3), equal pay for men and women (section 37 paragraph 1), minimum age of employment (section 37 paragraph 2), equal pay for young employees (section 37 paragraph 3), while the collective rights concern: freedom of association (section 39 paragraph 1), the possibility for trade unions to conclude collective agreements that apply *erga omnes* (section 39 paragraph 3) and the right to strike (section 40).

Sections 36 and 39 are particularly relevant for the purpose of this thesis. Section 36 paragraph 1 proclaims "Workers shall be entitled to a remuneration commensurate with the quantity and quality of their work, and in any case sufficient to ensure to them and their families a free and honourable existence [Article 2099 Civil Code]". This section represents the cornerstone of wage protection in Italy and has been used to establish a far-reaching system of wage maintenance since the end of the Second World War. It is important to note that section 36 emphasises the right to a "sufficient" wage. The meaning of this concept is broader than the simple notion of minimum wage. As argued by Ghera (2000 (a)), the insertion of the word "sufficient" in this section aims to guarantee to the worker and his/her family a level of income greater than simple subsistence. This closely resembles the principle followed by Justice Higgins in the *Harvester Judgment,* the philosophy of which influenced the pronouncements of the Commission and National Wage Case Decisions in Australia for nearly 80 years (see section 4.2.3).

Section 36 establishes principles that should be implemented by the Parliament and is prescriptive in nature (Ghera 2000(a):248; Pera 1996:477). In spite of this, the Italian Parliament has never enacted legislation regulating minimum wages and more broadly has neglected to give effect to section 36 paragraph 1. This lacuna has been filled by the Judiciary through a process that began soon after the enactment of the Republican Constitution. Starting from the early 1950s the Judiciary gave effect

to the prescriptive nature of section 36 *de facto* bypassing, in this way, the Parliament. This process is peculiar to Italy and highlights the relevance of the Judiciary in establishing and regulating labour standards.

Section 36 is implemented using collective agreements via article 2099 of the Civil Code. Pursuant to article 2099 paragraph 1 the wage level shall be fixed with reference to corporatist laws. Corporatist laws were in use during the fascist period and included collective agreements. After the collapse of the fascist regime, article 2099 was re-interpreted and corporatist laws were replaced by collective agreements (Ghera 2000(a):245). Consequently, wage clauses in collective agreements, which normally apply only to the members of the signatory associations, were extended to all workers. This is a well established practice and, as noted by Pera, "the judges directly apply section 36 paragraph 1 by invalidating the clauses, in the individual contracts of employment, which do not conform to the principle of the "sufficient wage" and by fixing the wage level with reference to the relevant collective agreement" (Pera 1996:150).

Although Italian governments have never enacted laws regulating minimum wages, the Judiciary, by giving effect to section 36 of the Constitution, created a mechanism of wage protection. This mechanism is based on the conditions laid down in collective agreements that are used as benchmarks to establish the level of the sufficient wage. In Italy, there is no uniform legal minimum wage. Rather, different categories of employees are paid different wage rates in accordance with the rates established by the relevant collective agreement. However, some agreements, that usually cover a large proportion of the workforce, have traditionally been pacesetters in relation to wages. Amongst these the Metal Workers' Agreement and the Chemicals' Agreement stand out. These agreements will be used in chapter 8 to measure the minimum wage level and its change over time.

The inter-relation between collective agreements and labour standards is restricted to the regulation of minimum wage and paid time off and does not generally extend to other standards. This is because section 39 paragraph 3 of the Constitution has never been implemented. This section holds that "trade unions have legal personality. They can...conclude collective agreements that apply to all the workers covered by the specific agreement". Section 39 aimed to extend the coverage provided by collective agreements. If section 39 had been implemented, collective agreements would have applied *erga omnes* through a mechanism similar to the one used to give effect to section 36 or by law. In this way, the conditions of employment laid down in collective agreements would have acquired the force of law.

Section 39 has never been implemented for several reasons. First, trade unions have generally opposed any attempt to legally register them. Section 39 paragraphs 1 and 2 establish rules for the registration of trade unions. In order to be registered "the statutes of the trade unions must be democratic", while only the registered trade unions are allowed to conclude collective agreements that apply *erga omnes*. During the 1950s, a debate took place in Italy on whether or not trade unions should be registered. Trade unions strenuously opposed the enforcement of mandatory registration as they feared the implementation of paragraphs 1 and 2 would enable governments to exercise statutory control over their activity and internal organisation. This was perceived as dangerous at a time when trade unions were still recovering from the repressive fascist experience. Second, the registration process also aimed to regulate the right to strike granted by section 40 of the Constitution. Once again, trade unions opposed any attempt to limit the right to strike and rejected the implementation of section 39. Finally, while the left wing trade union, the *Confederazione Generale Italiana del Lavoro (CGIL),* supported the enforcement of section 39 (at least during the first years of the Republic), smaller unions, such as the *Confederazione Italiana Sindacati dei Lavoratori* (*CISL),* feared that its implementation would have empowered the *CGIL* (by far the union with the largest membership) and its political

affiliation, the Italian Communist Party (PCI) (for detailed reports on the failure to implement section 39 see for example Pera 1996; Treu 1975; Mancini 1976; Carinci et al. 1999). The failure to implement section 39 produced a significant lacuna in the Italian legal framework as collective agreements are only binding on the members of the signatory associations and therefore cannot be used as a source of labour standards regulation. This stands in striking contrast with the system operating in Australia where awards are used as benchmarks during the process of registration of certified agreements and AWAs (see section 4.3.1). As also noted by Del Punta (1995), the main purpose of section 39 was to provide a mechanism of protection for those workers in a weak bargaining position or at the bottom end of the labour market by extending the coverage of collective agreements.

The legal void generated by the failure to implement section 39 was filled in different stages. First, the Judiciary implemented section 36. Second, the Judiciary sanctioned the principle that collective agreements can be derogated by individual contracts of employment only if the latter grant better conditions of employment (Civil Code art. 2113). In addition, the Judiciary extended the ambit of application of collective agreements. It was held that, under specific circumstances, the working conditions laid down in collective agreements must be applied to the individual contract of employment irrespective of the party affiliation. For example, collective agreements should be applied whenever the parties explicitly or implicitly endorse them. The first case occurs when the conditions contained in the individual contracts of employment closely resemble clauses laid down in relevant collective agreement while in the second case the employer, who applies numerous and significant clauses of a collective agreement, is compelled to apply the whole agreement (Carinci et al. 1999:283; Giugni 1999:161). The *Corte di Cassazione* also sanctioned the principle that employers who are affiliated with an employers' association that signed a collective agreement must apply the agreement to all workers who ask for it (*Corte di Cassazione*, August the 8th 1978, n. 3867 as reproduced in Giugni 1999:160). These

two practices provide further examples of the significance of the Judiciary in the regulation of working conditions.

7.3 From *"Garantismo Giuridico"* to Negotiated Labour Standards. The Evolution of Protective Labour Law in Italy

In section 7.2, it was revealed that the main instrument used to establish and regulate labour standards in Italy is statutory legislation. The evolution of Italian labour law has not followed a consistent pattern but rather different historical periods have been characterised by different approaches to labour law and labour standards regulation. Three phases can be identified in relation to the enactment of protective labour legislation: a first phase that started soon after the enactment of the Republican Constitution; a second phase that took place from the mid 1960s to the early 1980s, and a third phase thereafter.

In the first phase, from the late 1940s to the early 1960s, few laws were enacted to give effect to the protective principles embedded in the Constitution (Del Punta 1995; Scognamiglio 1999; Giugni 1986). With the exception of section 36, which was implemented mostly by the Judiciary, the protection accorded to labour standards remained firmly hinged on the prescriptions contained in the Fascist Civil Code (1942). As pointed out by Del Punta (1995), during this period legislation greatly favoured the employers at both social and legal levels. In particular, the capacity of the employers to freely lay off workers was not constrained. Dismissals were only regulated by section 2118 of the Civil Code which compelled the employer to notify in advance the intention to discharge a worker. This gave the employers a great advantage as employees were often intimidated by the fear of losing their jobs and were reluctant to exercise their rights (such as the right to strike or the right to join a trade union). During this phase, the system of labour protection in Italy was based more on collective bargaining and on the capacity of trade unions to negotiate with the employers than on legislation. Unlike in Australia, where the activity of

industrial tribunals ensured that working conditions received a high degree of legal protection, in Italy the failure to enact protective legislation, coupled with the lack of regulatory institutions, undermined the level of protection accorded to labour standards. The approach to protective labour law during this period was influenced by the liberal principle which holds that the purpose of labour law is merely to facilitate transactions between Capital and Labour and that employment conditions should be established through agreements freely negotiated between the parties (Del Punta 1995; Epstein 1983 and 1984; see also section 2.1.2).

This attitude changed dramatically in the following two decades. Beginning in the early 1960s, protective labour legislation began to be enacted and this continued until the mid 1980s. During this latter period, labour law was consistently used not only to readdress the imbalance of power between the employer and employee, but also to establish and regulate conditions of employment espousing, in this way, the protective scope of labour law. As observed by Scognamiglio (1999:277) "during this phase there was a perceived need, on the part of both the executive and the Judiciary, to improve working conditions and strengthen the capacity of trade unions to negotiate with the employers. This was particularly urgent due to the failure to implement most of the protective principles embedded in the Constitution". As a result, labour law became of primary relevance for the advancement of workers' rights, a process that was supported by most of the intelligentsia (for detailed reports on the change of attitude in relation to the use of labour law see for example Cessari 1965; 1987; Giugni 1979; Romagnoli 1995; Treu 1987 and 2000; Ichino 1996; Persiani 1999 and 2000).

Several laws were enacted during this period which constrained the employers' freedom and contributed to improve labour standards. Most of these laws still constitute the cornerstone of the Italian system of employment protection. On the 23rd of October 1960 the Italian Parliament enacted Law 1369/1960 which regulated

the outsourcing of work. Under this new framework, an employer could not employ workers who were hired and paid by the contractor for the simple purpose to perform work (Law 1369/1960, art. 1 paragraph 1). In addition to this general prescription, Law 1369/1960 regulated the cases in which outsourcing was allowed. Article 3 established that workers hired by the contractor were entitled to the employment conditions enjoyed by the workers directly employed by the commissioner and that both the contractor and the commissioner shared equal responsibility on this issue. The prescriptions contained in article 3 could only be derogated by the activities listed in article 5. Law 1369/1960 was enacted with the purpose of preventing employers from using outsourcing as an instrument of social dumping and to provide a reasonable level of protection to workers at the bottom end of the labour market.

Law 1369/1960 was flanked in 1962 by Law 230 which tightened the use of fixed-term contracts. Under the new regime, fixed-term contracts could only be concluded in some specific circumstances including: seasonal jobs; replacement of absent workers; completion of occasional or exceptional services or work for which the timeframe had already been established (Law 230/1962, art. 1 paragraph 2). Failure to comply with the prescriptions contained in Law 230/1962 was penalised with the conversion of the fixed-term contract into a tenured contract. The 1960s also stand out for the enactment of the first legislation on unfair dismissal. In 1966 the Italian Parliament passed Law 604/1960[53] which limited the employers' capacity to discharge a worker without good cause and established sanctions for violators. This Act also imposed upon the employer the burden of proof. This legislation is extremely important because, for the first time in Italy, it curbed the power of the employers to freely dismiss workers.

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[53] For a detailed account on the prescriptions of this Act see further section 8.8.1.

The protection accorded to labour standards and workers' rights further expanded in the 1970s. In 1970, the *Statute of Workers' Rights* (Law 300/1970) was passed on the wave of the industrial uprising that erupted in the late 1960s. Although this Act will be analysed in more detail in chapter 8, it is important to outline its most important features. The *Statute of Workers' Rights* granted several individual rights to employees, such as the right not to be transferred to a different job without a valid reason; the right to be promoted where a worker performs (for more than three months) higher tasks than those established by the contract of employment, the right not to be discriminated against on the grounds of trade union activity, race, language, sex, political or religious beliefs, or for participating in industrial actions. Along with these rights, the *Statute of Workers' Rights* also limited the employer's freedom to assess the employee's performance and further strengthened the unfair dismissal regime. Article 18 provides for the reinstatement of a worker who was unfairly dismissed and compels the employer to pay all the money accruing to the employee during the period of dismissal. The protections granted by Law 300/1970 are not limited to individual rights but also extend to labour relations. For example, while articles 19 to 27 sanction and regulate the right to establish employees' representative units at the workplace and confer special immunities to trade unionists, article 28 provides for a special processual remedy to restrain anti-trade union behaviour.

This golden age of protective labour law continued in the following years. Amongst the most important laws passed by the Parliament were Law 1204/1971 on maternity leave and Law 903/1977 on equal conditions of employment between men and women. On one side, Law 1204/1971 was enacted to implement section 31 paragraph 2 and section 37 of the Constitution (special protection for women and juniors). The most significant rights granted by Law 1204/1971 are: first, a woman cannot be discharged in the period between the occurrence of pregnancy and one year after childbirth (Law 1204/1971 art. 2 paragraph 1); second, the pregnant woman must suspend her work two months before childbirth and is prohibited from working

for the first three months after childbirth (Law 1204/1971 art. 4) and finally, during the maternity leave the employee is entitled to at least 80% of her normal wage to be paid by the social security service (Law 1204/1971 art. 15 paragraph 1). On the other side, Law 903/1977 was enacted to give effect to section 37 paragraph 1 of the Constitution (equal conditions of employment between men and women) and granted several rights to women (such as the right not to be discriminated on the basis of gender, equal pay for work of equal value, equal age of retirement for men and women and further protection for pregnant women; see section 8.7.1).

Along with the Parliament, the Judiciary also contributed to increasing the protection accorded to labour standards. For example, in 1966 the Constitutional Court partially repealed paragraph 2 of article 2109 (Civil Code) and held that an employee is entitled to take annual leave even if he/she had been at work for less than one year. Also the highest Court, The *Corte di Cassazione*, was involved in this process. In 1976, this body held that a worker must be allowed to perform another job while he/she is on sick leave and in 1980 it declared that wildcat strikes are legitimate industrial actions (*Cassazione* 1976 and n. 711/1980). Although the pronouncements of the *Corte di Cassazione* can be overturned in a different trial, they provide authoritative indications that are usually followed by lower Courts.

One of the most significant features of the labour legislation enacted in this period was the rigidity of the provisions contained in the statutes. As also noted by Scognamiglio (1999:277), the rationale underpinning the protective action pursued by the Parliament and by the Judiciary was based on the assumption that the worker is in a weak bargaining position and that collective bargaining by itself is insufficient to improve labour conditions. As a consequence, inderogable labour legislation was to be enacted to provide a reasonable level of protection to all the workers and to implement the principles entrenched in the Constitution. This approach to the use of labour law was called *garantismo giuridico* and aimed to provide a minimum level of

protection to all workers (for a complete overview of this principle and its application in Italy see Cessari 1966).

This approach to labour standards regulation changed dramatically in the following years. The third phase of protective labour law in Italy (from the mid 1980s until 2000) was characterised by a contradictory pattern. On one hand, the level of protection was increased and extended while, on the other hand, a process of deregulation began with this process undermining the theoretical foundations of the traditional *garantismo giuridico* and exposing large segments of the workforce to the operation of market forces. As with other countries (such as Australia see sections 4.3.1, 6.4 and 6.5) this process has been supported by the employers who have campaigned for both enhanced numerical flexibility and labour market reforms[54].

Striking examples of new protections granted to labour standards were Law 125/1991 on affirmative action (discrimination based on gender; see further section 8.8.2); Law 108/1990 which extended the protection granted by unfair dismissal legislation to firms with less than 15 employees[55]; Law 428/1990 on company transfers; Law 223/1991 on large-scale layoffs and redundancies (see section 8.10.2) and finally, Law 626/1994 which completely reformed the regulation of occupational health and safety (see section 8.9.2). Also the Judiciary contributed to enhance the level of protection accorded to specific labour standards. In 1988, the *Corte Costituzionale* held that the way in which unemployment benefits were calculated was illegitimate and forced the Parliament to pass legislation to increase benefits (see sections 8.4.1 and 8.4.2).

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[54] This process will be analysed in more detail in chapter 9.

[55] The penalties are considerably less than those established for firms with more than 15 employees. For example, the employers can choose between the reinstatement of the employee unfairly dismissed and the payment of a relatively small amount of money.

While these initiatives are fully in line with the protective purpose of labour law, it is more difficult to find a coherent thread in relation to legislation enacted to reform other standards and tackle the economic crisis of the early 1980s. In general, the aim of these laws was twofold: first, to increase the freedom of employers to 'flexibly' utilise the workforce and second, to weaken the traditional protective principle which held that the conditions of employment established by collective agreements cannot be less than those provided by statutory law. Both principles aimed to enhance reliance upon the market. Examples of laws which enhanced numerical flexibility are article 23 of Law 56/1987 which loosened the discipline regulating the use of fixed-term contracts[56] and Law 863/1984 that, for the first time, contemplated the possibility of concluding part-time contracts. On the other hand, laws that weakened the safety net principle were Law 903/1977 which, pursuant to article 5, established that the prohibition of night work for women in manufacturing could be removed through collective bargaining[57], Law 277/1991 which held that an employee dealing with chemical or biological hazards could be assigned to a lower job for safety reasons (Law 277/1991 art. 8) and Law 223/1991 which established that collective agreements could contain clauses that re-assigned workers to lower jobs (thus bypassing art. 2103 paragraph 1 of the Civil Code) if the employees were at risk of redundancy (Law 223/1991 art. 4 paragraph 11).

Along with these initiatives, various governments passed legislation to protect wages and employment. For examples, all the reforms of the *Cassa Integrazione*

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[56] Article 23 Law 56/1987 paragraph 1 held that fixed term contracts could be used all the times they were endorsed by collective agreements. There was therefore a compulsory reference to collective agreements which also had to specify the percentage of employees who could be hired on a fixed-term basis (Law 56/1987 art.23, paragraph 2).

[57] This prescription was overturned by Law 25/1999 that gave effect to a EU Directive. It was held that the prohibition of night work for women was repealed unless otherwise established by collective agreements.

Guadagni[58] (From Law 1115/1968 to Law 164/1975) aimed at maintaining wages while Law 113/1986 was passed to relieve juniors' unemployment and Law 236/1993 on solidarity contracts aimed to sustain employment[59]. The way in which Law 236/1993 operates is particularly interesting. "Solidarity Contracts" are collective agreements negotiated between employers and trade unions at plant level during a period of crisis. Under this framework, trade unions are allowed to accept a temporary reduction in working hours and wages on the condition that the employers do not proceed to collective dismissal. The loss in wage is then integrated by the government through the *Cassa Integrazione Guadagni* (redundancy benefits fund). The reduction in working conditions is permitted only if it is endorsed by a collective agreement concluded by the employer and the most representative union.

The compulsory reference to collective agreements and the wide powers conferred on trade unions highlight one of the most significant features of the legislation enacted during this period; the involvement of trade unions in the process of de-regulation. As noted by Del Punta (1995:16), "Italian deregulation has taken place, with few exceptions, in [accordance] with the social characteristics of the system...In this way trade unions have been given the difficult task to collaborate [sic] with the employers to jointly manage the transition from rigidity to flexibility". While during the second phase (from the early 1960s to the early 1980s), labour law was rigidly protective, in the subsequent two decades such rigidity was lifted and compensated through the strengthening of trade unions' legal rights to negotiate with management and control its activity (on this process see further Cessari 1987; De Luca Tamajo 1987 (a)(b)). Provisions that incorporate this aspect include: article 47

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[58] The *Cassa Integrazione Guadagni* is a mechanism that grants around 80% of the wage to the redundant employees and is paid for a limited period of time (one year on average). The Cassa Integrazione Guadagni is paid by the State through the social security services and only applies to medium and big firms.

[59] "Solidarity Contracts" were introduced for the first time by Law 863/1984.

of Law 428/1990 which makes it compulsory for an employer to notify trade unions of the intention to sell the firm (or part of it) and to negotiate the matter should trade unions request it. Failure to comply with this prescription is regarded as an anti-union offence and elicits heavy sanctions (Law 428/1990 art. 47, paragraphs 1 and 2). Also article 1 paragraph 2(a) of Law 196/1997 and article 23 of Law 56/1987 directly involve trade unions in the process of marketisation. These articles hold that fixed-term contracts can only be used in the ways prescribed by collective agreements. The compulsory reference to collective agreements embedded in many laws enacted in the past two decades should be regarded as an attempt to proceed to "controlled deregulation". Under this regime, trade unions were granted enhanced control over management decisions while at the same time the safety net principle was weakened and the employer's freedom to utilise the workforce enhanced. The compulsory reference to collective agreements and the incorporation of contractual aspects into the legal framework substantially modified protective labour law in Italy in the period examined. Italian protective labour law can now be defined as negotiated legislation since the statutes aim to involve trade unions and employers in the process of establishing and regulating labour standards rather than simply imposing them from above.

The crucial point here is that as marketisation was furthered, more protection for trade unions was introduced with such protection granting them the legal right to be actively involved in relevant areas of management decision-making. By lifting the limitations imposed upon the use of part-time and fixed-term contracts and a number of other protections the market was allowed greater regulatory scope. However, this shift was balanced by re-addressing the most striking shortcoming of the Italian system of labour protection: the lack of legal mechanisms that would require Capital to accept trade unions as legitimate counterparts and to involve them in the management process. This feature has also been promoted by legislation enacted at

the European level in the past two decades and the next section will analyse the effects of European labour law on Italian labour standards.

7.4 The Rise of the European Union: Labour Standards and European Labour Law.

Many legal provisions enacted in Italy in the last two decades of the twentieth century have been designed to implement European Directives or Regulations. Since 1951, when the first European Treaty (Comunita' Europea del Carbone e dell' Acciaio (*CECA*[60])) was ratified, the functions and the competencies of European institutions have considerably expanded. Along with the CECA, four treaties extended the integration of Europe: The Treaty of Rome (Economic European Community 1957), the EURATOM (European Community of Atomic Energy 1957), the Treaty of Maastricht (European Union 1992), the Treaty of Amsterdam (which amended all the other treaties) in 1997. The *raison d'etre* of these treaties is the same: national States accept a limitation of their sovereignty and delegate certain of their powers to European institutions. While the CECA and the EURATOM confer to Europe the power to govern specific matters, the other treaties embrace a wide range of issues and aim to make the European Union a more homogeneous economic, social and political entity. In this respect, the treaties of Maastricht and Amsterdam are of primary significance. They establish the European Central Bank and provide for the Monetary Union (single currency) and Economic integration of all signatory countries.

In reforming the Treaty of Rome, article 2 of the Treaty of Amsterdam expands the objectives of the European Community proclaiming that the European

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[60] The *Comunita' Europea del Carbone e dell'Acciaio* (European Community of the Coal and the Steel) was an agreement signed by European Countries that created a free market for the production and trade of coal and steel.

Union aims to: 1) promote economic and social progress and a high level of employment in order to achieve balanced and sustainable development; 2) achieve a high level of environmental protection; 3) reach a high level of social protection; 4) increase the quality of life; and 5) improve economic and social cohesion and solidarity amongst the member States. The Treaty of Amsterdam also lists the means the EU is to use to achieve the aforementioned objectives; these include: 1) free movement of people between the Member States; 2) alignment of legislation of each country to facilitate the functioning of the common market; 3) better coordination of the policies on employment of all States; 4) coordinating European social policy funded through an European Social Fund; 5) strengthening of economic and social cohesion; 6) improvement of occupational health and safety and 7) improvement of education and the promotion of culture of each member State (Treaty of Amsterdam art.3).

From the wording of articles 2 and 3, it clearly emerges that the scope of the EU transcends purely economic objectives and embraces social issues including the protection and improvement of labour standards. In spite of this, the level of legal protection granted to labour conditions and the balance between the economic and social aims of the European Union have traditionally been controversial issues. The position that has prevailed, since the ratification of the first European treaties, was one in which the social objectives were subordinated to the achievement of economic targets. This perspective reflected the belief of the founders that the benefits deriving from the creation of a common market would automatically lead to an improvement in employment conditions. As a consequence, European labour law has not followed a consistent pattern and its enactment has been fragmented and implementation uncertain.

The primacy of the economic aims was embedded in the treaties that established the CECA and the EURATOM. For example, article 2 of the treaty

constituting the CECA (1951) proclaims its purpose is to contribute to economic development and the achievement of a high level of employment while article 69 states that the removal of the impediments to the free movement of people between member states is a means to achieve the economic objectives listed in articles 1 and 2. The CECA contains only one clause related to labour standards. Pursuant to article 69, the Authority can adopt measures to protect the level of wages provided that "...the decrease in wages is used as a means of permanent competition between firms". This provision clearly subordinates the protection of labour standards to the achievement of economic objectives.

Labour standards received more extensive protection in the EURATOM. This treaty aimed to promote the development of Atomic energy in Europe. Article 2 of the EURATOM held that the authority must "establish uniform regulations on health and safety and guarantee that such regulations are enforced". This provision is strengthened by articles 30 and 39 that provided for the protection of workers and the population from the risks related to the use of ionised radiation.

Unlike the CECA and the EURATOM, the treaties constituting the European Common Market contain clauses that deal more extensively with labour standards. The cornerstone of labour standards protection is now contained in articles 136 and 137, Title XI of the Treaty of Amsterdam. Article 136 states that

> The [European] Community and the member States...aim to promote the employment, increase the living and the working conditions...improve social security and promote the social dialogue, develop the human resources...In order to achieve the aforementioned objectives the Community and the member States act in accordance with the characteristics of each country...[In doing so] they also consider the necessity to maintain the economic competitiveness of the whole community [sic]

Article 136 also reminds that European social policy is based on two documents: the European Social Charter (1961) and the Comunitarian Charter on Workers'

Fundamental Social Rights (1989). The rights contained in these two documents deal with the level of employment, living and working conditions, social security and social dialogue. In order to achieve the objectives listed in article 136, the EU is granted power to enact legislation over the following matters: 1) occupational health and safety; 2) labour conditions; 3) workers' information and consultation; 4) unemployment and 5) equal opportunities between men and women (Treaty of Amsterdam, art.137 paragraph 1). However, wages, freedom of association, strikes and lockouts are excluded from the rights listed in article 136 and are therefore regulated at the individual State level (Treaty of Amsterdam, art.137 paragraph 6). In short, there is neither a European income policy nor a European dispute resolution procedure.

In spite of the fact that both the Maastricht and the Amsterdam Treaties have extended the competencies of the European institutions, the social aims remain subordinated to the achievement of economic objectives. The primary purpose of the European Community is to pursue non-inflationary growth (Treaty of Amsterdam, art. 2) while all the member States must achieve a low GDP/Public Deficit ratio. The primacy of the monetary targets over the social aspects is directly recalled by article 126 Title VIII of the Treaty of Amsterdam (European employment policy). This article holds that in order to pursue the objectives on employment listed in section 125, the member States must act in accordance with the overall economic policy of the European Community. In other words, the policy of the member States to sustain employment must be anti-inflationary while the social policies must not affect the competitiveness of Europe. The subordination of the social aspects to the monetary objectives has led several commentators to conclude that European labour law is like a carriage pulled by the economic locomotive (Blanpain 2000:128; Ross 1995; Colucci 1998).

Notwithstanding the prevalence of the economic project, European protective labour law has increasingly integrated and supplemented national legislation. Three phases of European labour law can be identified: the first from 1954 to 1974, the second from 1974 to 1989 and the third thereafter. In the first stage, the policy of European institutions was heavily influenced by neo-classical orthodoxy and aimed to create a free-trade area while labour standards were largely ignored. The only measure taken towards the establishment of a common European social program was the constitution of the European Social Fund. This approach began to change during the 1960s with the adoption of the European Social Charter (1961) and the Preliminary Guidelines for a Community Social Program in 1971 (Blanpain 1972). These two documents led to the Paris Declaration of 1972 when Presidents and Prime Ministers of the member countries declared that they considered of equal importance the pursuance of vigorous action on social issues as well as the achievement of economic and monetary union (on this Declaration see further Vaan Praag 1973:150).

The following two phases were characterised by a more dynamic approach to labour standards regulation while the evolution of European labour law closely resembled the development that occurred in Italy. The 1974-1989 period can be divided into two sub-parts: the first from 1974 to 1980 and the second period from 1980 to approximately 1989. The 1974-1980 were the years of the "golden age of harmonisation" (Blanquet 1992). Several directives were enacted during this period to provide a uniform level of labour protection to European workers. These included the 1975 Directive on Equal Pay for Work of Equal Value and Redundancies; the 1976 Directive on Equal Treatment for Men and Women at the Workplace; the 1977 Directive on Acquired Workers' Rights in Case of Enterprise's Transfer; the 1978 Directive on Equal Treatment between Men and Women in Relation to Social Security; the 1980 Directive on Employees' Rights in case of Insolvability of the Employer. Also a number of directives on occupational health and safety began to be implemented during this phase.

In line with Italian legislation, which was inspired during this period by the principle of the *garantismo giuridico* (see further section 7.3), these Acts aimed to protect the employee who was regarded as being in a weak bargaining position *vis-à-vis* the employer. Yet, the European legislation went further. Through the enactment of Directive 75/129 on redundancies, imposed upon the employers the duty to negotiate (the word negotiate implies more that just informing) with employees' representatives the introduction of technological changes and the downsizing of firms. This Act accorded to trade unions the power to control management actions and foreshadowed subsequent developments in Continental Europe. As for Italy, the rationale underpinning this law promoted the involvement of trade unions in the process of restructuring and led to a 'controlled deregulation' (on the application of this concept to Italy see sections 7.3 and 8.10.2).

At the end of the 1970s, and following the second oil shock, most European countries experienced sluggish economic growth and massive unemployment. Neo-classical prescriptions began to dominate at European level and were enthusiastically supported by the British Prime Minister Thatcher and by employers. Excessive labour standards protection was held responsible for high rates of unemployment and inflation and the disproportionate costs borne by the employers. In this hostile climate, the enactment of European labour law substantially slowed down while several proposals failed to obtain approval from the Council[61]. The new Social Program endorsed on the 22nd of June 1984 was rather limited and only addressed 5 points: unemployment, the introduction of new technologies, occupational health and safety, social security and the promotion of consultation between employers and employees at the European level. The standard that received most attention during this

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[61] The rejected proposals included: The duty to inform and negotiate with the employees during undertakings by a complex structure (Vredeling proposal; 1980-1983), the regulation of part-time work (1982), fixed-term contracts (1982-1984), the reduction of working time.

period was occupational health and safety through the adoption of directives regulating the following matters: risks related to the exposure to chemical, physical and biological agents (1980), lead (1982), asbestos (1983) and noise (1986).

Despite the emphasis placed on occupational health and safety, labour standards were not accorded any great significance. Indeed, the 1985 White Paper, which focused on the creation of the European internal market, did not mention labour standards while the *Single European Act* (1986), which established the internal European Market, upheld the national sovereignty of the member states over the "rights and interests of the employed people". This required unanimous voting by the European Council and gave member States the right to veto proposals of the Commission in relation to labour standards. Once again occupational health and safety was the only standard that drew the attention of the European institutions. Article 137 of the Treaty on the European Community established that occupational health and safety matters could be endorsed by a qualified majority[62]. This gave rise to Directives 89/391, 89/654, 89/655, 89/656 which contained general provisions, modelled on Robens type principles and the prevention of industrial accidents and provided for a general framework regulating occupational health and safety (see section 8.9.2).

The social void generated by the prescriptions contained in the 1985 White Paper, induced some member countries, trade unions and non-governmental organisations to campaign for a social dimension in the internal market. These claims persuaded the European Commission to set up an interdepartmental working party on the Social Dimension of the Common Market whose report was released in 1988 and urged member states to place more emphasis on workers' rights and social issues. In

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[62] This means that a country cannot veto a decision of the Commission although the vote must be casted by at least 10 countries.

addition, the European Council at the 1989 Madrid Summit urged the European Community to uphold the 1972 commitment for a social dimension of the European Market. These developments, coupled with the enthusiasm on social issues brought by the President of the European Commission, the French socialist Jacques Delors, led to the adoption of the *Community Charter of Fundamental Social Rights for Workers* which was promulgated on the 9th of December 1989 and approved by all the countries with the exception of the United Kingdom.

Although this document emphasised the need to improve and harmonise labour standards within the European countries, it did not reverse the cautious approach to protective labour law that characterised the 1980s. There were several reasons why this was so. First, the *Community Charter of Fundamental Social Rights for Workers* is not a legally binding document as it does not generate principles of Community Law. According to an opinion adopted by the European Court of Justice, only a treaty signed by all member states can give rise to legally binding principles of Community Law (Blanpain 1999:137; Blanpain and Colucci 2000; Barnard 1995; for a contrary view see Riley 1989). The opting out of the United Kingdom negated this possibility. Second, the principles embedded in the *Community Charter of Fundamental Social Rights for Workers* are in most cases tautological propositions as they overlap areas over which the Community already had competence. The Charter, which extensively draws upon the European Convention on Human Rights and ILO conventions, contains 12 "fundamental social rights of workers" which are: 1) freedom of movement; 2) the right to be free to choose the occupation and the right to be fairly remunerated; 3) weekly rest period and paid annual leave; 4) the right to enjoy an adequate level of social protection; 5) freedom of association and collective bargaining 6) access to vocational training; 7) equal treatment for men and women; 8) the right to be informed and consulted; 9) occupational health and safety; 10) the protection of children and adolescents; 11) protection for elderly people at the age of retirement and 12) all disabled persons are entitled to concrete measures aimed at

improving their social and professional integration. The overlap between the rights listed in the *Community Charter of Fundamental Social Rights for Workers* and those previously established by the Treaty of Rome are particularly striking with regard to the following matters: freedom of movement (Treaty of Rome articles 39 to 42), sex discrimination; occupational health and safety (Treaty of Rome art. 137) and vocational training. Third, the implementation of the Charter is the responsibility of the member States rather than the European Community. Article 27, Title II of the *Community Charter of Basic Social Rights for Workers* clearly states:

> It is more particularly the responsibility of the Member States, in accordance with national practices, notably through legislative measures or collective agreements, to guarantee the fundamental social rights in this Charter and to implement the social measures indispensable to the smooth operation of the internal market as part of a strategy of economic and social cohesion.

This means that the action of the EC in relation to this charter is constrained by the principle of subsidiarity: in order to pass European legislation on issues over which the member States maintain primary competence a legal basis in the EEC/EC treaties must be found for every act (on the approval process for secondary legislation see further Barnard 1995:20-27). This hampered the implementation of European protective legislation after the adoption of the *Community Charter of Fundamental Social Rights for Workers*. For example, the Commission's Action Program, that was attached to the Charter, contained only 17 proposals of directives of which 10 were concerned with narrow health and safety matters[63]. The complex process of approval resulted in the endorsement of less than half of the proposed directives and this led to several negative comments on the efficacy of this declaration (see for example: Bercusson 1990; Watson 1991; Silvia 1991; Vogel-Pobsky 1991).

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[63] This contrasted with the proposals for almost 300 directives that were submitted as part of the White paper for the completion of the internal market.

The principles endorsed by the *Community Charter of Fundamental Social Rights for Workers* were subsequently upheld by the Treaty of Maastricht (1993) and the Treaty of Amsterdam (1997) although this development did not change the substance and the aims of these documents. The policies concerning labour standards regulation continued to be mainly the prerogative of States while most of the communitarian legislation covered the regulation of well established areas such as occupational health and safety and discrimination. The most relevant act, for the purpose of this thesis, passed during this phase were directive 96/34 on Family Leave and the Protection of Disabled Workers (see further section 8.7.2). In short, although labour standards protection is still part of the European project, its implementation has considerably slowed in the past two decades and its enactment has become piece-meal and fragmented.

European Union labour standards are implemented through directives, regulations, decisions, recommendations and opinions. Regulations, directives and decisions are legally binding documents while recommendations and opinions are non-binding suggestions. Regulations supersede national legislation; they are entirely binding and directly applicable to all the member states and are used to ensure uniformity of rules throughout the Community (art. 249 paragraph 2, *EC Treaty*). A Regulation is operative without any specific intervention of the national States and can be invoked by every citizen before a national judge. National legislation, which is inconsistent with European regulations, is void. Directives, by contrast, are used to seek the approximation of national laws within the Community. Directives are binding as to the result to be achieved. Member states must implement or transpose the provisions of the directives into the national legal system within the time limit set up by the directive. Compliance can be achieved through the use of different means (such as collective agreements where they are legally enforceable) on the condition that the content of the directive acquires force of law. Finally, the decisions, like the

regulations, are entirely binding documents. Unlike the regulations, the decisions are not general norms and they only apply to specific individuals or legal entities.

7.5 Conclusion

Unlike in Australia, the institutional framework regulating labour standards in Italy has not been subjected to overarching changes in the past two decades. Italy is governed by a civil law legal system, while labour standards protection is entrenched in the Republican Constitution. As a consequence, labour standards are implemented through legislation although in two cases (minimum wages and paid time off) collective agreements acquire force of law. These traditional sources have been integrated by super-national legislation enacted at European level. The inter-connection between the European and the domestic systems greatly influenced the evolution of labour standards in Italy in the 1979-2000 period. While some standards increased slightly, specifically overtime, paid time off, unemployment insurance, workers' compensation (see chapter 8 for further details) in other cases (employment equity, occupational health and safety and large-scale layoffs) the enactment of European legislation substantially extended the legal protection granted to labour conditions.

In spite of this, there has been a steady decline in the quality of protection accorded to labour standards at both European and, to a lesser extent, domestic levels. While Europe has reduced its commitment to social issues and circumscribed its activity to the regulation of economically neutral labour standards (equal employment opportunity and occupational health and safety), Italy has proceeded to 'controlled deregulation' through the enactment of negotiated laws. The consequences of this process have been twofold: first, the emphasis placed on the necessity to provide an inderogable floor of standards, envisaged by the traditional *garantismo giuridico* was

partially weakened and second, trade unions were granted a greater degree of control over managerial decisions.

The transition from *garantismo giuridico* to negotiated labour law was the expression of a constant tension between market liberalisation and employment protection with such tension erupting during the 1979-2000 period (see further chapter 9). The legal protection provided by statutory provisions can be bypassed in several circumstances on the condition that this is endorsed by collective agreements. Trade unions have been thus empowered in an unprecedented way for the Italian legal tradition. This peculiarity represents a significant point of departure in comparison with Australia. In Australia, the economic crisis of the 1980s induced governments to change the balance between different sources of labour standards regulation and to decrease the level of institutional protection granted to trade unions and collective bargaining (see chapter 4 and section 5.6.2). In Italy, the institutional framework has remained unaltered while there have been changes affecting the features of protective labour law which have granted unions extensive rights to negotiate with employers and influence management decisions.

Having investigated the main institutional features of the Italian employment protection system, the study will now move to measure labour standards in Italy in 1979 and 2000.

CHAPTER EIGHT

ITALIAN LABOUR STANDARDS: THE QUANTITATIVE ANALYSIS (1979-2000)

Introduction

As with chapter 5, the aim of this chapter is to measure and compare labour standards in Italy in 1979 and 2000. Statutory legislation is the main source through which labour standards have been established in Italy since the end of Second World War (see sections 7.1 and 7.2). As a result all the standards, except for the minimum wage and paid time off, are measured with reference to statutory legislation. The use of collective agreements to quantify minimum wage and paid time off is consistent with the definition of labour standards adopted by this thesis (see section 2.1), as collective agreements acquire force of law through section 36 (paragraphs 1 and 3) of the Constitution and are implemented via articles 2099 and 2109 of the Civil Code (see further section 7.2). The meaning of each provision was discussed in chapter 6.

8.1 Minimum Wage

The Italian minimum wage has not changed in the two decades studied. Therefore, this section will consider the years 1979 and 2000 together. It should be noted that the first component of the standard, the minimum wage level, was calculated on the basis of the minima established by the national metalworkers' collective agreements that were signed respectively in 1979 and 1999 (on the constitutional mechanism that extends the coverage of collective agreements to employees not affiliated with the signatory trade unions, see section 7.2). The metalworkers' agreement was chosen for two reasons: first, it provides extensive coverage and second, the wage rates prescribed by this agreement are amongst the lowest in Italy.

The 1st component of the standard, the minimum wage level, was fixed in 1979 at ITL 386122 per month (ITL 96530.5 per week). This was the lowest rate (1st out of 6 levels) an employee could earn (*Contratto Collettivo Nazionale di Lavoro per L'Industria Metalmeccanica Privata 16/7/1979*). The weekly rate was then divided by 40, the ordinary hours (*Contratto Collettivo Nazionale di Lavoro per L'Industria Metalmeccanica Privata 16/7/1979* art. 5) to obtain the hourly rate and then multiplied by 4.4923 (the 2000/1979 CPI ratio) to express the 1979 value at the 2000 level. The 1979 hourly rate was AU$ 8.80 (exchange rate as at the 1st of May 2000 (1231.4 ITL for 1 AU$ Dollar). 8.80 falls in the third category of this component of the standard (between AU$ 7.5 and AU$ 8.99) which is associated with a sub-index value of 7.14. The same value was assigned to the minimum wage level for the year 2000. The minimum wage rate was fixed, by the 1999 metalworkers' agreement, at ITL 1,767,500 per month (ITL 441875 per week) while the "ordinary" hours in 2000 remained 40. Consequently, the hourly rate was AU$ 8.90 which conforms to the 1979 sub-index value (7.14).

The 2nd component of the standard, the sub-minimum wage, was given a score of 0 as sub-minimum wages for juniors and trainees have been commonly established by collective agreements. For example, article 5 (section 16/VII) of the metalworkers' collective agreement (1979) fixed the sub-minimum wage for juniors and trainees at a fraction of the standard wage (between 82% and 88% of the ordinary rate depending on the employee's age and the level of education) and the same clause was upheld in the 1999 agreement.

The 3rd component of the standard, the presence of fines and imprisonment for failure to pay the minimum wage, was assigned a score of 0 for both years. In cases when an employer fails to pay the minimum wage, the employee is only entitled to reimbursement and no further action can be pursued. Failure to pay the minimum wage is not regarded as an indictable offence.

Finally, the last component of the standard, the presence of limits on the right of a loser in a claim to appeal, was regulated in 1979 and 2000 by article 409 of the *Codice di Procedura Civile.* As with any other civil trial, article 409 of the *Codice di Procedura Civile* provides for two levels of appeal in cases when an employer fails to pay the minimum wage. Given the fact that there are no statutory limits on the right of the loser to appeal a Court's decision, a score of 0 was assigned to the sub-index value for this provision for both years.

Table 8.1: Minimum Wage in Italy, Weights, Sub-index Values and Scores in 1979 and 2000

Provision/Language	Provision Weight	Subindex Value (if coded other than 10 or 0)	Subindex scores (1979)	Subindex scores (2000)
1) Minimum Wage Level (as of 1st of May 2000)	.92			
GT or EQ AU$ 10.5		10.00		
AU$ 9-AU$ 10.4		8.57		
AU$ 7.5-AU$ 8.9		7.14	AU$ 8.80	AU$ 8.90
AU$ 6-AU$ 7.4		5.51		
AU$ 4.5-AU$ 5.9		4.28		
AU$ 3-AU$ 4.4		2.85		
AU$ 1.5-AU$ 2.9		1.42		
2)Sub-minimum Wage	.04			
Coded as 10 if jurisdiction has no sub-minimum, 0 otherwise			sub-minimum wage present (sub index value =0)	Sub-minimum wage present (sub index value=0)
3) Fines Imprisonment	.02		fines not present (sub index value =0)	Fines not present (sub index value=0)
Coded as 10 if fines or imprisonment are possible actions on violator, 0 otherwise				
4) Limits on Rights of Appeal of Agency Decision	.02		No limits (sub index value=0)	No limits (sub-index value=0)

Minimum Wage 1979 and 2000 (basic index): 6.5688

8.2 Overtime

The standard for overtime slightly increased in the two decades studied. In order to capture these changes section 8.2.1 considers 1979 while section 8.2.2 will analyse the provisions for the year 2000

8.2.1 Overtime in 1979

The 1st component of the standard, the overtime load and the number of hours after which overtime rates are triggered, was regulated in 1979 by Law 692/1923. Overtime was defined as the work performed outside the ordinary hours. The ordinary hours were fixed by the same Act at a maximum of 48 hours per week or 8 hours per day (art. 1, R.D.L. 692/1923). In addition, this Act prescribed that the overtime loading should be at least 10% in excess of the regular rate. 10% overtime load after 48 hours falls in the lowest category of the scale (between 1.1 and 1.5 regular rate after 48 hours) and therefore a score of 1.42 was assigned to the sub-index value for this provision. It should be noted that Law 692/1923 also established several other limits that constrained the use of overtime. Amongst these the prescriptions contained in articles 5 and 5*bis* stood out. These provisions held that overtime could be used only to resolve extraordinary problems which could not be handled by the ordinary workforce or by hiring new employees. In addition, overtime could not be performed in excess of 2 hours per day or 12 hours per week.

As for the minimum wage, the 2nd component of the standard, the enforcement procedure, was regulated in 1979 by article 409 of the *Codice di Procedura Civile*. As was outlined earlier in this chapter (see section 8.1.1), this provision provides for two levels of appeal and there are no statutory limits on the right to appeal the Court's decision. Consequently, a score of 0 was assigned to the sub-index value for this component of the standard.

8.2.2 Overtime in 2000

The 1st component of the standard increased slightly over the 1979-2000 period. This was due to the enactment of Law 196/1997 that reduced the legal working time from 48 hours per week to 40 (Law 196/1997 art. 13 paragraph 1). Legal overtime is now triggered after 40 hours while the overtime loading has remained unchanged (10% in excess of the ordinary rate). The 10% overtime loading after 40 hours falls in the third last category of this component of the standard (between 1.1 and 1.5 regular rate after 40 hours) which is associated with a sub-index value of 4.18. The other component of the standard was assigned a score of 0 as the enforcement mechanism has not significantly changed since 1979. The only difference relates to the presence in 2000 of a compulsory process of conciliation. However, if conciliation fails the dispute proceeds before an ordinary Court (see section 8.2.1).

Table 8.2: Overtime in Italy, Weights, Sub-index Values and Scores in 1979 and 2000

Provision/Language	Provision Weight	Subindex Value	Subindex scores(1979)	Subindex scores (2000)
1) Overtime	.95			
1.5x reg. Rate after 40 hrs. per week		10		
2x reg. Rate after 48 hrs. per week		8.57		
1.5x reg. rate after 44 hrs per week		7.14		
1.5x reg. rate after 48 hrs per week		5.71		
1.1 to 1.5 reg. Rate after 40 hrs per week		4.18		10% in excess of regular rate after 40 hours
1.1 to 1.5 reg. Rate after 44 hrs per week		2.85		
1.1 to 1.5 reg. Rate after 48 hrs per week		1.42	10% in excess of regular rate after 48 hours.	
2) Limits on Rights of Appeal of Agency Decisions	.05		No (subindex value=0)	No (subindex value=0)

Overtime 1979 (basic index): 1.349

Overtime 2000 (basic index): 3.971

8.3 Paid Time Off

The legal sources regulating paid time off are legislation and collective agreements. This standard increased slightly in the 1979-2000 period. Thus, section 8.3.1 analyses 1979 while section 8.3.2 will investigate the year 2000.

8.3.1 Paid Time Off in 1979

In 1979 the 1st component of the standard, the number of public holidays, was regulated by Law 260/1949, Law 90/1954 and Law 54/1977 and more broadly by section 36 of the Constitution and by article 2109 of the Civil Code. Law 54/1977 reduced the number of public holidays from 11 to 9 (Law 54/1977, art. 1). 9 falls in the fourth category (between 9 and 9.9 public holidays) and therefore a score of 5.6 was assigned to the sub-index value.

The 2nd component of the standard was regulated by Law 260/1949. Pursuant to article 5, workers were entitled to the full daily wage for each public holiday not worked and to a higher rate for holidays worked. Such rate was usually established with reference to collective agreements (around 50%) or legal overtime rates (10%) (Carinci et al. 1999). Given the fact that in 1979 there was a legal mechanism that granted regular pay for public holidays not worked and at least overtime for holidays worked, a score of 10 was assigned to the sub-index value for this provision.

The 3rd component of the standard, the weeks of annual leave and the related loading rate, was regulated by collective agreements. As was noted in section 7.2, the Constitution grants weekly time off and paid annual leaves (section 36 paragraph 3). Section 36 is implemented through article 2109 of the Civil Code which at paragraph 2 states that "[the worker] is entitled, after one year of work, to take annual leave...The days of leave are established with reference to the law, the corporatist laws, customs or with equity". This paragraph extends the scope of collective

agreements which become legally binding as the corporatist laws have been repealed and replaced by collective agreements (on this mechanism see section 7.2). Since 1973, the standard prescription contained in collective agreements has been four weeks of annual leave without any leave-loading rate. This falls in the second category of the scale (between 4 weeks annual leave 0% loading rate and 3 weeks annual leave 6% loading rate) and therefore a score of 7.5 was assigned to the sub-index value.

Finally, the last component of this standard, the period after which an employee becomes eligible to take annual leave, was regulated by article 2109 of the Civil Code and by a Decision of the Constitutional Court. Pursuant to article 2109 of the Civil Code an employee is entitled to take annual leave after 1 year of continuous employment (Civil Code art. 2109 paragraph 2). This paragraph was repealed by the Constitutional Court which in 1963 held that an employee is entitled to take annual leave even if he/she has been employed for less than one year (*Corte Costituzionale n. 66 10th of May 1963).* The Constitutional Court pointed out a constitutional inconsistency between article 2109 paragraph 2 of the Civil Code and section 36 of the Constitution. Under the new regime, an employee who worked for less than 1 year was entitled to 1/12 annual leave for each month or fortnight of employment. However, in order to be eligible to take the entire 4 weeks annual leave a worker had to be employed continuously for one year. Twelve months falls in the second category which is associated with a sub-index value of 6.67.

8.3.2 Paid Time Off in 2000

The only provision that changed in comparison with 1979 is the number of public holidays. Public holidays were increased from 9 to 11 in 1985 (D.P.R n.792/1985) and to 12 in 2000. Twelve falls in the top category (12 or more days of public

holidays) and therefore a score of 10 was assigned to the sub-index value. All the other components have remained unchanged.

Starting from the early 1980s, this standard has also begun to be increasingly regulated via legislation. In 1981 the ILO convention 132 (24th of June 1970) was ratified and implemented through Law 157/1981. This Convention established a minimum of three weeks annual leave. In addition, EC Directive 93/104 increased the legal minimum to four weeks[64]. The level of protection granted by these laws is less or equal to the one already operating in 1979 and does not affect any of the components of the standard.

Table 8.3: Paid Time Off in Italy, Weights, Sub-index Values and Scores in 1979 and 2000

Provision/Language	Provision weight	Subindex Value	Subindex scores (1979)	Subindex scores (2000)
1) Holidays	.165			
12+days of holiday		10		12 days
11-11.9 days		7.8		
10-10.9 days		6.7		
9-9.9 days		5.6	9 days	
8-8.9 days		4.4		
7-7.9 days		3		
6-6.9 days		2		
5-5.9 days		1		
Less Than 5 days		0		
2) Pay for holidays not worked or over time for Holidays Worked	.335		Yes (subindex value=10)	Yes (subindex value=10)
3) Vacation Length\Pay Coding	.45			
4 Weeks Vacation, 10% or more of Pay Reg. Pay		10		
4 weeks vacation 0% or 3 Weeks Vacation, 6% of Pay Reg. Pay		7.5	4 weeks 0% loading rate	4 weeks 0% loading rate
3 weeks vacation 0% or 2 Weeks Vacation, 6% of Pay Reg. Pay		5		
2 Weeks Vacation, 4% of Pay Reg. Pay		2.5		
No Vacation, no Pay		0		
4) When entitled Coding	.05			
After 10 months with employer		10		
After 12 months with employer		6.67	12 months	12 months
After more than 12 months with employer		3.33		
No Provision		0		

Paid Time Off 1979 (basic index): 7.98

Paid Time Off 2000 (basic index): 8.71

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[64] This Directive has not been implemented yet.

8.4 Unemployment/Employment Insurance

The standard for unemployment/employment insurance increased over the two decades studied. Consequently, section 8.4.1 analyses 1979 while section 8.4.2 will consider the year 2000.

In Italy there have been two different types of unemployment benefits since 1991: the *Indennita' di Mobilita'* (available to workers with previous working experience who lost their job because of redundancy) and the *Indennita' di Disoccupazione* (unemployment benefits) while before 1991 only the *Indennita' di Disoccupazione* was available. On one hand, the *Indennita' di Mobilita'* can be enjoyed only by workers who lose their job and have been employed for at least 12 months (Law 223/1991 art. 16 paragraph 1). The allowance is 100% of the regular wage for the first 12 months (Law 223/1991 art. 7(a)) and 80% thereafter (Law 223/1991 art. 7(b)). The *Indennita' di Mobilita'* can be enjoyed for a maximum of 48 months (depending on the length of service, the employee's age and the geographic location). On the other hand, the *Indennita' di Disoccupazione*, the traditional unemployment benefit, is more accessible although the allowance is lower than the one provided by the *Indennita' di Mobilita'*. The standard for unemployment/employment insurance was calculated on the basis of the *Indennita' di Disoccupazione* (Law 264/1949) for two reasons: first, the *Indennita' di Mobilita'* was established only in 1991 and therefore a comparison with 1979 would not be possible; second, the coverage provided by the *Indennita' di Disoccupazione* is more extensive than the one granted by the *Indennita' di Mobilita'*. In addition, the system regulating the *Indennita' di Disoccupazione* is more similar to the one governing unemployment benefits in Australia.

8.4.1 Unemployment/Employment Insurance in 1979

The 1st component of the standard, the eligibility requirements, was regulated in 1979 by Law 264/1949. Unemployment benefits were available on the condition that the recipient had been previously employed for at least three months (Law 264/1949 art. 32 paragraph a). This prescription falls in the second category of this component of the standard (eligibility subjected to previous employment) which is associated with a sub-index value of 5.

The 2nd component of the standard, the employee tax rate, was assigned a score of 10 as unemployment benefits in Italy have been traditionally drawn from a public fund, while taxes have never been deducted from the employee's salary for this purpose.

The 3rd component of the standard, the average weekly or monthly benefit as a percentage of the average weekly or monthly wage, was assigned a score of 2 because in 1979 the unemployment allowance was still fixed at ITL 800 per day (or ITL 5600 per week (Carinci et al. 1999: 413)). The average weekly wage was just above ITL 100000[65] and therefore the average weekly benefit/average weekly wage ratio was around 5% and this falls in the lowest category (less than 30%) which is associated with a sub-index value of 2.

The last component of the standard, the maximum period of time a recipient is entitled to enjoy unemployment benefits, was regulated in 1979 by Law 264/1949. Pursuant to article 32 unemployment benefits could be enjoyed for a maximum of 180 days (24 weeks); this falls in the lowest category of the scale (26 weeks or less), which is associated with a sub-index value of 2.

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[65] This figure was calculated on the basis of the metalworkers' collective agreement (as at August 1979). Such an agreement stated that for a third level employee the monthly wage was ITL 410122 and therefore the weekly wage was ITL 102530.5.

8.4.2 Unemployment/Employment Insurance in 2000

The main novelty in relation to this standard was the more generous unemployment allowances granted in 2000 compared with 1979. In particular, the 3rd component of this standard, the average weekly/monthly benefit as a percentage of the average weekly/monthly wage, substantially increased. In 1988, the *Corte Costituzionale* held that the way in which the daily unemployment benefits were established was illegitimate since unemployment benefits were based on a fixed rate which had never been updated (sentence n. 497/1988). Following this pronouncement, the government enacted Law 160/1988, so that unemployment benefits are now calculated as a percentage of the employee's average monthly wage. This percentage was fixed initially at 7.5% of the worker's average monthly wage and subsequently increased to 15%, 20%, 25%, 27% and finally to 30% in 1995 (Law 608/1996 art. 4 paragraph 16). Law 608/1996 was passed to give effect to a government's proposal (Protocollo 23rd of July 1993) which aimed to increase the unemployment benefits up to 40% of the average monthly wage (Liso 1995). The 30% rate falls in the second last category (between 30% and 34%) of this component of the standard which is associated with a sub-index value of 4.

All the other components have remained unchanged since 1979. The eligibility requirements are still based on article 32 paragraph (a) Law 264/1949, while no taxes are imposed upon the employees and the maximum period of time unemployment benefits can be enjoyed is still 24 weeks.

Table 8.4:Unemployment/Employment Insurance in Italy, Weights, Sub-index Values and Scores in 1979 and 2000

Provision \ Language	Provision Weight	Subindex Value	Subindex scores (1979)	Subindex scores (2000)
1)Eligibility	.1			
Unlimited in relation to previous employment		10		
Limited only in relation to previous employment		5	Granted only if recipient had previously worked for at least three months	Granted only if recipient had previously worked for at least three months
Limited to the existence of an unemployment fund		0		
2)Employee Tax Rate	.3			
No Employee Tax		10	No Employee Tax	No Employee Tax
GT 0 but LT 1%		8.3		
1%-2%		6.7		
2%-3%		5		
3%-4%		3.3		
4%-5%		1.7		
3) Coding Avg. Weekly/Monthly Benefit as a Percentage of Avg. Weekly/Monthly Wages	.35			
45%-49%		10		
40%-44%		8		
35%-39%		6		
30%-34%		4		30%
LT 30%		2	5.4%	
4)Maximum Total Benefit/Extended Benefits	.25			
Unlimited		10		
45 Weeks		8		
43 Weeks		6		
39 Weeks		4		
26 Weeks or less		2	24 weeks	24 weeks

Unemployment/Employment Insurance 1979 (basic index): 4.7

Unemployment/Employment Insurance 2000 (basic index): 5.4

8.5 Workers' Compensation

The standard for workers' compensation has slightly increased since 1979. Therefore, section 8.5.1 investigates 1979 while section 8.5.2 will consider the year 2000.

In Italy the right to be compensated for work-related injuries receives extensive protection and is sanctioned by the Constitution. Section 38 paragraph 1 of this Charter proclaims that "every citizen unable to work…is entitled to be maintained and assisted" while paragraph 2 states that "In case of injury, illness, impairment, old

age and involuntary unemployment the workers are entitled to receive assistance that should be commensurate to their needs [article 2110 Civil Code]". This section is implemented through article 2110 of the Civil Code[66], Law 1124/1965 and Law 833/1978. The Constitution and the aforementioned laws constitute the backbone of workers' compensation in Italy and have regulated this standard since 1978.

8.5.1 Workers' Compensation in 1979

The first three components of the standard evaluate the stringency and the extension of workers' compensation insurance system and were regulated in 1979 by Law 1124/1965. This legislation made it compulsory for all employers to insure for work-related injuries and diseases (Law 1124/1965 art. 1). Such insurance could only be obtained through a public authority, the I.N.A.I.L (Istituto Nazionale per l'Assicurazione contro gli Infortuni sul Lavoro)[67]. Waivers were not allowed as the definition of employer contained in article 9 was rather broad. This article held that employers were all the private and public firms including the state, the regional and provincial authorities, the cooperative enterprises, charities, the public and private schools, the prisons and contractors (Law 1124/1965 art. 9 paragraphs 1,2,6,7,8 and 9). As private employment was fully covered by workers' compensations schemes, waivers were not permitted under any circumstance and there were no exemptions based on the firm's size, the first three components of this standard were all assigned a score of 10.

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[66] This article prescribes that in case of injury, illness or pregnancy if legislation does not establish the level of assistance the compensation is determined with reference to the special laws, the corporatist laws (substituted by collective agreements) the customs or equity.

[67] Workers' Compensation insurance has been compulsory in Italy since 1898 (Law 80/1898). At that time private companies could also insure employers. This regime was changed in 1933 by law 264/1933 that established that workers' compensation insurance could only be obtained through a public authority; the INAIL.

The 4th provision, the compulsory coverage for farmworkers, was regulated by Law 1124/1965. This Act did not contain a definition of farmworker but instead listed the agricultural activities for which workers' compensation insurance had to be obtained. This definition was broad and included farming, agriculture and all the industrial activities related to them (Law 1124/1965 art. 207 paragraphs 1-2 and art. 1). The coverage also extended to the owners and the tenants of land, their wives and children and all the workers (including occasional and part-time employees) hired to work on the farm (Law 1124/1965 art. 205 and Law 92/1979 art. 6). Given the fact that farmworkers were fully covered by workers' compensation schemes, a score of 10 was given to the sub-index value.

The 5th component of the standard evaluates the level of protection granted to atypical workers such as household and casual workers. In 1979 article 4(1) of Law 1124/1965 provided coverage to casual workers by including them in the list of employees entitled to receive workers' compensation benefits. In addition, household workers were covered by D.P.R. 1403/1971 and by Law 877/1973. As in 1979 casual and household workers received legal protection, a score of 10 was given to the sub-index value for this component of the standard.

The 6th component of the standard, the mandatory coverage for government employees, was regulated by article 9 paragraph 1 of Law 1124/1965 which held that the definition of employers included "private and public bodies including the State and the local authorities...". As in 1979 government employee insurance was mandatory, a score of 10 was given to the sub-index value.

The 7th component of the standard evaluates the classes of employees covered by workers' compensation schemes. In Italy in 1979 coverage by workers' compensation insurance was limited. Law 1124/1965 established two criteria to evaluate employee's eligibility: the first criterion assessed the level of risk inherent in the employee's job while the second criterion related to the employee's class. On one

side, the first criterion established that all employees who "directly operate machineries and/or are involved in the use of thermal and electric appliances" had to be insured and that such insurance had to cover also the employees who worked in the proximity of these machines (Law 1124/1965 art.1). In addition, article 1 paragraph 3 listed 28 activities that were considered hazardous and for which insurance had to be obtained for all employees. On the other side, the second criterion defined the workers who were entitled to be covered by workers' compensation insurance (Law 1124/1965 art.4). Amongst them were: permanent and casual employees who performed physical tasks, supervisors, craftsmen, trainees, teachers and students who performed hazardous experiments (Law 1124/1965 art.4 (1)(2)(3)(5)). Several classes of employees were excluded from workers' compensation coverage. For example, clerical workers, unless employed in one of the hazardous activities listed by article 1 or working in the proximity of a machinery, were not covered by the insurance[68]. As in 1979 there were exemptions based on the employee's class, a score of 0 was given to the sub-index value for this component of the standard.

The 8th provision of the standard, the level of coverage for work-related diseases, was regulated in 1979 by law 1124/1965. This Act distinguished between injuries and work-related diseases. While the definition of injury was rather broad, the possibility to be compensated for work-related diseases was extremely limited[69]. Only the diseases listed by Law 1124/1965 could be compensated. This system was called *Sistema Tabellare* as the diseases covered by workers' compensation insurance were listed in tables attached to the legislation and regularly updated[70] (on this system and

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[68] This was due to the fact that according to article 4(1) clerical workers were not performing physical tasks.

[69] Article 2 paragraph 1 of Law 1124/1965 stated that "The insurance covers all the violent injuries occurred at work that caused death or a permanent or temporary disability..."

[70] In 1979 the remunerable work-related diseases were 41 for industry and 21 for agriculture (art. 3 Law 1124/1965).

on the related debate see Rossi 1980:114; Cinelli 1998:379; Persiani 2000(b):135). As not all work-related diseases were covered by workers' compensation insurance, a score of 0 was assigned to the sub-index value for this component of the standard.

Components 9 and 10 assess the level of Total Temporary Disability benefits (TTD). Total Temporary Disability was regulated by article 68 of Law 1124/1965. Pursuant to article 68 an employee unable to work was entitled, starting from the fourth day after the occurrence of the injury, to 60% of his/her average daily wage and to 75% if the disability persisted for more than 90 days (Law 1124/1965 art.68 paragraphs 1 and 2)[71]. As these rates were less than the reference values contained in table 8.5 (from a minimum of 66 2/3% up to a maximum of 100% or more), a score of 0 was assigned to the sub-index value for provisions 9 and 10.

Components 12 and 13 evaluate the level of Permanent Total Disability benefits. Permanent Total Disability Benefits were proportional to the worker's level of disability. Pursuant to article 74 of Law 1124/1965, permanent total disability Benefits were calculated as follows: 1) disability between 11% and 60%: allowance between 50% and 60% of the worker's pre-injury average monthly wage (Law 1124/1965 art.74(1)); 2) disability between 61% and 79%: allowance proportional (between 61% and 79% of the worker's pre-injury average monthly wage) to the level of disability (Law 1124/1965 art.74(2)); 3) disability between 80% and 100%: allowance equal to 100% of the worker's pre-injury average monthly wage (Law 1124/1965 art.74(3)). The minimum benefit was 50% of the worker's pre-injury average monthly wage while the maximum permanent total disability (PT) benefit was 100% of the worker's average monthly wage. Since the minimum permanent total disability benefit was less than 66 2/3% of the worker's pre-injury wage while the maximum permanent total disability benefit was 100% of the worker's pre-injury

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[71] From the first to the fourth day Total Temporary Disability was paid entirely by the employer.

wage, a score of 0 was given to component 12 while a score of 10 was assigned to provision 13.

The 14th component of the standard was assigned a score of 10 since both total temporary disability and permanent total disability benefits could be enjoyed for the entire duration of disability.

Components 15 and 16 evaluate the level of death benefits. Death benefits were regulated by article 85 Law 1124/1965 and included regular payments and lump sums. Weekly (or monthly) death benefits were granted as follows: 1) 50% of the worker's pre-death average monthly wage payable to the widow(er) for life or until his/her re-marriage (Law 1124/1965, art. 85(1)); 2) 20% to each dependent children (Law 1124/1965, art. 85(2) and 3) 40% to orphans (Law 1124/1965, art. 85(2)). As death benefits were always less than 66 2/3% of the worker's pre-death average monthly wage, a score of 0 was assigned to provisions 15 and 16.

Component 17 was assigned a score of 10 as article 85(1) of Law 1124/1965 established that death benefits were payable to the widow(er) for life or until his/her re-marriage.

Provision 18 assesses whether or not legislation provides for a lump-sum in case of widow(er) re-marriage. Article 85(1) of Law 1124/1965 expressively held that a widow(er) was entitled to receive a lump-sum equal to three years of the worker's pre-death average monthly wage on her/his re-marriage. As a lump sum was granted in case of re-marriage, a score of 10 was given to the sub-index value for this component of the standard.

Provisions 19 and 20 evaluate the tenure of death benefits granted to dependent children. Law 1124/1965 established that dependent children were entitled to receive death benefits until they reached the age of 18 if not a student, 21 if a secondary student and 26 if enrolled at university (Law 1124/1965, art. 85(2)). As 18

and 26 conform to the requirements contained in table 8.5 (18 if not a student and 25 if a student), a score of 10 was given to provisions 19 and 20.

Provisions 21 and 22 deal with the monetary and time limits on medical or rehabilitation services. Medical or rehabilitation services were provided by the National Health Service for the entire duration of the disease or injury without any statutory limit as for time or amount of money. As no time or monetary limits were imposed upon medical and rehabilitation services, a score of 10 was assigned to both components of the standard.

Components 23 to 25 assess the enforcement mechanism. Provisions 23 and 24, the internal process and the levels of appeals beyond first, were regulated by Law 1124/1965 (articles 100-104), article 443 *Codice di Procedura Civile*, Law 533/1973 (articles 7-8) and by articles 7-8 of Law 533/1973. Article 443 of the *Codice di Procedura Civile* established a compulsory internal process before proceeding to the Court. The decision of the workers' compensation board could not be appealed internally. As an internal process was compulsory in 1979 and given the fact that the decision of the Authority could not be appealed, a score of 10 was assigned to provisions 23 and 24.

The last component of this standard, the levels of appeal beyond first, was regulated by article 409 of the *Codice di Procedura Civile*. As mentioned earlier in this chapter, article 409 of the *Codice di Procedura Civile* provides for an ordinary procedure that contemplates two levels of appeal. This prescription falls into the third category of this component of the standard (two levels of appeal after the internal process) which is associated with a sub-index value of 5.

8.5.2 Workers' Compensation in 2000

The only component of the standard that increased in the 1979-2000 period was the coverage provided to work-related diseases (component n. 8). In section 8.5.1, it was observed that in 1979 the definition of work-related diseases was extremely narrow as only the ailments listed in the tables attached to Law 1124/1965 could be compensated. The features of this system generated a lively debate during the late 1970s-mid 1980s on whether a broader definition of work-related disease should be adopted in order to give full effect to section 38 of the Constitution (see section 8.5.1). The Constitutional Court became the arbitrator of this debate. Through a number of contradictory pronouncements, the Constitutional Court broadened the definition of "remunerable work-related diseases". In 1981 the *Corte Costituzionale* upheld the legitimacy of the *Sistema Tabellare*, though recognised that the rigidity of this system had the potential to limit the number and types of injuries and diseases that could be compensated (*Corte Costituzionale*, Decisions n. 127 and 140 1981). These decisions were overturned in 1988 when the *Corte Costituzionale* held that some provisions of Law 1124/1965 lacked constitutional legitimacy. In particular, the *Corte Costituzionale* repealed articles 3 and 211 of Law 1124/1965 on the ground that, with the exception of the listed diseases, these provisions did not provide coverage for all the other injuries and diseases for which a nexus of causality could be proven. The *Corte Costituzionale* also repealed articles 134 and 135 of Law 1124/1965 which required that in order to be compensated the symptoms had to arise within a prescribed period. Along with the listed diseases, these two pronouncements introduced a new criterion based on the nexus of causality between the illness and the activity performed. Unlike the previous system, which assumed a linkage only between the listed diseases and some specific jobs, under this new regime all diseases can be compensated provided that they are work-related while the burden of proof is

borne by the claimant[72]. As all the work-related diseases are now covered by workers' compensation schemes, a score of 10 was assigned to this component of the standard.

Table 8.5: Workers' Compensation in Italy, Weights, Sub-index Values and Scores in 1979 and 2000

Provision	Rec. No.	Prov Weight	Subindex Value	Subindex scores(1979)	Subindex scores(2000)
Compulsory Coverage	2.1				
1)Compulsory Coverage for Private Employment	2.1a	.024		Yes (subindex value=10)	Yes (subindex value=10)
2) No Waivers Permitted	2.1b	.024		No waivers permitted (subindex value=10)	No waivers permitted (subindex value=10)
3) No Exemption Based on Firm Size	2.2	.047		No exemption (subindex value=10)	No exemption (subindex value=10)
4)Farmworkers Covered	2.4	.047		Yes (subindex value=10)	Yes (subindex value=10)
5) Casual and Household Workers Covered	2.5	.047		Yes (subindex value=10)	Yes (subindex value=10)
6)Mandatory Government Worker Coverage	2.6	.047		Yes (subindex value=10)	Yes (subindex value=10)
7) No Exemption Based on Employee Class	2.7	.047		No, Limited to hazardous activities, physical work or class of employees listed in Art 4 Law 1124/1965 (subindex value=0)	No, Limited to hazardous activities, physical work or class of employees listed in Art 4 Law 1124/1965 (subindex value=0)
8) Coverage for All Work-Related Diseases	2.13	.047		No, limited to the diseases listed in Law 1124/1965 (41 diseases for industry and 21 for agriculture (subindex value=0)	Yes (subindex value=10)
9) TTD Benefits=66 2/3% Wages (s.t maximum)	3.7	.047		60% of worker's daily wage for the first 90 days and 75% thereafter (subindex value= 0)	60% of worker's daily wage for the first 90 days and 75% thereafter (subindex value= 0)
10) Maximum TTD Benefit at Least 100% worker's average weekly wage	3.8	.047		Maximum 75% of worker's daily wage (subindex value= 0)	Maximum 75% of worker's daily wage (subindex value= 0)
11) Retain Prevailing PT Definition	3.11	.047		Not applicable=10	Not applicable=10
12) PT Benefit = 66 2/3% Wages (s.t. maximum)	3.12	.047		Minimum 50% (subindex value=0)	Minimum 50% (subindex value=0)
13) Maximum PT Benefit at Least 100% worker's average weekly wage	3.15	.047		Yes (subindex value=10)	Yes (sub-index value=10)
14) Benefit Duration = Disability Duration	3.17	.047		Yes (subindex value=10)	Yes (subindex value=10)
15) Death Benefits = 66 2/3% Wages	3.21	.047		No (subindex value=0)	No (sub-index value=0)
16) Maximum Death Benefit at Least 100%	3.23	.047		No (subindex value=0)	No (subindex value=0)

[72] It is important to note that the nexus of causality does not have to be proven in relation to the listed diseases.

worker's average weekly wage					
17) Continuation of Benefits to Widow(er)	3.25a	.024		Yes (subindex value=10)	Yes (subindex value=10)
18) Lump Sum to Widow(er) on Remarriage	3.25b	.008		Yes, three years of worker's pre-death average wage (subindex value=10)	Yes, three years of worker's pre-death average wage (subindex value=10)
19) Continuation of Benefits to Dependent Children until 18	3.25c	.008		Yes (subindex value=10)	Yes (sub-index value=10)
20) Continuation of Benefits to Dependent Children Until 25 if Student	3.25d	.008		Eligibility ceases when recipients turns 26(subindex value=10)	Eligibility ceases when recipients turns 26(subindex value=10)
21) No Statutory $ Limit on Medical or Rehabilitation Services	4.2	.047		No statutory limit (subindex value=10)	No statutory limit (subindex value=10)
22) No Time limit on Right to Medical or Rehab Services	4.4	.047		No time limit (subindex value=10)	No time limit (subindex value=10)
Rights of appeal					
23) Internal First Level Agency		.05		Yes (subindex value=10)	Yes (subindex value=10)
24) Internal Appeal Process		.05		No appeals (sub-index value=10)	No appeals (sub-index value=10)
25) Level of Appeal Beyond First		.05			
No Appeal Beyond Internal Appeal Process			10		
After internal Process can go either to State Courts or to State Supreme Court, but not Both. Civil Law countries: one appeal			7.5		
After internal Process can go to State Courts and then to Supreme Court. Civil Law Countries: two appeals			5	Ordinary procedure (two appeals)	Ordinary procedure (two appeals)
No internal Process but can Appeal administrative Decision at Either the State Court level or the State Supreme Court, but not Both. Civil Law countries: one appeal			2.5		
No internal Process but can Appeal Administrative decision at the State Level and then to the State Supreme Court. Civil Law Countries: two appeals			0		

Workers' Compensation 1979 (basic index): 6.44

Workers, compensation 2000 (basic index): 6.91

8.6 Collective Bargaining

The standard for collective bargaining has remained unchanged in the studied period; thus 1979 and the year 2000 will be analysed together.

The 1st component of the standard, the level of statutory protection accorded to collective bargaining, has traditionally been regulated by the Constitution and legislation. The core of statutory protection granted to trade unions and collective bargaining is contained in a series of enactments: section 39 of the Constitution; Law 367/1958 on freedom of Association and the right to collective bargaining which implemented the ILO conventions 87 and 98; Law 657/1966 that implemented the ILO convention 117 on social policy; the *Statute of Workers' Rights* (Law 300/1970) and Law 157/1981 on the protection of trade union members at the workplace which gave effect to the ILO conventions 132, 135 and 138. Section 39 paragraph 1 of the Constitution sanctions the right to freely associate by proclaiming that "the organisation of trade unions is free" and provides for the registration of trade unions (section 39 paragraphs 2 and 3). Section 39 formally protects collective bargaining and envisages the possibility for registered trade unions to conclude collective agreements that apply *erga omnes.* It is reiterated that, with the exception of paragraph 1 (Freedom of Association) all the other prescriptions contained in this section of the Constitution have never been implemented and therefore trade unions cannot negotiate agreements that apply *erga omnes* (for more details see section 7.2). The protection to collective bargaining provided by the Constitution is strengthened by Law 367/1958. This act, which implemented the ILO conventions 87 and 98, establishes that: both the employers and the employees have the right to form organisations without seeking previous authorisation from the government, that such organisations cannot be suspended or de-registered, that public authorities do not have the right to interfere with their internal statutes and that trade unions have the right to freely choose their rules and representatives and elaborate their policies (Law

367/1958 art.3). In addition, this Act provides for special protection for trade unions and collective bargaining. It is specified that neither the employers nor the State can interfere or limit the right of trade unions to collectively negotiate or intimidate trade union members in any way. The *Statute of Workers' Rights* (Law 300/1970) further strengthens this regime at workplace level (articles 14 to 28 Law 300/1970) and provides for an effective legal avenue against victimisation. Pursuant to article 28, a single judge can issue a restraining order against an employer who attempts to hamper or limit trade union activities[73] (Law 300/1970 art.28). Legal action must be initiated by one or more trade unions and the judge must decide within 2 days from receipt of the claim. The decision can be appealed only once before the same judge.

While this legal framework grants extensive rights to trade unions, the same level of protection is not accorded to collective agreements. This is because section 39 paragraph 4 of the Constitution has never been implemented and therefore collective agreements are only binding for the members of the signatory associations (see section 7.2). Individual agreements are allowed under this regime, although the conditions of employment must be at least the same of those prescribed by the relevant collective agreement (when a collective agreement is applicable) or by the Law (Civil Code articles 2077 and 2113). As statutory protection to collective bargaining and trade unions is granted and individual agreements are allowed, a score of 5 (full statutory protection but individual agreements available) was assigned to the sub-index value.

The 2nd component of the standard deals with the internal organisation of trade unions. A score of 10 is assigned if a trade union can be registered without an election, 0 otherwise. It has already been noted that section 39 paragraphs 2,3 and 4 of the Constitution (registration of trade unions) has never been implemented (see above

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[73] Amongst the trade union activities is included the right to strike.

and section 7.2). The implementation of section 39 paragraph 3, which makes the registration of a trade union conditional upon the adoption of an internal democratic statute, has been strenuously opposed by the organised Labour movement since the enactment of the Italian Constitution (see section 7.2). Trade unions became "unrecognised" associations and consequently their internal structure is only regulated by the Civil Code (articles 36 to 42; "unrecognised" organisations). Article 36 paragraph 1 of the Civil Code states "the internal statutes and administration of the "unrecognised" associations are regulated by the agreements between the members". Thus, it is not compulsory to hold an election to constitute a "unrecognised" association. Since an election is not required, a score of 10 was assigned to the sub-index value.

A score of 10 was also assigned to the 3rd component of the standard as no statutory limits are imposed upon the number of matters that can be negotiated during the bargaining process. Collective agreements have traditionally regulated a large variety of subjects including pay rates, overtime, workers' compensation, leave and meal breaks.

The 4th component of the standard, which relates to the presence of compulsory conciliating mechanisms to settle industrial disputes, has never been regulated by law. Conciliatory clauses such as cooling off procedures and third party conciliation might be contained in the procedural section of collective agreements but the legislation does not provide for them. This is a considerable omission and is one of the institutional factors that help explain the high level of industrial conflict in Italy and the long duration of industrial disputes. The lack of a compulsory mechanism of conciliation has induced some commentators (such as Giugni 1999) and political parties to campaign unsuccessfully for the introduction of conciliating procedures and for more comprehensive regulation of the bargaining process. Given the fact that

Italian legislation does not provide for compulsory conciliation, a score of 0 was assigned to the sub-index value for this component of the standard.

The 5th provision, the protection accorded the right to strike and the possibility of permanently replacing workers on strike, is regulated by the Constitution, the *Statute of Workers' Rights* and more recently by Law 196/1997. Section 40 of the Constitution protects the right to strike by stating that "The right to strike can be exercised in the ways prescribed by the legislation". Furthermore, articles 15 and 28 of the *Statute of Workers' Rights* (Law 300/1970) expressively prohibits the permanent replacement of workers on strike. While article 15 protects the single employee from victimisation, article 28 applies to trade unions. Article 15(b) expressively states that "It is illegal to discharge or discriminate against a worker ..because of his/her affiliation with a trade union or because he/she is on strike". Article 15 is reinforced by article 28 that provides for remedies in case a worker or a trade union is discriminated against on the ground of being involved in industrial action. This regime is further strengthened by the new legislation on outsourcing. Article 1 paragraph 4(b) outlaws the use of outworkers to replace employees on strike (Law 196/1997 art. 1 paragraph 4(b)). As the replacement of workers on strike is prohibited under any circumstance, a score of 10 was assigned to this provision of the standard.

The last two components of the standard, the presence of first agreement arbitration and the enforcement procedure, have never been regulated by law. This is due to failure to implement section 39 paragraphs 2,3 and 4 of the Constitution (registration of trade unions) and to the legal status of trade unions which are "unrecognised" associations (see section 7.2 and above). If section 39 paragraphs 2,3 and 4 had been implemented, registered trade unions would have automatically acquired the legitimacy to negotiate with the employers. The failure to implement section 39 generated a regulatory void and consequently the bargaining process has

traditionally been dominated by the relative power of the parties. The right to bargain is obtained through the informal and reciprocal acceptance between the bargaining agents. In short, there is not a legal procedure that compels the employers to accept trade unions as legitimate bargaining agents. Since first agreement arbitration is not available and given the fact that there is not a claim procedure regulating industrial disputes in Italy, a score of 0 was assigned to provisions 6 and 7.

Table 8.6: Collective Bargaining in Italy, Weights, Sub-index Values and Scores in 1979 and 2000

Provision/Language	Prov. Weight	Subindex Value	Subindex scores(1979)	Subindex scores(2000)
1) Statutory Protection for Collective Bargaining and Trade Unions	.15			
Full statutory protection		10		
Statutory protection but Individual agreements available		5	Equal protection granted to collective and individual agreements	Equal protection granted to collective and individual agreements
Absence of statutory protection		0		
2) Election not Required if Evidence that Majority Support Union	.2		Election not required (subindex value=10)	Election not required (subindex value=10)
3) Unlimited Subjects of Bargaining	.1		Unlimited subject of bargaining (subindex value=10)	Unlimited subject of bargaining (subindex value=10)
4) Conciliation During Negotiations Compulsory at Request of Government or at Request of One Party	.2		Conciliation not available (subindex value=0)	Conciliation not available (subindex value=0)
5)Striker Permanent Replacements Prohibited	.1		Strikers' replacement prohibited (subindex value=10)	Strikers' replacement prohibited (subindex value=10)
6)First Agreement Arbitration Available	.1		No (sub-index value=0)	No (subindex value=0)
7) Limits on Rights of Loser to Appeal	.15		Enforcement mechanism not existent (sub-index value=0)	Enforcement mechanism not existent (subindex value 0)

Collective Bargaining 1979 and 2000 (basic index):4.75

8.7 Equal Employment Opportunity/Employment Equity

The standard for Equal Employment Opportunity/Employment Equity has slightly increased since 1979. As a result, section 8.7.1 analyses 1979 while section 8.7.2 will consider the year 2000.

8.7.1 Equal Employment Opportunity/Employment Equity in 1979

Equal employment opportunity/employment equity was regulated in 1979 by the following sources: the Constitution, the *Statute of Workers' Rights* (Law 300/1970), Law 903/1977 (on formal equal employment opportunities between men and women) and to a lesser extent by article 2087 of the Civil Code. Also European legislation played an important role. In particular, affirmative action (for women) was promoted by EEC Directive 76/207 and by EEC recommendation 635 (1984).

Race, the 1st ground of discrimination, was covered by the Constitution and the *Statute of Workers' Rights* (Law 300/1970). Section 3 paragraph 1 of the Constitution proclaims that "All the citizens have equal social dignity and are equal before the law irrespective of their gender, race, religion, political beliefs and social and economic conditions". These grounds of discrimination were integrated and reinforced in 1970 by article15 of Law 300/1970 which prohibited discrimination at the workplace based on trade union membership, strike participation, political beliefs, religion, race, language and gender (Law 300/1970 art. 15 paragraphs 1 and 2). As race was fully covered by anti-discrimination legislation, the first two components of this standard (race, visual minorities, aboriginal people and national origin/ancestry) were assigned a score of 10.

The 3rd ground of discrimination, gender, received particular protection. Along with section 3 paragraph 1 of the Constitution and article 15 of the *Statute of Workers' Rights*, article 1 of Law 903/1977 expressively prohibited discrimination based on gender and provided for a particularly effective mechanism of enforcement (see component n. 13). As discrimination on the ground of gender was outlawed in 1979, a score of 10 was assigned to the sub-index value.

The 4th ground of discrimination, religion, was covered by section 3 paragraph 1 of the Constitution and article 15 of the *Statute of Workers' Rights* (Law 300/1970) and therefore a score of 10 was assigned to the sub-index value.

The 5th component of the standard (discrimination based on age) was given a score of 0 because age has never been a proscribed ground of discrimination in Italy. Zero was also the score assigned to the sixth provision (discrimination based on sexual preference/orientation) as discrimination based on sexuality in Italy has never been outlawed.

The 7th component, discrimination on the ground of disability, was covered by article 2087 of the Civil Code, Law 482/1968 and some specific acts (such as Law 594/1957 and Law 308/1958) which aimed to protect specific categories of disabled workers (for example blind phone operators or the deaf and mute). Article 2087 of the Civil Code holds that "the employer must adopt all the necessary measures...to preserve the physical and moral health and safety of the employee" while Law 482/1968 compelled employers (public and private) with more than 35 employees to hire a quota of disabled workers (Law 482/1968 articles 11 and 12). As disability was a proscribed ground of discrimination, a score of 10 was assigned to the sub-index value for this provision.

The 8th component of the standard, discrimination based on political beliefs or organisation membership received legal protection by section 3 paragraph 1 of the Constitution and by article 15 paragraph 2 of the *Statute of Workers' Rights* (Law 300/1970; see above) and therefore a score of 10 was assigned to the sub-index value.

The 9th component, paid maternity leave, received extensive protection in 1979 through the combined operation of article 2110 of the Civil Code, Law 1204/1971 on maternity and Law 903/1977 on formal equality between men and women. All these laws granted several rights to women. In particular, women were

allowed to suspend their work two months prior childbirth and could remain away from work up to three months after giving birth. During this period, women were entitled to 80% of the ordinary wage. It should be noted that these statutes did not provide for any other type of leave for family-related matters. Family leave was granted by some collective agreements although this was not a common and well established practice (Del Punta, Lazzaroni and Vallauri 2000:53). Since legislation in place in 1979 granted 20 weeks of paid maternity leave, a score of 10 was assigned to the sub-index value.

Component n. 10 concerns sexual harassment. A score of 10 is assigned if discrimination based on sexual harassment is outlawed, 0 otherwise. In 1979 sexual harassment was not a proscribed ground of discrimination and therefore a score of 0 was given to the sub-index value.

Component n. 11, the principle of equal pay for work of equal value, received protection by the Constitution, the Treaty of Rome (Foundation of the European Community, Rome (25th of March 1957)), the *Statute of Workers' Rights*, Law 657/1966 and to a lesser extent by Law 903/1977. The Constitution sanctioned this right indirectly through section 3 paragraph 1(see component number 1) and directly through section 37 paragraphs 1 and 3. Section 37 paragraph 1 endorsed this principle in relation to men and women by stating that "The female worker is entitled to the same rights and wage as the male worker", while paragraph 3 sanctioned equal pay for work of equal value between adult workers and juniors[74]. These sections were reinforced by article 15 of the *Statute of Workers' Rights* which held that every action aimed at discriminating on the grounds of political or religious beliefs, race, language, gender or trade unions' membership was void (see component n. 1). The principle of

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[74] This paragraph holds that juniors are entitled to the same wage as for adult employees for work of equal value.

equal pay for work of equal value between men and women was also expressly endorsed by article 2 of Law 903/1977[75] that implemented section 37 paragraph 1 of the Constitution, while a general principle that applied not only to the workers of the same enterprise but also to those employed in the same industry was sanctioned by article 4 of Law 657/1966 that gave effect to the ILO convention 117/1962 on social policy. Equal pay for work of equal value between men and women was also promoted at the European level. Article 119 of the Treaty of Rome held that every member State had the duty to enforce the principle of equal pay for work of equal value between men and women. Given the extensive protection accorded to this principle, a score of 10 was assigned to the sub-index value.

Provision n. 12, reasonable accommodation for disabled employees, did not receive protection in 1979. Law 482/1962 only compelled employers who employed more than 35 employees to hire a quota of disabled workers without reference being made about accommodation. Since employers did not have the duty to provide reasonable accommodation to disabled employees, a score of 0 was assigned to the sub-index value.

The last component of this standard, the enforcement mechanism, did not receive any specific protection. The core of anti-discrimination legislation was constituted by article 15 of the *Statute of Workers' Rights*. This article did not provide for limitations upon the right of the loser to appeal. All claims were to be dealt with by the Judiciary through an ordinary procedure (two levels of appeal with the onus of proof resting with the claimant). More expeditious procedures were only provided in three cases: trade union discrimination (art. 28 Law 300/1970), discrimination on the ground of gender and violation of the prohibition of night work for women (Law

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[75] Article 2 of Law 903/1977 held that "The female workers are entitled to the same wage of male workers for work of equal value".

903/1977 articles 5 and 15). In all these cases the enforcement procedure provided by article 28 of the *Statute of Workers' Rights* (Law 300/1970) was applied. Within two days from the reception of the claim a single judge (the former *Pretore)*, could order the end of the discriminatory behaviour. This decision could be appealed only once before the same judge within 15 days from the first pronouncement (Law 300/1977 art. 28 paragraph 3). As in 1979 the enforcement mechanism for equal employment opportunity/employment equity claims was an ordinary procedure (with the aforementioned exceptions) without any limitation as for the right of a claimant to appeal, a score of 0 was assigned to the sub-index value.

8.7.2 Equal Employment Opportunity/Employment Equity in 2000

One provision, reasonable accommodation for disabled employees (component n.12), has increased in 2000 in comparison with 1979. In section 8.7.1, it was noted that in 1979 legislation did not compel employers or the social security authorities to make reasonable accommodation for disabled employees. This omission was filled during the 1990s through several acts that aimed to facilitate the adjustment of disabled employees to the working environment. In particular, Law 104/1992 and Law 68/1999 encourage the employers to make reasonable accommodation to disabled employees. While on one hand both laws retain the system of compulsory quotas provided by Law 482/1962 (see section 8.7.1; component n. 7), on the other hand, they grant several incentives to help disabled employees. Amongst the most significant provisions is article 8 paragraph 1(c) of Law 104/1992 which provides for the elimination of all physical obstacles in private and public properties that can prevent people with disability from entering the premises. This provision is flanked by article 18 paragraph 6(b) (Law 104/1992) that confers on the regions the power to allocate incentives and funds to help employers make necessary adjustments at the workplace. This system of incentives is further strengthened by Law 68/1999 which grants all employers a contribution of up to 50% of the necessary expenditures to

modify the working environment (Law 68/1999 art. 13 paragraph(c)). As employers have now the duty to provide reasonable accommodation to disabled employees, a score of 10 was assigned to the sub-index value.

It should also be noted that legislation regulating family leave was modified in the year 2000 by Law 53/2000 that implemented the European Directive 96/34 (3rd of June 1996). This Act introduces two important changes: first, family leave can now be taken by the father and second, Law 53/2000 grants time off for family-related matters. As already noted, in 1979 maternity leave was generous in Italy. While the new Act does not significantly change the level of these entitlements, Law 53/2000 grants time off for family-related matters (for an exhaustive overview about the new changes on this matter brought by Law 53/2000 see further Del Punta et al. 2000 chapter 1). Article 4 paragraph 1 provides for 3 days of paid leave for death or serious illness of the partner or relatives[76] while article 4 paragraph 2 grants up to two years of unpaid leave for the same reasons[77]. Although this prescription does not affect the core of component n. 9 (20 weeks paid maternity leave), it represents a relevant change in comparison with 1979.

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[76] In case of a de-facto relationship parental leave can be taken only on the condition that the relationship is certified (Law 53/2000 art.4(1)).

[77] During this period the employee cannot work or be discharged.

Table 8.7: Equal Employment Opportunity/Employment Equity in Italy, Weights, Sub-index Values and Scores in 1979 and 2000

Provision/Language	Provision Weight	Subindex Value	Subindex scores(1979)	Subindex scores(2000)
1) Race, Visual Minorities, Aboriginal People	.15		Race, visual minorities and aboriginal people covered (subindex value=10)	Race, visual minorities and aboriginal people covered(subindex value=10)
2) National Origin/Ancestry	.1		National origin/ancestry covered (subindex value=10)	National origin/ancestry covered (subindex value=10)
3) Gender	.15		Gender covered (subindex value=10)	Gender covered (subindex value=10)
4) Religion	.1		Religion covered (subindex value=10)	Religion covered (subindex value=10)
5) Age	.1			
No Exceptions		10		
Retirement Plan Exception		5		
Age Not Covered		0	Age not covered	Age not covered
6) Sexual Preference/Orientation	.05		Sexual preference/orientation not covered (subindex value=0)	Sexual preference/orientation not covered (subindex value=0)
7) Disability	.1		Disability covered (subindex value=10)	Disability covered (subindex value=10)
8) Political Beliefs/Org. Membership	.05		Political beliefs covered (subindex value=10)	Political beliefs covered (subindex value=10)
9) Family leave due to pregnancy, Illness of Family Member or Serious Health Problem at least 20 paid weeks	.05		20 weeks paid maternity leave (subindex value=10)	Standard maternity leave plus Family leave due to Illness of Family Member or Serious Health Problem, 3 paid days every year or up to 2 years of unpaid leaves (subindex value=10)
10) Sexual Harassment Covered	.03		Sexual Harassment not covered (subindex value=0)	Sexual Harassment not covered (subindex value=0)
11) Equal Pay Covered	.03		Equal Pay Covered (subindex value=10)	Equal Pay Covered (subindex value=10)
12) Reasonable Accommodation for Disabled Employees	.04		Reasonable Accommodation for Disabled Employees not covered (subindex value=0)	Reasonable Accommodation for Disabled Employees covered (subindex value=10)
13) Limits on Rights of Appeal	.05		Only enforceable through Court except for trade unions and gender discrimination (subindex value=0)	Only enforceable through Court except for trade unions and gender discrimination (subindex value=0)

Equal Employment Opportunity/Employment Equity 1979 (basic index): 7.3

Equal Employment Opportunity/Employment Equity 2000 (basic index): 7.7

8.8 Unjust Discharge

The level of protection granted by unfair dismissal legislation has not significantly changed over the period studied. Thus 1979 and 2000 will be investigated together.

The first four components of this standard relate to well established exceptions to the employment at will doctrine entrenched in common law cases or in pronouncements held by the Judiciary. As already noted in section 7.2, Italy is a typical civil law country and therefore common law is not applicable. In addition, none of the four exceptions have ever been subjected to a definitive ruling by the *Corte di Cassazione* or the Constitutional Court. As none of the four exceptions have received extensive interpretation, a score of 5 was assigned to components 1 to 4.

The last and most important component, statutory protection accorded to unfair discharge, has traditionally been regulated by Law 604/1966, article 18 of the *Statute of Workers' Rights* and more recently by Law 108/1990. Until 1966, dismissal was only governed by article 2118 of the Civil Code which held that both parties were free to terminate the contract of employment at any time on the condition that a notice of termination was provided in advance (Civil Code art. 2118 paragraph 1). In case a dismissal occurred without notice, the employee was entitled to a sum in lieu of notice (Civil Code art. 2118 paragraph 1). This legal framework was significantly modified by Law 604/1966 that constrained the power of the employer to freely discharge employees. Under Law 604/1966, an employee can only be dismissed for "*giusta causa*" or "*giustificato motivo*" (Law 604/1966 art.1). "*Giusta causa*" is defined as serious misconduct on part of the employee (Civil Code art. 2119), while "*giustificato motivo*" is a less serious offence and is divided into two sub-types: subjective "*giustificato motivo*" and objective "*giustificato motivo*". The definition of subjective "*giustificato motivo*" is contained in article 3 and relates to a serious violation of the reciprocal contractual obligations. The main difference between "*giusta causa*" and subjective "*giustificato motivo*" concerns the seriousness of the misconduct. In

addition, advance notice to the employee is not required in case the discharge occurs for "*giusta causa*". A worker can also be laid off for reasons related "to the production or the internal organisation of the enterprise" (objective "*giustificato motivo*" Law 604/1966 art.3). Where a worker is unfairly dismissed he/she is entitled to be reinstated or, at the employer's discretion, be compensated by a sum ranging between 2.5 and 6 months of regular pay depending on the number of employees, the size of the enterprise and the worker's length of service (Law 604/1966 art.8). In 1979 Law 604/1966 did not apply to firms with less than 35 employees (Law 604/1966 art.11)

The sanctions for unfair dismissal were significantly strengthened in 1970 with the introduction of article 18 of the *Statute of Workers' Rights*. This article further constrains the ability of the employer to freely lay off employees as it is ruled that where a worker is discharged without a "*giusta causa*" or a "*giustificato motivo*" the employee must be compulsorily reinstated or where this does not occur the regular wage be payable for life. This regime applies to firms with more than 15 employees (Law 300/1970 art. 35). This system of protection was modified slightly and extended by Law 108/1990. This Act amended article 18 of the *Statute of Workers' Rights*. The new regulation offers the employee the choice to opt for 15 months wages instead of being reinstated and extends the protection provided by art. 18 also to non-profit organisations (Law 108/1990 art. 1)[78]. In addition, Law 108/1990 article 6 repealed article 11 of Law 604/1966 and extended the protection accorded by this statute to firms with less than 15 employees. Since the right of the employer to freely dismiss a worker has been severely limited since 1970, a score of 10 was assigned to the sub-index value for component n. 5 for 1979 and 2000.

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[78] This regime applies to profitable or not profitable organisations with 15 or more employees and to farmers with 5 or more employees and in any case to the enterprises that employ more than 60 workers (Law 300/1970 art.18 as amended by art. 1 Law 108/1990).

Table 8.8: Unjust Discharge in Italy, Weights, Sub-index Values and Scores in 1979 and 2000

Provision/Language	Provision Weight	Subindex Value	Subindex scores (1979)	Subindex scores (2000)
1) Discharge Prohibited if Employee has implicit Contract	.05			
Definitive State Ruling in Favour of Exception		10		
No Court Decision		5	No Court Decision	No Court Decision
Definitive State Ruling Against Exception		0		
2) Handbook Exception	.05			
Definitive State Ruling in Favour of Exception		10		
No Court Decision		5	No Court Decision	No Court Decision
Definitive State Ruling Against Exception		0		
3) Public Policy Exception	.1			
Definitive State Ruling in Favour of Exception		10		
No Court Decision		5	No Court Decision	No Court Decision
Definitive State Ruling Against Exception		0		
4) Covenant of Good Faith Exception	.1			
Definitive State Ruling in Favour of Exception		10		
No Court Decision		5	No Court Decision	No Court Decision
Definitive State Ruling Against Exception		0		
5) Limited, except for Misconduct, Incompetence or Negligence/Limited to "Good Cause"	.7		Unjust discharge limited to just cause or serious misconduct (subindex value=10)	Unjust discharge limited to just cause or serious misconduct (subindex value=10)

Unjust Discharge 1979 and 2000 (basic index):8.5

8.9 Occupational Health and Safety

The level of protection granted to occupational health and safety has increased slightly over the period studied. Hence, section 8.9.1 analyses 1979 while section 8.9.2 will consider the year 2000. The legal framework regulating this standard has dramatically changed during the late 1980s-early 1990s due to the implementation of several European Directives. Such change is not fully captured by the scale as the level of the sanctions (the most numerous components of this standard) has remained substantially unchanged since 1979. In order to fully capture the significance of the

change that occurred to the legal framework regulating occupational health and safety, section 8.9.2 will provide an outline of the changes introduced by the new European regulation.

8.9.1 Occupational Health and Safety in 1979

The 1st component of the standard relates to the presence of a general duty clause in the legal framework regulating occupational health and safety. In 1979 article 2087 of the Civil Code imposed a general duty of care upon the employer. This article held that: "The employer must adopt all the measures that, in accordance with the specificity of the job and the level of expertise and the technology, are necessary to protect the physical and moral integrity of the worker". Since in 1979 the employer was subjected to a statutory general duty clause, a score of 10 was assigned to the sub-index value for this component.

The 2nd component of the standard, the powers of the inspectors, was regulated by articles 8, 9 and 10 of Law 520/1955. This act conferred on the Inspectors of the Ministry of Labour the power "to inspect every part of the workplace, day and night without seeking previous authorisation from the Authority" (this power was extended in 1978 to the inspectors of the national health care service). As a warrant was not required, a score of 10 was given to the sub-index value.

Components 3 to 5 evaluate the level of penalties for violations of occupational health and safety regulations and were governed by the following Acts: the Penal Code, Law 547/1955 on the prevention of industrial accidents, Law 302/1956 and Law 303/1956 on the prevention of industrial accidents and the protection of the workers' health. These acts prescribed both fines and imprisonment for violations of the general conditions contained in the statutes. The maximum imprisonment possible established by these laws was 6 months while the penalties ranged between ITL 250000 for minor offences and ITL 1500000 for serious offences

(Law 547/1955 art. 389(a)(b)(c), Law 302/1956 art. 53(a)(b)(c), Law 303/1956 art. 58(a)(b)(c)). The penalties prescribed by these acts were strengthened by articles 437 and 451 of the Penal Code. Article 437 held that every person who on purpose failed to put in place appliances and signals for the prevention of industrial accidents could be detained for a period ranging between 6 months and 5 years[79], while article 451 reduced the imprisonment to a maximum of one year for wilful tampering of fire extinguishers. ITL 250000 to 1500000 falls in the second lowest category (between AU$ 50 and 15999) and therefore a score of 1.7 was assigned to components 3 to 5.

A score of 0 was assigned to provision number 6 as penalties could not be increased by a factor of 10 in case of repeated violations.

Components 7 and 8 evaluate the penalties for wilful violations causing death (1st and 2nd offence). Pursuant to article 437 of the Penal Code and article 389 of Law 547/1955, any wilful violation of health and safety regulation causing an accident or an injury could be punished with up to 10 years of imprisonment and a penalty of up to ITL 1500000. As previously noted, ITL 1500000 falls in the second lowest category (see coding maximum penalty for a wilful violation of statute) and therefore a score of 1.7 was assigned to the sub-index value for provisions 7 and 8.

Component n. 9, the maximum penalty for failing to abate a hazard, was governed by Law 520/1955. This act regulated the powers of the inspectors and established the sanctions for failure to comply with the inspectors' directives. Pursuant to articles 9 and 10 of Law 520/1955 the inspectors of the Minister of Labour or the National Health Service were empowered to issue *"Diffide"* or *"Disposizioni"*. While the former were proper notice of infringement issued for failure to comply with one or more specific regulations, the latter concerned

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[79] The imprisonment ranged between 3 and 10 years if the offence caused an industrial accident.

hazardous situations for which no specific provisions had been enacted (on this distinction see further Natullo 1995:195). Failure to comply with a *Diffida* was sanctioned with the penalty provided for the breach of the specific regulation (or, pursuant to art. 389 (a)(b)(c) Law 547/1955, with a penalty comprised between ITL 250000 and 1500000) and the failure to accomplish a *Disposizione* resulted in a sanction ranging between ITL 200000 and 1000000 (Law 520/1955 art.11(1)). Since the maximum penalty for failure to abate a hazard was ITL 1500000, a score of 1.7 was assigned to the sub-index value.

Components 10, 11 and 12 assess the existence of reductions in penalties in relation to: the size of the firm, the presence of a written health and safety program and in case of absence of violations of occupational health and safety regulations during a specific period of time. No reductions were provided by the legal framework regulating occupational health and safety in 1979 and therefore a score of 10 was assigned to each of these provisions. Component 13 was given a score of 0 because the employers were not required to keep a record of the industrial accidents (article 4 Law 547/1955).

Component n. 14 was assigned a score of 10 as the provinces or the local councils could set stricter requirements than the central government.

Component n. 15 concerns the statutory presence of occupational health and safety committees. This aspect was regulated by article 9 of the *Statute of Workers' Rights* (Law 300/1970). This article granted to employees the right to ensure that health and safety regulations were properly enforced and more broadly to promote health and safety at the workplace. This right should have been exercised through employees' committees set up at enterprise level (Law 300/1970 art.9). This prescription has never been implemented adequately because employers were not compelled to institute health and safety committees (see further Pera 1984:568-570).

As health and safety committees were recommended but not compulsory in 1979, a score of 0 was assigned to the sub-index value.

Component n. 16 assesses the maximum imprisonment prescribed for violations of health and safety regulations. It has already been observed that pursuant to article 437 of the Penal Code, the maximum imprisonment was 10 years in case a wilful violation caused an accident or an injury. 10 years falls in the top category (equal to or greater than 24 months) which is associated with a sub-index value of 10.

Component n. 17, the maximum penalty for contravening a direction of inspectors, was regulated by Law 520/1955. Failure to comply with a *Disposizione* (notice of improvement) was sanctioned with a maximum penalty of ITL 1000000 (Law 520/1955 art. 11 paragraph 1). This value falls in the second lowest category (between AU$50 and AU$33,999) and therefore a score of 1.7 was assigned to the sub-index value.

Components 18 and 19, maximum penalties for any contravention by anyone and for minor offences, were governed by Law 547/1955 article 389(a)(b)(c), Law 302/1956 article 53(a)(b)(c), Law 303/1956 article 58(a)(b)(c) which fixed a general maximum penalty of ITL 1500000. As a result, a score of 1.7 was given to the sub-index value.

Component n. 20, additional fines possible for minor offences, was regulated by Law 547/1955 article 389(a)(b)(c), Law 302/1956 article 53(a)(b)(c), Law 303/1956 article 58(a)(b)(c) and the Penal Code. Along with the penalties provided by the Legislation (administrative sanctions), additional fines (or imprisonment) could be imposed by the judge pursuant to articles 437, 451, 589, 590 of the Penal Code (wilful negligence and manslaughter). Additional sanctions could be imposed in relation to both serious and minor offences and therefore a score of 10 was assigned to the sub-index value.

Component n. 21, penalties for failing to abate a second hazard until corrected, was regulated by article 9 Law 520/1955 and by Law 547/1955 article 389(a)(b)(c), Law 302/1956 article 53(a)(b)(c), Law 303/1956 article 58(a)(b)(c). In case a *Diffida* was issued to abate or correct a hazard, the maximum penalty was ITL 1500000 (without any distinction between first or less serious offences). This value falls in the second lowest category (between AU$ 50 and 15999) of the scale and therefore a score of 1.7 was assigned to the sub-index value.

The last component of this standard, the enforcement mechanism, was governed by a complex system that involved the Ministry of Labour for the administrative procedure and the Judiciary for the penal aspects. A legal proceeding could be initiated by an inspector, by one or more employees or by anyone else. The breach of a regulation had to be ascertained by an inspector who could issue a *Diffida* or a *Disposizione*. On one hand, a *Diffida* could not be appealed and the violator was compelled to pay the administrative fine prescribed by Law 547/1955 article 389(a)(b)(c), Law 302/1956 article 53(a)(b)(c), Law 303/1956 article 58(a)(b)(c) (see above). On the other hand, a *Disposizione* could be appealed within 15 days to the Ministry of Labour although the prescriptions contained in the *Disposizione* had to be implemented while the appeal was pending (Law 520/1955 art. 10 paragraph 2). Along with this administrative procedure, in case a *Diffida* was issued, the inspector had the duty to inform the Judiciary which would initiate a penal procedure. The penal procedure was external to the Authority administering health and safety regulations (the Ministry of Labour). The defendant was subjected to two levels of appeal (ordinary procedure) and the penal proceeding could be extinguished before the judge through the payment of an additional fine (*oblazione*) provided that the violator complied with the prescriptions contained in the *Diffida*. It should be noted that the enforcement mechanism was very effective as the administrative procedure was entirely internal to the Authority administering occupational health and safety and the possibility to appeal its decisions was limited. In addition, the penal procedure

was automatically initiated in case a *Diffida* was issued. As the right of appeal was limited, a score of 10 was assigned to the sub-index value.

8.9.2 Occupational Health and Safety in 2000

As indicated above, the legal framework regulating occupational health and safety has been significantly integrated, and largely supplemented, by European Directives in the two decades considered. The enforcement of European legislation started in the early 1990s with the implementation of Directive 80/1107 on the handling of asbestos and lead (Law 277/1991 and 77/1992) and was completed in 1994 by Law 626/1994 which gave effect to EU Directive 89/391. While the aim of the first two acts was the regulation of specific hazards, the implementation of EU Directive 89/391 produced a significant change in the overall framework regulating occupational health and safety. The accomplishment of the European Directives generated a lively debate amongst Italian lawyers as they feared the implementation of the new Directives, and in particular of EU Directive 80/1107 could negatively affect the protection granted by previous legislation (on the legal implications of this debate see Natullo 1995).Regardless of these concerns, the new framework became fully operative in 1994 with the enactment of Laws 626/1994 and 758/1994.

The main features of the new system are: a more specific definition of the rights and duties of the employers and the employees; health and safety committees are now compulsory; there is now an explicit linkage between health and safety and the overall organisation of the enterprise and the protection of the workers' health and safety is now hinged on the principle of the "maximum safety technologically feasible". In line with the Robens' type health and safety regulations (see section 5.9.2), the new legal framework places a greater emphasis on prevention rather than on punishment. This also emerges from the analysis of the reform of the penal procedure. It is now easier for the offender to proscribe the penal offence.

The measures to prevent industrial accidents and the duties of the employers are now contained in articles 3 and 4 of Law 626/1994. Article 4 lists the duties of the employers which are: a written preventive assessment of the hazards at the workplace; the indication of the necessary measures to correct the identified hazards; the designation of a responsible person for occupational health and safety matters; the duty to inform the employees about potential hazards. In addition, the employer must keep a record of the accidents that occur at the workplace (Law 626/1994 art. 4 paragraph 5(o)). As an occupational health and safety record is now compulsory and no waivers to this rule are allowed, a score of 10 was assigned to component n. 13 (Record-keeping exemption for small firms and specific industries).

Another change relates to the regulation of the employees' committees. Pursuant to article 18 paragraph 1 (Law 626/1994) it is now compulsory for all the firms to appoint at least one employee representative for occupational health and safety. The number of employees' representatives is established in relation to the firm's size in the following ways: one representative in enterprises with up to 200 employees, three representatives in enterprises with 201 to 1000 employees and 6 representatives for firms with more than 1000 workers (Law 626/1994 art. 18 6(a)(b)(c). As employees' representatives are now compulsory, a score of 10 was assigned to provision n.15.

Finally, the new legal framework also increased the administrative penalties and modified the way in which the penal procedure (that along with the administrative procedure is compulsory) can be proscribed. The new administrative penalties range between ITL 1000000 and ITL 8000000 (Law 626/1994 articles 89, 90, 91,92 and 93) depending on the person who committed the offence (employers are punished with higher sanctions than the employees) and the severity of the offence. ITL 1000000 to 8000000 falls in the second lowest category of the standard (see coding penalty for a

wilful violation of statute) which is associated with a sub-index value of 1.7. This is the same value assigned to all the penalties for the year 1979.

In addition, the mechanism to proscribe the penal procedure has slightly changed. Pursuant to articles 21 and 24 of Law 758/1994, if an inspector is satisfied that the employer complied with a *Prescrizione* (which substituted the *Diffida*) the inspector notifies the prosecutor that the offender accomplished what was ordered and the penal offence can be proscribed or a reduced penalty imposed. In short, while in 1979 the penal proceeding could be proscribed only by the judge, Law 758/1994 provides for an automatic and more expeditious mechanism of prescription for non-wilful offences. This new mechanism closely resembles the one operating in 1979 and therefore the same score (10) was assigned to the sub-index value for this provision of the standard.

Table 8.9: Occupational Health and Safety in Italy, Weights, Sub-index Values and Scores in 1979 and 2000

Provision/Language	Provision Weight	Subindex Value	Subindex scores (1979)	Subindex scores (2000)
1) Subject to General Duty Clause	.02		Yes, Art. 2087 of the Civil Code(subindex value=10)	Yes, Art 2087 of the Civil Code (sub index value=10)
2) Inspection Warrant Can be Demanded Prior to Inspector Entry	.053		No (sub-index value=10)	No (sub-index value=10)
3) Maximum Penalty for a Wilful Violation of Statute	.053			
GT or =AU$ 170000		10		
AU$136000-AU$169999		8.33		
AU$102000-AU$135999		6.7		
AU$ 68000-AU$101999		5		
AU$34000-AU$67999		3.33		
AU$50-AU$ 33999		1.7	ITL 1500000	ITL 8000000
No Penalty		0		
All amounts are in Australian Dollars				
4) Maximum Penalty for a Serious Violation of Statute	.053		ITL 1500000 (subindex value=1.7)	ITL 8000000 (sub-index value=1.7)
See Coding on "Maximum Penalty for a wilful violation of Statute".				
5) Maximum Penalty for a Wilful Repeat Violation of OSHA	.053		ITL 1500000 (subindex value=1.7)	ITL 8000000 (sub-index value=1.7)
See Coding on "Maximum Penalty for a wilful violation of Statute".				
6) Repeat Violation Penalties May Be Increased by a Factor of 10	.053		No (sub-index value=0)	No (sub-index value=0)
7) Penalty for First Offence, Wilful Violation Causing a Death	.053		ITL 1500000 (sub-index value=1.7)	ITL 8000000 (sub-index value=1.7)
See Coding on "Maximum Penalty for a wilful violation of Statute."				
8) Penalty for Second Offence, Wilful Violation Causing a Death	.053		ITL 1500000 (sub-index value=1.7)	ITL 8000000 (sub-index value=1.7)
See Coding on "Maximum Penalty for a wilful violation of Statute."				
9) Maximum Penalty for Failing to Abate a Hazard Until Corrected	.053		ITL 1500000 (sub-index value=1.7)	ITL 8000000 (sub-index value=1.7)
See Coding on "Maximum Penalty for a wilful violation of Statute".				
10) Reduction in Penalties for Firms with up to 250 Employees	.02		No reduction (sub-index value =10)	No reduction (sub-index value =10)
11) Reduction in penalties for Written Health and Safety Program	.02		No reduction (sub-index value =10)	No reduction (sub-index value =10)
12) Reduction in Penalties for Absence of Violations During a Specified Time	.02		No reduction (sub-index value =10)	No reduction (sub-index value =10)
13) Recordkeeping Exemptions for Small Firms or Specified Industries	.02		Employers not required to keep health and safety record (sub-index value=0)	No exemption (sub-index value=10)
14) State\Provinces May Set Stricter	.053		Yes (sub-index	Yes (sub-index

Standards Than federal Government			value=10)	value=10)
15) Occupational Safety Committee or Representative Required	.053		Recommended but not Compulsory (sub-index value=0)	Yes (sub-index value=10)
16) Maximum Imprisonment Possible	.053			
Equal to or greater than 24 Months		10	10 years	10 years
12 Months		8		
6 Months		6		
3 Months		4		
1 Month		2		
No imprisonment		0		
17) Maximum Penalty for Contravening Direction of Safety Officer/Inspector	.053		ITL 1000000 (sub-index value=1.7)	ITL 1000000 (sub-index value=1.7)
See Coding on "Maximum Penalty for a wilful violation of Statute."				
18) Maximum Penalty for any Contravention by Anyone	.053		ITL 1500000 (sub-index value=1.7)	ITL 3000000 (sub-index value=1.7)
See Coding on "Maximum Penalty for a wilful violation of Statute."				
19) Maximum Penalty for Minor Offences	.053		ITL 1500000 (sub-index value=1.7)	ITL 8000000 (sub-index value=1.7)
See Coding on "Maximum Penalty for a wilful violation of Statute."				
20) Additional Fines Possible (for minor offences)	.053		Yes (sub-index value=10)	Yes (sub-index value=10)
21) Daily Penalty Assessed for Failing to Abate a Second Hazard Until Corrected	.053		ITL 1500000 (sub-index value=1.7)	ITL 8000000 (sub-index value=1.7)
See Coding on "Maximum Penalty for a wilful violation of Statute."				
22) Limits on Appeal of Agency Decisions	.052		Yes (sub-index value=10)	Yes (sub-index value=10)

Occupational Health and Safety 1979 (basic index): 4.871

Occupational Health and Safety 2000 (basic index): 5.601

8.10 Advance Notice of Plant Closings/Large-Scale Layoffs

The standard for Advance Notice of Plant Closing/Large-Scale Layoffs has significantly increased over the two decades studied due to the implementation of European Directives. As a result, section 8.10.1 analyses 1979 while section 8.10.2 will consider the year 2000.

8.10.1 Advance Notice of Plant Closing/Large-Scale Layoffs in 1979

In 1979 redundancies and collective dismissals were not specifically regulated. Employees collectively laid off were entitled to the same level of protection and benefits granted by unfair dismissal legislation (see section 8.8). The only three provisions which received institutional protection in 1979 were components 3, 5 and 7 (advance notice, notice to the affected employee and severance pay) while all the other components were assigned a score of 0 due to the lack of specific regulation.

Pursuant to article 2118 of the Civil Code, an employee was entitled to a notice of dismissal, the conditions of which had to conform to "the law, the corporative regulations or equity". As was observed in sections 7.2 and 8.3, the corporative regulations were substituted by collective agreements after the collapse of the fascist regime. Collective agreements usually specify periods of notice that are proportional to the employee's length of service and can range between 1 and 6 months. Six months fall in the top category of the scale (more than 16 weeks), which is associated with a sub-index value of 10.

The 5th component was also assigned a score of 10 because article 2118 of the Civil Code expressively required a notice of dismissal to be given to the affected employee.

Finally, the last component that in 1979 received legal protection was provision n. 7 (severance pay). Pursuant to article 9 of Law 604/1966 and article 2120 paragraph 1 of the Civil Code, a dismissed worker was entitled to a lump sum (*Trattamento di Fine Rapporto*) equal to the last monthly pay multiplied by the years

of service[80]. As severance pay was available to all discharged workers, a score of 10 was given to the sub-index value.

8.10.2 Advance Notice of Plant Closing/Large-Scale Layoffs in 2000

As was noted in section 8.10.1, in Italy there was not a general legal framework regulating large-scale layoffs until 1991. By contrast, at European level collective dismissals have been regulated since 1975 through EEC Directive n. 129 (subsequently modified by EU Directive 92/56). The European regulation was implemented in Italy in 1991 by Law 223/1991. The enactment of this statute was preceded by two pronouncements of the European Court of Justice in 1981 and 1985 that condemned Italy for failure to comply with article 100 of the Treaty of Rome (on this pronouncements see Mazzotta 1982; Pocar 1983; Roccella and Treu 1995). Law 223/1991 increased the protection accorded to the first, second, fourth and sixth provisions.

Law 223/1991 applies to all enterprises that employ more than 15 workers and intend to lay off at least 5 workers within a period of 120 days (Law 223/1991 art. 24 paragraph 1). 15 employees fall in the top category of the 1st component of this standard (10 or more employees but less than 25) which is associated with a sub-index value of 10.

The 2nd component of the standard, the maximum period within which the discharge must occur, is now regulated by article 4 paragraph 3(1) of Law 223/1991. Employers who wish to collectively discharge workers must inform the relevant trade union (art. 4 paragraph 2). The notice must indicate the exact time within which the proposed lay-off will occur (art.4 paragraph 3(1)). This prescription falls in the top

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[80] This benefit was restricted to clerical workers until 1966 when article 9 of Law 604/1966 extended the *Trattamento di Fine Rapporto* to all employees.

category (no maximum time but the specific period must be indicated) which is associated with a sub-index value of 10.

Also components 4 and 6 significantly changed in comparison with 1979. The new legislation not only imposes on the employer the duty to inform the relevant trade unions but also provides for a compulsory mechanism of negotiation. Pursuant to article 4 paragraphs (5)(6)(7) an employer who decides to collectively layoff workers must give notice to the relevant trade union. Within 7 days from the reception of the notice, the parties must begin a process of negotiation in order to avoid the dismissal (Law 223/1991 art. 4 paragraph (5))[81]. The negotiation shall be concluded within 45 from receipt of the first notice. In case negotiation fails, written notice must be forwarded to the *Ufficio Provinciale del Lavoro* (Minister of Labour, Provincial Office) that will proceed to a further attempt of conciliation (Law 223/1991 art. 4 paragraphs 6 and 7). This process must end within 30 days from the receipt of the notice. Only after this procedure is concluded can the discharge take place. As both Trade unions and government must be informed about proposed redundancies, a score of 10 was given to provisions 4 and 6.

Finally, the last component of the standard, the enforcement procedure, was assigned a score of 0 since Law 223/1991 does not limit the rights of appeal. In case a violation of the procedures contained in Law 223/1991 occurs, an employee can seek relief pursuant to Law 604/1966 (unfair dismissal; see section 8.8). This is an ordinary procedure based on two levels of appeal. More expeditious procedures are only provided for failure to comply with article 4 paragraphs (2)(5) (duty to inform the employees' representatives and compulsory negotiations with unions) which are considered violations of trade unions' rights and are therefore governed by the

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[81] The parties must negotiate on whether or not it is possible to reinstate all or some of the workers through the use of "*Solidarity Agreements*" or Part-Time/Fixed-Term Contracts.

enforcement mechanism provided by article 28 of Law 300/1970 (*Statute of Workers' Rights*; see section 8.8).

Table 8.10: Advance Notice of Plant Closings/Large-Scale Layoffs in Italy, Weights, Sub-index Values and Scores in 1979 and 2000

Provision/Language	Provision Weight	Subindex Value	Subindex scores (1979)	Subindex scores (2000)
1) Number of employees	.2			
10 or more		10		15
25 or more		6.7		
50 or more		3.3		
Not Present		0	Not present	
2) Max Time Period in Which Layoffs Must Occur	.04			
No Max Time		10		Specific period
4-5 weeks		6.7		
8 weeks		3.3		
NP		0	Not specified	
3) Advanced Notice Required (maximum period)	.2			
More than 16 weeks		10	24 weeks (6 months)	24 weeks (6 months)
12 to 16 weeks		7.5		
8 to 12 weeks		5		
4 to 8 weeks		2.5		
No notice required		0		
4) Notice to Minister of Labour or Government	.01		No Notice (sub-index value=0)	Yes (sub-index value=10)
5) Notice to Affected Employees	.2		Yes (subindex value=10)	Yes (subindex value=10)
6) Notice to Union	.1		No(subindex value=0)	Yes(subindex value=10
7) Severance Pay	.2		Yes (subindex value=10)	Yes(subindex value=10)
8) Limits on Appeal of Agency Decisions	.05		No(subindex value=0)	No(subindex value=0)

Advance Notice of Plant Closing/Large- Scale Layoffs 1979 (basic index): 6

Advance Notice of Plant Closing/Large-Scale Layoffs 2000 (basic index): 9.5

8.11 Conclusion

In this chapter labour standards in Italy were analysed and measured for 1979 and 2000. The following standards slightly increased over this period: overtime, paid time off, unemployment/employment insurance, workers' compensation, equal employment opportunity/employment equity, occupational health and safety, while

the protection accorded to large-scale layoffs was substantially enhanced. Minimum wage, collective bargaining and unfair dismissal remained unaltered.

On one side, overtime and paid time off were changed through the enactment of legislation while the level of protection accorded to unemployment/employment insurance and workers' compensation was increased by the Judiciary through several pronouncements of the Constitutional Court. These standards were changed through an internal process that involved the Parliament and the Judiciary. On the other side, the increases relating to equal employment opportunity/employment equity, occupational health and safety and large-scale layoffs was the result of an exogenous process that involved the European Union. Table 8.11 provides a summary of the findings of this chapter.

Table 8.11: Labour standards in Italy in 1979 and 2000; Basic Indexes

Standard/ Year	Min. Wage	Overtime	P.T. Off	U. Insurance	Work. Comp.	Coll. Barg.	Equal. Empl.	Unf. Dismissal	Occ. Health & Safety	L. Scale Layoffs
1979	6.5688	1.349	7.98	4.7	6.44	4.75	7.3	8.5	4.871	6
2000	6.5688	3.971	8.71	5.4	6.91	4.75	7.7	8.5	5.601	9.5

CHAPTER NINE

THE EVOLUTION OF LABOUR STANDARDS IN ITALY: CORPORATISM, MARKETISATION AND THE PROCESS OF CHANGE 1979 TO 2000

9.1 Introduction

In chapter 8, it was revealed that labour standards increased in Italy through the period studied. The protection accorded to overtime, paid time-off, unemployment/employment insurance, equal employment opportunity/employment equity, occupational health and safety and large-scale layoffs was strengthened. The aim of this chapter is to explain this outcome by investigating the industrial relations processes through which labour standards were changed in Italy and the continuous interaction between the countervailing demands for market liberalisation and employment protection.

The chapter makes four key points. First, it is argued that workers' fears concerning the potential negative consequences of increasing the marketisation of the economy and labour market flexibility induced trade unions to focus on maintaining their capacity to bargain with employers and to control management policies. The shift from *garantismo giuridico* to negotiated labour standards is representative of the trade-off achieved between the social partners and marks a significant point of departure from developments in Australia. The critical point is that Italian trade unions did not allow free market enthusiasts to both expand the reach of the market and concomitantly weaken Labour's capacity to bargain in the market place. Second, the weakness of governments was a significant factor ensuring that unions were successful in maintaining their capacity to bargain. Third, as with Australia, the market-employment protection mix changed over time. In particular, the ascent of the European Union, by emphasising the need, for member countries, to achieve a low

deficit-GDP ratio and contain inflation, further shifted the focus in favour of market liberalisation and imposed an unprecedented level of market discipline on the social partners. Fourth, despite the adoption of corporatist practices, the increase in protection accorded to labour standards was only marginally influenced by the endorsement of neo-corporatism. Unlike in Australia, labour standards in Italy were rarely included in the political and economic exchange between the social partners. These four key elements informed and shaped the character and timing of labour standards reform.

Given the complexities that characterise the Italian political and industrial relations systems, this chapter will consider the evolution of labour standards in four distinct periods: the late 1960s to late 1970s; the late 1970s to early 1980s; 1984 to 1991 and 1992 to 2000. In so doing, the chapter will seek to identify, during each phase, the agents that were the primary drivers of labour standards reform and, in the process, highlight the fact that the evolution of labour standards in Italy was greatly influenced by changes in the relative power position of Labour, the State, and Capital and by the creation of the European Union (EU).

9.2 Trilateral Practices and Conflict. De-institutionalised Industrial Relations and Labour Standards 1964 to 1980

In section 7.2, it was revealed that the Italian system of labour protection relies on provisions that began to be enacted during the second half of the 1960s and were influenced by the principle denominated *garantismo giuridico* (see section 7.3). Many of these statutes were passed on the wave of the industrial uprising that began in the late 1960s, without formal negotiations between trade unions, governments and employers. In order to explain the process through which labour standards were expanded in this period, it is necessary to explore the characteristics of the main Italian trade unions, their ties with the major political parties and the nature of political bargaining during this period.

There are three prominent Italian trade unions: the Confederazione Generale Italiana del Lavoro (CGIL), the Confederazione Italiana Sindacati dei Lavoratori (CISL) and the Unione Italiana del Lavoro (UIL). These three confederations cover the vast majority of unionised workers[82]. The differences between CGIL, CISL and UIL have traditionally been drawn along political and ideological lines (Regalia and Regini 1998). While the CGIL was affiliated to the Italian Communist Party (PCI), the CISL maintained close links with the Christian Democrats (Democrazia Cristiana), and the UIL with the Socialist Party (PSI). This resulted in Italian trade unions being subordinated to political parties from the end of Second World War until the early 1970s. However, while ties with the political constituencies were common to all three confederations, the level of subordination varied. On one side, the Constitution of the CGIL was inspired by orthodox Leninist theory, which conceptualises trade unions as the "transmission belt" of political parties[83]. According to this notion, trade unions are allowed to operate at both political and industrial levels, though their strategies must be endorsed and continuously supervised by the political party, whose task is to ensure conformity with the overall political strategy (Regalia and Regini 1998; Mascini 2000; Cella 1999; Regini 1981; 1982). On the other hand, the CISL's tradition allowed a less tight dependence on the Christian Democrats and its activity traditionally privileged the industrial arena and contractual issues rather than legislative reform. However, in a political climate dominated by the confrontation between Capitalist and Communist ideologies, the CISL has often entered the political debate by portraying itself as the alternative to Communist unionism. From the end of the Second World War until the mid 1960s, all political

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[82] The CGIL and the CISL have traditionally been the unions with the largest membership. For example, in 1964 2711842 workers were affiliated with the CGIL while the CISL accounted for 1515154 members. In 1996, this figure increased to 5211568 workers for the CGIL and 3838104 and 1593615 for the CISL and the UIL respectively. Trade union density dropped from 49% in 1977 to 36.8% in 1996 (Cesos 1997).

[83] This ideology was formally abandoned at the 1956 PCI Congress.

parties provided financial support as well as human resources to their trade union allies. This assistance was made necessary by the slow rate of economic growth and the declining level of unionisation[84] that characterised the period.

As was observed in section 7.3, at the beginning of the 1960s few laws had been enacted to implement the protective principles embedded in the Constitution. During this phase, the only labour standard that received legal protection was the minimum wage (see section 7.2). The employment protection system remained hinged on the provisions contained in the Fascist Civil Code. Several factors contributed to this situation: the economy was in recession, the bargaining power of trade unions was low and the political scene was dominated by the ideological confrontation between the PCI and the right wing of the Christian Democrats. The latter, consistently displayed an anti-Labour attitude. Labour conditions were established at the contractual level through collective bargaining. The lack of legislative reforms was also due to the neo-liberal, anti-inflationary policies adopted by the centre-right governments of the 1950s and by the proximity of these administrations to the employers (Reyneri 1998; Regalia and Regini 1998; Provasi 1998; Costantini and Bianchi 2001). Influenced by neo-classical economic orthodoxy, both the governments and the employers' associations maintained a marked hostility to labour standards. Unlike in Australia, during the late 1940s to early 1960s period, market forces operated with almost unrestrained freedom in the labour market (see section 6.2).

This trend began to reverse in the early 1960s. Through the 1962 to 1968, labour standards increased substantially. Governments focused on strengthening the protection accorded to job and wage security through the enactment of legislation regulating unfair dismissal, occupational health and safety, part-time/fixed-term

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[84] Trade union density decreased from 45.6% in 1953 to 27.7% in 1967.

contracts, outsourcing and the prohibition of piece rate payments (see section 7.3). Three factors engendered this development. First, the economic cycle was on the rise. GDP increased by 11.5% in 1960 and unemployment plunged below 6% in 1961. This strengthened the capacity of Labour to both bargain with the employers and exercise pressure on political parties. Second, there was a shift in the leadership of the Christian Democrats. In 1962, the first centre-left government was elected. This was a coalition comprising several parties (Christian Democrats, PSI and the Republicans) and was dominated by the left wing of the Christian Democrats, which displayed more sympathy for labour standards and workers' rights issues than had their colleagues on the right of the party. Third, these governments began to adopt Keynesian economic policies that, as revealed in section 2.3.1, tend to accept that employment security is an important means to sustain aggregate demand. Most importantly, the achievement of low rates of unemployment also induced a marked change in trade union strategy and the nature of their demands. In the 1950s, employment had been the major concern for Labour and accordingly, when market conditions improved in the early 1960s, emphasis was placed on the need to ensure job security. In short, the enactment of laws protecting job security was perceived by both Labour and the governments of the 1960s as a compelling necessity given the fact that, during the late 1940s and through the 1950s, employers were granted almost unrestrained freedom to exploit the workforce and the absence of legislation providing for job security greatly contributed to this abuse.

Although Labour's market power increased in the 1960s and trade unions became more active, the political parties were the primary agents promoting labour standards during this period. This was due to the subordination and financial reliance of trade unions to political constituencies (Giugni 1965; Regalia and Regini 1998). The divergence in the nature of political parties and their union allies regarding the role of labour standards became manifest as debate around this issue evolved through the early 1960s. While the CGIL played an active role in supporting the PCI's

demand for increased job security, the CISL maintained a lower profile. These contrasting strategies were consistent with the ideological approach entrenched in the tradition of these two federations. The divergence became crystal in 1966 following the enactment of the first law on unfair dismissal (Law 604/1966). While the CGIL welcomed the new statute, the CISL representatives in the lower house issued a statement declaring that the new legislation was an unwanted interference in the industrial relations arena and a blatant violation of the right of unions to freely negotiate employment conditions (Costantini and Bianchi 200:6).

Having begun the process of labour standards reform, the National Parliament continued to pass protective labour law in the following years. In the 1970s, the focus expanded to embrace industrial democracy and equal employment opportunity through the enactment of the *Statute of Workers' Rights* and laws regulating maternity leave and prohibiting discrimination on several grounds (see section 7.3). The main factors that contributed to this development were the strengthening of Labour's market power and the nature and intensity of the political protests that erupted in the late 1960s. Trade union density jumped from 28.7% in 1968 to 49% in 1977 (Della Rocca 1998:107). On the economic side, this increase was encouraged by sustained economic growth and by a further reduction in unemployment. Labour's market power was also enhanced by a wave of industrial and political disputes that started in 1968[85] and continued until the end of the 1970s. In 1969, there were 3788 strikes with 7.5 million workers involved in these actions and 302 million lost working hours (Costantini and Bianchi 2001). As with other countries in the same period, the synergy between social movements and workers ensured that many of these disputes placed great emphasis on improving industrial democracy and equal employment

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[85] This year is often referred to as the *"Hot Autumn"*.

opportunity, a development greatly supported by the feminist movement which gained strength during the late 1960s-mid 1970s.

In a political climate shattered by growing demands for social rights, CGIL, CISL and UIL found it increasingly difficult to control their members (Costantini and Bianchi 2001; Cella 1972). The CISL was particularly affected by this process. It became clear to the leadership of the federation that its narrow focus on contractual issues and connections with the Christian Democrats was leading to a loss of members to the overtly political trade union: the CGIL. The CISL's secretariat responded at its 1969 Congress by embracing a new policy based on the promotion of both contractual and political issues and by seeking an alliance with the CGIL and the UIL. In addition, the industrial uprising of the late 1960s enabled trade unions to distance themselves from the political parties (Accornero 1975; Cella 1979). With economic growth and increased membership, the survival of the workers' organisations was no longer dependant on the financial and human resources provided by their political allies. The process of disengagement was important for the unions to achieve a common front and reform program between the three major confederations and to incorporate the spontaneous mobilisation of the workforce (Regalia and Regini 1998). The main feature of this alliance was that, unlike the 1962 to 1968 period, the improvement of labour standards came to be seen by Labour as a direct objective of trade union strategy. The first union that distanced itself from its party political allies was the CISL in 1969, followed one year later by the CGIL. However, as noted by Regalia and Regini (1998:470), this measure was only functional to the development of a common strategy between the three major confederations and should not be regarded as a definite denial of the link with the political parties.

During this period, the degree of coordination between employers, trade unions and governments remained low and this development was greatly influenced by the disengagement of CGIL, CISL and UIL from their political protectors. Even

when negotiations occurred at the institutional level, it usually focused on a limited number of issues (such as the reform of redundancy benefits (*Cassa Integrazione Guadagni*) and pensions) and often took place without the involvement of the employers' associations. The latter, significantly weakened by industrial and political unrest, were also neglected by the centre-left governments which held office for most of the 1970s and which were more inclined to negotiate labour issues with the unions than with the representatives of Capital. In addition, given the industrial strength of trade unions, the centre-left governments tended not to interfere during contractual negotiation between Labour and Capital. This development was supported by the main opposition party, the PCI, which was expanding its influence within both the industrial and the political spheres. As a consequence of these factors, the Italian industrial relations system remained firmly based on *Collective Laisser Faire* rather than on the corporatist practices that became the norm in Northern Europe through this period (Ghera 2000(b); Giugni 1985; Bellardi 1999).

The scene began to change in the mid-1970s as the Italian economy began to be afflicted by stagflation. Following the first oil shock, inflation increased to 19.4% in 1974, unemployment rose to 17.2% and in 1975 GDP plunged by 3.5%. In this environment, trade unions found it increasingly difficult to obtain real wage increases and better conditions of employment through collective bargaining. This development proved extremely important for the future evolution of labour standards because it opened the divisions in the alliance between the major confederations in that the CISL and the UIL began to question the effectiveness of a strategy based on the promotion of both contractual issues and labour standards. Despite these increasing concerns, the power of workers' organisations and their capacity to mobilise was sustained during the first half of the 1970s. Strikes and political protests, moreover, continued and were able to overturn the centre-right government led by Andreotti (who tried to implement a restrictive monetary policy) in 1974. The political environment became extremely

unstable. In 1974 alone, three different centre-left governments tried unsuccessfully to tackle the economic crisis.

To protect real wages from inflation, in 1975 the trade unions were able to force employers to accept a reform of the *Scala Mobile*; the mechanism of automatic wage indexation contained in all collective agreements. Under normal circumstances, collective agreements allowed different forms of automatic indexation that were tied to the skills of employees and their productivity. Low skill/productivity employees received partial indexation while the coverage was complete for high skill/productivity employees. The 1975 industrial campaign changed this system and all employees were granted full indexation. This further added to the inflation rate that peaked at 18.1% in 1977.

The capacity of trade unions and social movements to campaign for social rights and labour standards was, however, subsequently undermined by the PCI's participation in the government of "national solidarity" that ruled the country from 1977 to 1979 (Regalia and Regini 1998). This emergency government was formed to confront the wave of terrorist attacks perpetrated not only by the Red Brigades, a revolutionary Communist organisation, but also by right-wing extremists and segments of the intelligence community. The PCI's inclusion in the government reduced the trade unions' freedom to campaign over both industrial and political matters. The CGIL, the CISL and the UIL were all forced to select carefully the issues upon which to campaign and to ensure conformity with the government's political goals. While the trade unions' support for this position was fiercely opposed by parties to the left of the PCI (such as *Democrazia Proletaria*) and large segments of the Labour movement, the new political climate renewed the capacity of political parties to intrude into the industrial relations arena and shape union strategy (Regalia and Regini 1998:472; Carrieri and Donolo 1984).

The economic crisis of the mid 1970s, the associated weakening of the ability of trade unions to protect real wages, and the new policy of the PCI are fundamental factors that help explain the adoption of trilateral practices and the new trade union and employer approach to labour standards regulation. While during the first half of the 1970s, Italian industrial relations remained highly de-institutionalised, in the second half of the decade trilateral consultations were implemented with increasing frequency. For example, in 1977 CGIL, CISL and UIL signed an agreement with *Cofindustria*, the largest employers' association, in which it was agreed full wage indexation would no longer be included in the computation of severance pay (art. 2120 of the Civil Code see also section 8.10.1). In return, the employers agreed to increase investment in the south of Italy and the unions were ceded a greater role in the management of redundancy procedures. The nature of this agreement is very important for two reasons: first it represented one of the earliest attempts at institutional dialogue between employers and trade union groups and second, by involving trade unions in redundancy procedures it foreshadowed subsequent developments central to the evolution of Italian labour standards (Bellardi 1999; 2000; Maresca 2000; Ghera 2000(b)). Although this agreement encouraged the involvement of governments, which should have endorsed it through the enactment of legislation modifying art. 2120 of the Civil Code, the centre-left executive remained faithful to its *Collective Laissez Faire* tradition and did not intervene. There were two main reasons that prevented the executive endorsing this agreement. First, the political situation was so tense the executive was forced to maintain its focus on the fight against terrorism rather than on industrial issues. Second, as part of the agreement that allowed the PCI to be involved in the government of national solidarity was the commitment, by the other political parties, that they would not intervene in the industrial relations arena without the consent of the PCI.

The new course of Italian industrial relations was also furthered by the strategy of moderation endorsed by the great majority of trade unions in the late

1970s. In 1978 CGIL, CISL and UIL adopted a common policy declaring that they intended to pursue sustainable demands that were compatible with the overall economic condition of the country (EUR Protocol). The main objective of this strategy was to reduce inflation, increase productivity and sustain employment. As part of this new policy, CISL and UIL made it clear that the reform of labour standards was no longer a matter of priority for unions because the economy was in ill health and therefore the defence of real wages through collective bargaining was to be the primary focus of union activity. The CGIL disagreed with the latter point but endorsed the EUR Protocol, as it believed that the economic downturn left workers' organisations with no choice but to focus on contractual issues.

In short, from the early 1960s until the mid 1970s the power of trade unions and the capacity of Labour to campaign at both political and industrial level increased. This produced a substantial improvement in labour standards in the areas of job security, industrial democracy, occupational health and safety and equal employment opportunity/employment equity. From the mid 1970s, this situation began to change and Italy entered a new phase of employment protection and industrial relations in which employers became the primary agents inducing labour standards reform.

9.3 "Labour's Forward March Halted": Economic Crisis and Incomplete Neo-Corporatism. Labour Standards in the early 1980s

At the turn of the 1970s, the economic crisis was exacerbated by the second oil shock. In 1980, economic growth slowed, inflation reached 21.3%, the public deficit amounted to U$ 11000 million and unemployment was 8%. It became clear to Labour that all the gains obtained through the automatic indexation of wages would be outweighed by the inflationary spiral. Accordingly, the reform of the *Scala mobile* and the protection of real wages became the primary focus of government and Labour respectively.

At this stage, Italian industrial relations were still dominated by strong trade unions committed, in principle, to pursuing a common front (Costantini and Bianchi 2001; Carrieri and Donolo 1984; Carrieri and Donolo 1986:195-201). However, the trade unions' tendency to neglect labour standards, which had emerged in the late 1970s, became more pronounced in the 1980s. There were three main reasons why this was so. First, the second oil shock tended to further shift the focus of the social actors, in particular the trade unions, from political and ideological matters to contractual issues.

Second, the industrial and political power of the workers' organisations was declining. Trade union density and power began a long-term process of decline from 1978 and suffered a major and very symbolic defeat in a dispute with FIAT in 1980. In this latter struggle, the firm announced in September 1980 that it intended to make 24000 workers redundant by recourse to the *Cassa Integrazione Guadagni* (Redundancy Benefit Fund). Trade unions opposed this decision and organised a strike. On the 14th of October 1980, 40000 white collar workers crossed the picket line and returned to work. As a consequence, unions were forced to accept virtually all the conditions demanded by management in what was the first major defeat of Labour in more than 10 years (Galli and Pertegato 1994). This defeat, by putting Labour on the defensive, proved critical to future developments concerning labour standards and industrial relations because it marked a change in the balance of power between trade unions and employers in favour of the latter.

The third factor that shifted the focus away from labour standards was the further weakening of the alliance between CGIL, CISL and UIL. By 1979, the PCI had left the government coalition. This, paradoxically, increased the dependence of Labour on the political parties (Regalia and Regini 1998). The renewed conflicts between the communist and anti-communist parties, coupled with the economic crisis, deepened the differences between CGIL, CISL and UIL. CISL and UIL re-discovered

their mildly reformist tradition and links with the Christian Democrats and the PSI respectively. As part of this process, CISL and UIL reinforced the notion, already expressed at the 1978 EUR Congress, that they were more concerned with contractual issues than with labour standards. In this environment, the CGIL accepted that it needed to strengthen its ties with the PCI (Costantini and Bianchi 2001:10).

The omission of the PCI from the government substantially weakened the capacity of the executive to rule the country. From 1980 to 1993 Italy was governed by unstable centre-left coalitions that were sympathetic to Labour and whose economic policy remained heavily influenced by Keynesian theory (Giugni 1989; 1985; Regini 1996; Crouch 1998). The heterogeneity and intrinsic instability of these coalitions compelled successive governments to seek the collaboration of both trade unions and employers, as it was believed that, though the power of Labour had been diminished, inflation could not be curbed without the involvement of these organisations in the overall management of the economy (Crouch 1998:57). The tendency to experiment with corporatism was also enhanced by the fact that employers were gaining voice. Technological changes introduced at the workplace together with slow economic growth resulted in high rates of unemployment and large segments of the workforce were made redundant. Furthermore, the 1980 trade union defeat at FIAT, by strengthening the relative power position of Capital, enabled the employers to insist that negotiations this time had to involve Capital.

The government's interest in neo-corporatist arrangements was made clear in a proposal submitted by the Republican Prime minister Giovanni Spadolini in 1981. This document sought to facilitate the collaboration of trade unions and employers, win support for the need to reform the *Scala Mobile*, and thus control wages. Unlike the 1977 attempt, in 1981 the government was more energetic in promoting consultation between the social actors (Bellardi 1999; Carrieri and Donolo 1986). Given the continuing weakness of government, this was deemed the only viable

option to pursue a deflationary incomes policy. CGIL, CISL and UIL agreed, in principle, to keep wage claims within the limit of the programmed rate of inflation that was fixed for 1981 at 16%. The employers welcomed this move because, for the first time in more than 10 years, real wage increases were to be restrained.

It is important to outline some features of this first attempt to introduce corporatist practices. First, while the government pursued a more dynamic policy, its actions remained firmly hinged on *Collective Laissez Faire*. The 1981 agreement did not directly involve the executive in the management of industrial relations. The government reached an agreement with the social actors to establish a cap to the increase of wages but it remained external to the negotiation between employers and trade unions. The 1981 agreement sanctioned the principle of self-containment of wages on the part of trade unions but it did not realise any political exchange as was to occur with the Accord in Australia. Trade unions did not receive anything in return for their proposed compliance with the government's programmed rate of inflation (Bellardi 1999; Giugni 1980; Dal Co and Perulli 1986:161-168). Indeed, several commentators described the 1981 protocol as a blocked political exchange because it did not involve the coordination of incomes policy with broader macroeconomic objectives (Bellardi 1999:22; Regini 1981:173). The second characteristic of the 1981 consultation was its restricted scope and lack of reference to labour standards. Again unlike in Australia, Labour standards in Italy were not directly included in the bargaining between the social actors. This was due to the fact that both Labour and Capital did not have a legislative program because of the tendency of the social partners to focus on contractual rather than legislated issues (Cella 1987; Treu 1981).

Although the employers, the trade unions and the government officially endorsed this first attempt to implement corporatist practices, the agreement was nothing more than a press release (Mascini 2000:22; Dal Co and Perulli 1986:163). The different views of CGIL, CISL and UIL, together with the weakness of the

executive and its incapacity to make the parties hold to their commitments ensured the failure of the 1981 proposal. CISL and UIL agreed to limit automatic indexation to 16%. The CGIL and the PCI, however, made it clear that the difference between the programmed and the real rate of inflation had to be borne by the State. CISL and UIL pressured the government to enact legislation reforming the *Scala Mobile* and to ignore the claims of CGIL and PCI but Spadolini feared a confrontation with the latter and the probable mass protests that would result. Consequently, the issue was thrust back into the industrial relations arena (Santi 1982:XIII; Treu 1984; Lange and Regini 1987).

In this scenario of increasing instability and blocked political exchange, neo-corporatism finally broke through. On the 22nd of January 1983 the Minister of Labour, the socialist Scotti, CGIL, CISL, UIL and all the employers' associations announced that an agreement (known as the Scotti protocol) had been reached that would contain automatic indexation of national industry-based collective agreements to a maximum of 13% for 1983 and 10% for 1984. In return the trade unions obtained: more generous family benefits, the reduction of Medicare costs and the price of other commodities and services subsidised, a cut in income taxes for low wage earners and the reduction of working time by 40 hours per year. The employers' benefits included the blockage of enterprise bargaining for 18 months and a discount on the employers' severance load which was to be borne by the State. In addition, employers agreed to increase national industry-based collective agreements by ITL 100000 over a three year period. As with Australia, wage restraint and social security were reciprocally traded. Furthermore, as with the 1981 failed agreement, the gains that were obtained by Labour involved social protection rather than labour standards. The discount on the severance load aimed to curb the costs borne by the employers while the reduction of working time and the limited increase in wages were granted to compensate Labour for the losses deriving from the blockage of enterprise bargaining.

In order to understand the factors that made this agreement possible, it is important to outline a series of events that took place in the 1982-1983 period and the change of attitude of governments, trade unions, employers and their relative power position. First, in 1982 the *Cofindustria* disregarded its commitment to the 1975 agreement that linked increases in the *Scala Mobile* to inflation. Second, the government laid aside its non-interventionist position and included in negotiations with employers and Labour matters that had previously pertained to the executive such as Medicare, family payments and income taxes. This was done with the clear purpose of transforming a *zero-sum* negotiation into a *positive sum* game (Bellardi 1999; 1989; 1984; Perulli 1988; Veneziani 1983). Third, the PCI and the CGIL finally realised that there was no interest in further exacerbating the tension amongst the social partners given the fact that the government was extremely weak and the economic situation compelled the parties to adopt vigorous measures to reduce inflation (Mascini 2000:42).

While the precise interpretation of this agreement is still open to debate[86], the 1983 Protocol contains two features that subsequently influenced the evolution of labour standards. First, Italian governments had traditionally been reluctant to use legislative instruments to regulate employment-related matters without a broad-based agreement with the social actors. It will be seen in the next section that even when corporatist arrangements were not in place, informal negotiations between the social partners have always preceded the enactment of legislation modifying the employment protection system. This clearly emerges from the analysis of the process that led to the endorsement of the Scotti Protocol. Although the Fanfani government (which in the meantime had succeeded the Spadolini government) constantly threatened to unilaterally proceed to the enactment of a government decree if an

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[86] Regini argues that the 1983 accord was true corporatism (Regini 1984 and 1996). By contrast, Bellardi claims that the Scotti protocol was just an opportunistic exchange (Bellardi 1999:30).

agreement was not achieved in a reasonable period, the employers' and employees' organisations were aware this was a bluff. As with earlier administrations, the Fanfani executive did not have the necessary political resources to resort to unilateralism (Del Co and Perulli 1986:165). At the end of the 1983 negotiations, all the parties claimed victory, though it was clear that "the main victory was the avoidance of two extremes: the authoritative use of legislation and the unrestrained reliance upon market forces as both ways clearly clashed with the Italian industrial relations tradition" (Mascini 2000:45). The second factor that shaped the evolution of labour standards in subsequent years concerned the nature of Italian trilateral practices that remained feeble during the 1980s (Bellardi 2000). While the 1983 accord represented a consistent advance, it contained most of the elements of instability that led to the failure of previous agreements. The CGIL and the PCI reluctantly supported the Scotti Protocol. In addition, this agreement weakened the alliance between CGIL, CISL and UIL[87] and this added further instability to the industrial relations system. This explains why the PCI, the government, the trade unions (in particular the CGIL) and the employers focused their activity on contractual issues during this period rather than on labour standards. It was believed that in this way short-medium term gains could be more easily achieved.

In short, the long season of labour standards reform, which began in the early 1960s and continued through the 1970s, was halted in the early 1980s. The declining bargaining power of the trade unions, coupled with the economic downturn, forced Labour to focus on contractual issues rather than labour standards. This development was facilitated by the increasing capacity of employers to bargain with both trade unions and governments.

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[87] The Scotti Protocol was ratified by CGIL, CISL and UIL.

9.4 The Years of Exclusion. Marketisation, Labour Standards and Negotiated Labour Legislation (1984-1991)

In section 9.3, it was observed that labour standards did not change in 1979-1983 despite the adoption of neo-corporatism. By contrast, the 1984-1991 period was characterised by a profound transformation which affected the nature of labour standards. This change was greatly influenced by the interaction of two conflicting needs: the employers' demand for flexibility and the trade unions' attempts to defend their market power. In order to analyse this transformation, it is necessary to investigate events that took place in the industrial relations arena with emphasis being placed on the enhanced capacity of employers to act as agents of labour market reforms.

In section 9.3, it was noted that the 1983 agreement was reluctantly endorsed by the CGIL and the PCI. In addition, this accord contained the germs of its own collapse. The Scotti protocol was extremely expensive for the State as it was based on an expansive fiscal policy (Schimitter 1989; 1997; Lash 1985). The effects of the 1983 agreement on the public finance became clear the next year. The public deficit jumped to over US$ 3190 million dollars in 1984 (from + US$ 698 million dollars in 1983), inaugurating a negative spiral which almost led to the bankruptcy of public finance ten years later. The *casus belli*, that led to the temporary abandonment of neo-corporatism in Italy, was sparked in 1984 by a request of Bettino Craxi, the new socialist prime minister. Craxi asked the trade unions to limit their claims to the 1985 programmed rate of inflation by further cutting automatic indexation by 3%. This was preceded by a restrictive fiscal policy, which reduced the *Scala Mobile* for pensioners. The severity of the public deficit compelled the government to refuse any further concessions on the social wage. While CISL and UIL agreed to this proposal, the CGIL, supported by the PCI, continued to insist that the endorsement of this new protocol was only possible on the condition that the difference between the real and the programmed inflation was reimbursed to workers. In this environment, the last

remnants of the alliance between CGIL, CISL and UIL were finally abandoned and the government proceeded by authority to the enactment of Law 10/1984, which cut automatic indexation by 3%, without providing for any reimbursement. This Act was supported by an accord previously achieved by *Cofindustria*, the government, CISL and UIL while CGIL and the PCI promised a fierce political and social response.

The 1984 accord (known as the Saint Valentine agreement) was initially challenged in the Constitutional Court on the basis that it violated section 39 of the Constitution (see sections 7.2 and 7.3). However, the Court accepted the constitutional legitimacy of the accord ruling that agreements between the social actors and the government were not proper collective agreements and therefore section 39 of the Constitution was not applicable (for a detailed analysis of this pronouncement see Ricci 1999:372). At the political level, the PCI and the CGIL organised a referendum to challenge the St. Valentine accord. This referendum was put to the electorate but was rejected on the 9th of June 1985. Despite these defeats the industrial relations and political arenas were shattered, once again, by massive political protests and strikes organised mainly by the PCI and the CGIL. In this environment, it became clear to the government, *Cofindustria*, the CISL and the UIL that the exclusion of the PCI and the CGIL from corporatism was leading to the paralysis of the industrial relations system. The "impious alliance" collapsed, corporatism was halted and new ways out of the crisis were sought (Bellardi 2000).

The 1984 failure of neo-corporatism in Italy was due to two main factors. First, the weakness of the various executives and the fiscal crisis prevented governments from honouring their financial commitments (Ghera 2000(b):123; Bellardi 1999:31; Regini 1984). Second, the divergences between CGIL, CISL and UIL contributed to the instability of the system (Bellardi 1999:31; Bellardi 1989; Giugni 1985:54; Cella and Treu 1986). The 1983 and 1984 agreements did not contain clauses regulating or binding the behaviour of the partners in the future. This

was a priority given the extremely conflictual nature of Italian industrial relations and the inexperience of governments, trade unions and employers with regard to trilateral practices. This ensured the short life of the 1983 and 1984 protocols, which were only pragmatic and opportunistic exchanges with little long term perspective. Such failure led to a new phase in the relationship between the social actors, which affected the characteristics of the employment protection system (Ghera 2000(b); Lange 1987; Regini 1988). In particular, the 1984-1990 phase marked the shift from *garantismo giuridico* to negotiated labour law. Three factors are crucial to understand this development: first, the increasing capacity of Capital to promote labour standards' reforms; second, the failure of corporatism and third, the continuing weakness of governments.

The 1984 accord sanctioned the suspension of corporatism. It did not cause, however, the interruption of informal consultations between trade unions, employers and governments. This was of particular importance at a time when employers were gaining power and voice while trade unions were divided and forced to operate in a depressed and fragmented labour market[88]. By the mid 1980s, the employers' associations were able to advance comprehensive proposals to reform labour standards. This development marks a significant point of departure in comparison with the 1962-1984 period, as the employers became the major agent of labour standards reform. Two types of approach characterised the employers' proposals. The first emphasised the *market* (see sections 2.2.1; 2.2.2 and 2.3.1) and was put forward by *Federmeccanica*, an employers' association which represented steel manufacturers and was affiliated with *Cofindustria*. The second was presented by the employers' association of the State owned enterprises (*IRI*), and was a *concertative* approach that focused upon cooperative practices between Capital and Labour. The two documents

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[88] The unemployment rate ranged between 9.5% and 10.5% in the 1983-1984 period.

emphasised the need to enhance numerical and functional flexibility at the workplace. However, while the *Federmeccanica* vehemently criticised the rigidity of protective labour law and urged the government to lift the limitations imposed upon the use of part-time and fixed-term contracts and the outsourcing, the IRI argued for improved Labour-management relations at the workplace to achieve these objectives (Federmeccanica 1985; Mortillaro 1984). As noted by Bellardi "both proposals sought to decrease the relevance of legislation and enhance the reliance upon the market" (Bellardi 1999:48). The difference between the two documents lay in the means advocated to achieve more flexibility. On one hand, *Federmeccanica* advocated the repealing of protective legislation and did not envisage any exchange between organised Labour and Capital. On the other hand, the IRI aimed to weaken the rigidity of the *garantismo giuridico* by involving workers' organisations in the overall management of the enterprise, emphasising the relevance of trade unions in the attainment of this objective. According to this proposal, an increase in the function of the market in relation to labour standards could only be achieved through the legitimation of Labour as management's partner and its involvement in the process of re-regulation (Carinci 1986; Treu 1986; Ghera 1986; Pedrazzoli 1985).

The government endorsed the IRI approach to flexibility. Despite the absence of formal consultations between the social partners, labour standards were modified during this period through a process of cooperation between employers' organisations, trade unions and the executive. The actors never met jointly, but rather, consensus was achieved at different tables. The executive adopted a strategy similar to the one unsuccessfully endorsed by P.M. Spadolini at the turn of the decade (see section 9.3). However, the political and industrial relations climate was very different in 1985 in comparison with 1981. The factors that generated P.M. Craxi's success were: an increase in the rate of economic growth and decrease in the rate of inflation (9.2% in 1985; 5.8% in 1986), the declining power of trade unions (trade union density dropped to 40% in 1986) and the prospect of industrial peace for the

employers. The 1985 consultation also improved the bilateral relationship between employers and trade unions. This led to the ratification in 1986 of an agreement between *Cofindustria* and CGIL, CISL and UIL on the payments of the decimal points of the *Scala Mobile* and the regulation of apprenticeship contracts introduced by Law 863/1984. Although the scope of this agreement was limited, its adoption was crucial for future developments and paved the way for new relationships between Capital and Labour. In the preamble, the parties defined the common goals as: the reduction of inflation and sustained economic growth to improve employment. In the second part, trade unions and employers committed themselves to support the aforementioned objectives and to coordinate their actions at both industry and enterprise levels. In particular, trade unions pledged to negotiate work-time flexibility in order to improve the competitiveness of firms and meet their demands for flexibility.

This new climate of collaboration between the employers' associations and trade unions favoured the government in its attempt to increase reliance upon the market and reform labour standards in ways that would provide employers with the flexibility they desired. The new laws on part-time, fixed-term contracts, solidarity contracts, and the general shift from *garantismo giuridico* to negotiated labour standards (see section 7.3) should be interpreted in light of these events. The government formalised, in legal terms, cooperative practices that were already operating at contractual level (Giugni 1985). In this way, the executive was also able to avoid a direct confrontation with the CGIL and the PCI and overcome its traditional weakness.

The new cooperation between employers and trade unions directly influenced the features of protective labour law. The marketisation of labour standards in Italy has been characterised by the adoption of functional rather than numerical flexibility and more importantly it involved Labour in the decision-making process (Bellardi

1999; 1988). All negotiated labour laws enacted in Italy through this period aimed to maintain employment within firms by rotating jobs, introducing flexible working hours and involving trade unions in the process of re-regulation. The critical point here is that as market governance was increased, new forms of protection were put in place to ensure marketisation did not undermine labour standards. Functional flexibility was attained by lifting the limitations imposed on the use of part-time and fixed-term contracts and the constraints contained in article 2103 of the Civil Code. But this reform was accompanied by a strengthening of the right of trade unions to participate in management decision-making processes and this latter development limited the capacity of employers to use their new freedom to increase the level of exploitation (see section 7.3).

In the end, this participation process was supported by the great majority of employers. They accepted that the benefits, in terms of industrial peace, gained from collaboration outweighed the costs. It was a victory of the *IRI* protocol that was recognised by the volte-face of the *Federmeccanica*, which in a document released in 1988, laid aside its neo-liberal position and emphasised the virtues of the Italian way to de-regulation and flexibility (Federmeccanica 1988). Hence, whereas in Australia marketisation focused upon the reform of the bargaining structures that defended the rights of Labour, in Italy emphasis was placed on the reform of standards constraining the employers' freedom to allocate the workforce. During this period, governments limited their actions to the enactment of legislation that gave effect to agreements previously reached by trade unions and employers.

In summary, through the 1984 to 1991 period the workers' organisations accepted a greater role for the market in the area of job creation and in return the employers agreed to involve trade unions in the management of flexibility. The State facilitated this outcome because it was too weak to impose a neo-liberal agenda.

Yet, more was still to come, for Labour's countervailing demands for legal employment protection were to expand to the reform of other labour standards. This was made concrete with the enactment of Laws 108/1990 and 223/1991 that extended the protection granted by unfair dismissal legislation and regulated large-scale layoffs (see sections 8.8.2; 8.10.2). Under the latter legislative framework, employers were allowed to proceed to industrial restructuring to improve their competitiveness, while trade unions were granted the right to negotiate the terms and conditions of such restructuring.

Like the two tier system in Australia, there was a push in Italy towards the decentralisation of the locus of bargaining from the industry to the enterprise level and this process was encouraged by the new legislation on redundancy. However, it is crucial to emphasise the fact that with the level of protection for collective bargaining being left in place, even if legally weaker than in Australia, and given the sustained capacity retained by Italian trade unions to bargain at the workplace level (see sections 9.2 and 9.3), the negative consequences of decentralisation for Labour were contained. By contrast, in Australia unions inexperience with free enterprise bargaining rendered the weakening of the power of the Commission and hence the collective bargaining standard, at a time of declining union power, a serious mistake that award restructuring could not contain.

The process of marketisation and labour standards modification was paradoxically favoured by the lack of regulation of collective bargaining, the instability of governments and the rise of European labour law. On one side, the lack of laws and practices regulating collective bargaining, and the chronic incapacity of the executive to impose its determinations, made the representatives of Capital and Labour more responsible than before. On the other side, the implementation of supernational legislation, such as the European directive on large-scale layoffs, enabled governments to improve the protection against the negative effects associated

with an excessive reliance on the market and avoid a direct confrontation with the employers[89] (Del Punta 2002). The only two standards whose increase was "external" to this process were workers' compensation and unemployment/employment insurance. As revealed in sections 7.3, 8.4.2 and 8.5.2 the modification of workers' compensation and unemployment/employment insurance was the result of pronouncements of the Constitutional Court and were not included in the exchange between the social actors. This further underlines the low level of coordination between different constituencies of the State and their contradictory actions during this period.

9.5 Clipping the Wings of Trade Unions. The European Union and the Rebirth of Neo-corporatism. Formal Political Exchange and Labour Standards in the 1990s

In section 9.4, it was revealed that the 1984 to 1991 period was crucial for the Italian employment protection system as it marked the shift from *garantismo giuridico* to negotiated labour standards. It was also observed that the compromise reached by Capital and Labour in relation to labour standards was the expression of a new balance of power between employers and trade unions and the continuing weakness of the State. By contrast, the 1991 to 2000 period was characterised by a new approach to labour standards and a more pronounced change in the employment protection-market liberalisation mix in favour of the latter. Central to this process was the creation of the European Union and the single currency market. The critical point is that European economic requirements imposed a level of market discipline on the social actors that the Italian State had not been able to attain. More specifically, the

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[89] The enactment of Law 223/1991 was received by the employers without protest for two reasons. First the employers' associations did not want to trouble the new climate of collaboration with trade unions. Second, they accepted and traditionally supported the creation of the European common market and the "social" rules governing it.

European union became the major driving force that furthered marketisation by reducing the capacity of Labour to bargain with Capital and the State. This development marks a significant point of departure in comparison with the 1984 to 1991 period. In order to explore the way in which this change developed, it is necessary to analyse both the state of the economy at the turn of the decade and the interaction between the social partners during the negotiations that led Italy to join the European Union.

By the end of the 1980s, the Italian economy was afflicted by two major problems: a ballooning public deficit and sustained unemployment. Government expenditures increased from ITL 72000 billions in 1986 to over ITL 82000 billions in 1993, while unemployment ranged between 10% and 12%. The increase in government expenditures was mainly due to the renewal of several contracts in the public sector in the late 1980s and to the long-standing strategy, adopted by all Italian governments, to use public finances to gain electoral support (Mascini 2000). The economic outlook was particularly grim given Italy's need to comply with the European parameters set at Maastricht (Bordogna 1996). The prospect of losing a competitive advantage through the devaluation of the currency induced the employers to campaign again for an incomes policy. This development came about because Capital's demand for flexibility had been largely met in the 1984 to 1991 period and as a consequence employers turned their attention to wage costs (Bellardi 1999:58). The demand for a restrictive incomes policy was also triggered by the employers' fear that the increase in wages granted by governments in the public sector in the late 1980s would be exploited by trade unions to obtain similar benefits in the private sector. The strictness of the European requirements was a fundamental factor that induced this new focus.

An incomes policy appeared to be the only instrument that could reduce inflation as the economy was in recession and a restrictive monetary policy would

have affected investment and profitability negatively. In addition, while the power of trade unions had been declining, they retained significant bargaining capacity (trade union density ranged between 38% in 1993 and 36.8% in 1996) and this induced employers to continue seeking Labour's collaboration. All social partners were bound by the Maastricht parameters and committed to Europe, which acted as a factor of stability for Italian industrial relations (Negrelli and Treu 1994; Accornero 1998). However, while trade unions and employers were in a strong position at the beginning of the 1990s, the long-standing weakness of the government was further exacerbated by the massive wave of corruption scandals, known as *Mani Pulite* (clean hands), that erupted in 1992 and eliminated almost the entire governing class.

It was in this context that a new political exchange evolved through three successive stages. The first stage, finalised in December 1991, involved a reduction of tariffs and subsidised products, a 1% discount of sick leave to be borne by the State and the reform of public sector employment contracts. This first agreement between the government, employers and CGIL, CISL and UIL aimed to enhance the competitiveness of both the public and private sectors and to maintain the stability of the exchange rate. The breadth of this accord was narrow due to the long-standing incapacity of the social partners to find a compromise on a definitive reform of the *Scala Mobile* and to coordinate their demands over the income policy. In the second stage, a minority government, led by the socialist Giuliano Amato, implemented the most drastic cut in public expenditures since the constitution of the Republic. The public deficit was financed through indirect taxes and cuts in public expenditures. The *Scala Mobile* was abolished and enterprise bargaining was suspended for one year. In addition, trade unions agreed, in principle, to maintain future wage claims at industry level within the programmed rate of inflation, and to link wage increases to productivity at enterprise level (Roccella 1993; Ricciardi 1996).

It is important to note that the 1992 Protocol was designed by the Amato government and endorsed by CGIL, CISL and UIL without any modification. In spite of Amato's socialist affiliation, this protocol met virtually all the claims advanced by the employers and very little was provided to the workers' organisations. In this respect, the accord departed not only from previous domestic experiments of political exchange but also from traditional models of Northern European corporatism. Normally such models envisaged expansive fiscal policies that were utilised to compensate one or both actors (employers and trade unions) for the losses (Schmitter and Grote 1997). However, in Italy in 1992 the State was no longer able to exchange a restrictive incomes policy for fiscal benefits. The European requirements also impinged negatively on the capacity of trade unions to bargain with employers and governments. Notwithstanding the significant power retained by Labour, trade unions were forced to lay aside their demands and accept a negative exchange. It should be emphasised that despite the fact that some senior administrators of the CGIL and smaller unions with a militant tradition were aware that the European requirements were impinging negatively upon the capacity of Labour to bargain, the prevalent perception amongst trade unions (in particular the CISL and the UIL) was that the creation of the single currency market would have increased prosperity. In addition, Italian trade unions retained a sustained power and this nourished the perception, amongst trade union leaders, that this power could continue to be utilised after the creation of the monetary union.

The emphasis on economic rigour contained in the Maastricht parameters greatly affected the ability of trade unions and governments to reach a compromise that could offer rewards to Labour. This became more apparent during the third stage of the negotiation. On the 23rd of July 1993 a new Protocol was signed between a minority government led by Carlo Azeglio Ciampi, the former governor of the Italian Reserve Bank, *Cofindustria* and CGIL, CISL and UIL. This protocol aimed to give effect to the 1992 agreement as it sought to coordinate the government's policies to

control inflation and the different levels of bargaining. Trade unions and employers' associations agreed to keep wage increases of the national industry-based collective agreements within the programmed rate of inflation (which had to conform to the parameters set by the European institutions). The differential between the programmed and real rate of inflation was to be reimbursed by the employers every two years. In addition, increases granted at the enterprise level were to be linked to productivity. For its part, the government agreed to sustain employment through retraining programs, privatising employment services[90] and increasing unemployment benefits (see section 8.4.2).

This was the most comprehensive trilateral agreement in the history of the Republic since it laid down codes of conduct and deadlines for future negotiations on a broad range of issues and established rules for the regulation of the bargaining process (Alleva 1993; Ghezzi 1993). Yet, it was a trap for Labour. The 1993 Protocol, by emphasising the need to contain inflation and the Public Deficit/GDP ratio within the parameters set by the European institutions, limited the capacity of the State to use fiscal policy to compensate Labour for potential losses. The crucial point is that the Italian executive was compelled to do so by the necessity to join the European Union, whose economic policies were shaped by neo-liberal orthodoxy and imposed financial austerity and market discipline upon member States (D'Antona 1993:414-415). As part of this process, trade unions, and in particular the CGIL, were forced not only to accept real wage restraints but also to moderate their claims in the future. This induced some scholars, such as D'Antona (1993), to define the 1993 Protocol as the *"Cold Autumn"* of Labour because the restrictions imposed by the European Union left trade unions with no choice but to accept a negative exchange.

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[90] Until 1993 only government agencies could provide employment services.

As with the 1980s protocols, in the early 1990s labour standards only marginally entered the exchange between the social actors. The only standard that was included in the bargaining process was unemployment/employment insurance. Unemployment benefits were increased to 30% of the workers' average monthly wage (see section 8.4.2). This was the only immediate concession granted by the government and should be regarded as the swan song of domestic labour standards reform. Since then the increases that have occurred to Italian labour standards have been due to the implementation of European Directives; a fact that underlines the Italian reliance upon the European institutions. This latter point highlights the contradictory role played by the European Union with regard to industrial relations and labour standards. While the European economic parameters imposed market discipline on the social partners and sanctioned the end of domestic labour standards, European labour legislation had a positive effect on labour standards and was utilised to improve the protection accorded to equal employment opportunity (family leave and a reasonable working environment for disabled employees), occupational health and safety and overtime (see sections 8.7.2 and 8.9.2). Equal employment opportunity and occupational health and safety laws were implemented because the time to comply with the relevant European Directives had expired. Overtime, however, was part of a more complex process which aimed to increase the reliance upon the market by weakening the regulation of outsourcing and simultaneously compensating Labour for the potential losses that were likely to result. It is important to note that this new mix between marketisation and employment protection was attained by melding together contrasting EU directives into a single piece of legislation (Law 196/1997).

The nature of the agreement achieved by the social partners with regard to law 196/1997 is representative of the shifting balance in power between trade unions, employers and governments during this phase. The employers, strengthened in their bargaining capacity by the growing influence of the European Union, were able to further their demand for market liberalisation. Trade unions, however, partially

resisted this attempt by forcing the government to limit the breadth of the reform regulating outsourcing. As with the 1984 to 1991 period, Labour made it clear that the introduction of outsourcing was only possible on the condition that extensive supervisory rights be granted to Labour. The centre-left government, led by P.M. Prodi (1996-1997) and bound by the 1993 protocol, endorsed the trade unions' demands and enacted a law that not only provides for the compulsory involvement of workers' organisations in determining the extent to which employers are allowed to use outworkers, but also protects Labour's market power by prohibiting the use of outsourced workers to replace employees involved in industrial action (see section 8.6). In addition, as previously mentioned, the government tried to further compensate Labour by reducing the legal working time in Law 196/1997.

As with Australia, the last phase of the evolution of Italian labour standards was characterised by a change in the market liberalisation-employment protection mix in favour of the former. However, unlike Australia, this change was influenced more by the rise of the European Union than by the governments' ideological affiliation.

The concertative practices formally endorsed with the 1993 Protocol lasted through the 1990s although they had never been very stable (Bellardi 2000; Baglioni 1995). Trade unions, and in particular the CGIL, often felt uncomfortable with their limited scope for direct action. Paradoxically the position of trade unions was aggravated by the governance of centre-left governments through the 1990s which maintained their ties with CGIL, CISL and UIL. This further constrained the strategies of Labour. The instability of neo-corporatism became clear in 1994 after the victory of a centre-right coalition led by the entrepreneur Silvio Berlusconi. Berlusconi's attempt to reform superannuation and pensions in a restrictive way caused a national general strike called separately by CGIL, CISL and UIL. The government resigned in the aftermath of the protest. A new government, led by the

centre-right Dini, implemented, with the support of trade unions, a reform of the superannuation benefits similar to the one envisaged by Berlusconi.

9.6 Conclusion

The evolution of labour standards in Italy has been influenced by changes in the distribution of power between the social actors and by the inception of the European Union. While in the 1960s to late 1970s Labour was able to campaign successfully at both contractual and political levels, in the 1980s and 1990s its political capacity partially declined while employers' influence rose. This was mainly due to the macro-economic environment and the declining level of unionisation that accompanied the industrial restructuring in the 1980s. In spite of this, some labour standards increased. The protection accorded to overtime, large-scale layoffs, occupational health and safety, equal/employment opportunity and unemployment/employment insurance was enhanced. The increase in the protection accorded to different standards was the result of parallel processes. On one hand, equal employment opportunity/employment equity, overtime, large-scale layoffs and occupational health and safety were strengthened through the implementation of European Directives. These Directives were utilised by governments to advance labour standards and to avoid a direct confrontation with the employers. On the other hand, unemployment/employment insurance and to a limited extent unfair dismissal were increased through a domestic process. Large-scale layoffs, unemployment/employment insurance, unfair dismissal and overtime were enhanced to counter-balance an increasing reliance upon market forces. This development reached its zenith with the enactment of legislation that weakened the rigidity of provisions regulating the use of part-time, fixed-term contracts, outsourcing, the prescriptions contained in article 2103 of the Civil Code and in general through the shift from *garantismo giuridico* to negotiated labour law. The deregulation that occurred to these standards was accompanied by the strengthening of trade unions'

legal rights to bargain with employers. As stated in section 9.4, this proved to be a crucial difference in comparison with similar events that occurred in Australia as Italian trade unions, which traditionally had a better capacity to freely negotiate employment conditions at the enterprise level than their Australian counterparts, were further strengthened in their ability to bargain with management, in this way precluding Capital from over exploiting the new regulations on 'flexibility'. This development was influenced greatly by the continuation in office of centre-left governments and the historical connections between political parties and trade unions.

The increase in labour standards protection was only marginally influenced by the adoption of corporatist practices. Trilateral negotiations normally centred upon contractual issues and the containment of two long-standing economic problems: inflation and public deficit. Such practices were highly unstable during the early 1980s and were abandoned from 1984 until the early 1990s. In spite of this, informal consultations continued and contributed to the adoption of negotiated labour laws and functional flexibility. This arrangement was shaped by the balance of power between employers and trade unions and by the weakness of successive governments. This stands in striking contrast with Australia, where the stability of neo-corporatism led to a comprehensive reform of the legal framework regulating the employment protection system and to a weakening of Labour's capacity to bargain in the market.

Finally, it should be emphasised the fact that the European Union had a double effect on labour standards. On one side, as stated repeatedly, European Directives were utilised by various centre-left governments to increase the protection accorded to some labour standards. On the other side, the European economic requirements imposed an unprecedented level of market discipline upon the social actors and constrained the capacity of Labour to negotiate terms and conditions of employment. Again like in Australia, Labour's capacity to bargain began to be eroded in Italy in the

1990s, although this erosion was due to the adoption of the European neo-liberal boundaries rather than the enactment of repressive legislation.

CHAPTER TEN

THE COMPARATIVE EVOLUTION OF LABOUR STANDARDS IN AUSTRALIA AND ITALY (1979-2000)

10.1 Introduction

Having completed the measurement and analysis of labour standards in Australia and Italy through the 1979-2000 period, the thesis will conclude by comparing the respective experiences of the two countries. The main finding of this chapter is that there had been a convergence across the two nations with regard to the level of legal protection accorded to labour conditions. In explaining this outcome, the chapter makes five key points. First, the dynamic underpinning this convergent pattern was similar in both countries as labour standards were increased to counter-balance a greater reliance on market forces. Second, the continuing tension between the demand for marketisation and employment protection produced a different outcome across the two countries. While in Australia this tension caused a weakening of Labour's right to bargain, in Italy the countervailing demand for employment protection focused on maintaining workers' market power. The latter development is critical, for in the case of Australia it meant trade unions were forced to operate in an environment in which market forces were increasingly allowed a freer hand and therefore Labour's capacity to bargain became a more crucial factor determining whether working conditions were adequately sheltered. Third, in Italy the weakness of the State and the collapse of corporatism in the mid 1980s largely explains the degree of union success in sustaining workers' capacity to bargain. By contrast, in Australia governments were strong and, hence, were able to promote a neo-liberal agenda. This development was paradoxically supported in Australia by those trade unions with industrial muscle which were dissatisfied with the determinations of the AIRC during the years of centralised wage indexation and consequently supported the weakening of the powers

of the Commission. Fourth, the market-liberalisation/employment protection mix changed during the 1990s in Australia and Italy in favour of the former. This development was encouraged in both countries by the increasing capacity of the employers to campaign for labour market flexibility. However, while in Australia the employers' demands were endorsed by both the Labor Party and the Coalition, in Italy the increasing marketisation of the economy was due to the inception of the European Union rather than a genuine enthusiasm of the State for neo-liberal solutions. Fifth, the more confrontationist strategy adopted by Italian trade unions in comparison with their Australian counterparts, coupled with the continuing weakness of the Italian State, were crucial factors in ensuring that the market's domain remained more constrained in Italy than in Australia.

The chapter is divided into two main parts. In the first part, the indexes generated in chapters 5 and 8 will be compared and analysed. In addition, a summary of the changes that affected each standard will be provided. The second part considers: the main features of the industrial relations processes that led to an increased reliance on market forces in the two countries; the characteristics of neo-corporatism and its role in shaping the changes that occurred to labour standards and the relevance of the institutional factors in determining the level and type of labour standards protection.

10.2 Converging Employment Protection Systems: Labour Standards in Australia and Italy 1979-2000

Table 10.1 provides a summary of the indexes generated for the two countries in 1979 and 2000. The last two columns display the respective sums of the standards in 1979 and 2000 and the averages. In general, labour standards increased in both Italy and Australia. While the sum of the indexes in 1979 was 59.74 for Australia and 58.46 for Italy, this figure increased to 79.38 for Australia and 67.61 for Italy in 2000. Although summing across the ten indices provides a general overview of the trend, it is not

acceptable to perform a cross-standard analysis within and across the two nations because the components of each of the standards are not comparable. Ranking the indexes provides information that is more accurate (see table 10.2).

Table 10.1: Basic Indexes of Comparative Labour Standards in Australia and Italy in 1979 and 2000

Standard/Country	1979		2000	
	Australia	Italy	Australia	Italy
Minimum Wage	8.08	6.57	9.4	6.57
Overtime	9.50	1.35	9.50	3.97
Paid Time Off	9.29	7.98	9.29	8.71
Unemployment Insurance	7.20	4.70	7.20	5.40
Workers' Compensation	6.68	6.44	5.93	6.91
Collective Bargaining	10.00	4.75	6.75	4.75
Equal Employment Opportunity	2.50	7.30	7.50	7.70
Unjust Discharge	1.50	8.50	8.50	8.50
Occupational Health and Safety	2.99	4.87	7.71	5.60
Large-Scale Layoffs	2.00	6.00	7.60	9.50
Sum Basic Indexes	**59.74**	**58.46**	**79.38**	**67.61**
Averages	**5.97**	**5.85**	**7.94**	**6.76**

In 1979 Australia ranked first in six standards: minimum wage, overtime, paid time off, unemployment insurance, workers' compensation and collective bargaining, while Italy led in four areas: equal employment opportunity/employment equity, unjust discharge, occupational health and safety and large-scale layoffs. In short, the employment protection system in Australia granted more extensive protection than the Italian one with regard to standards requiring employers' payments, while Italy led in relation to standards constraining the employers' actions *vis a vis* the employees (with the exception of collective bargaining). The relative ranking of the two countries changed slightly in 2000 with Australia ranking first in minimum wage, overtime, paid time off, unemployment/employment insurance, collective bargaining and

occupational health and safety and Italy leading with regard to workers' compensation, equal employment opportunity/employment equity and large-scale layoffs (see table 10.2). In 2000, the differences between the two countries were less polarised than in 1979. On one hand, Italy displaced Australia on one standard requiring employers' payments (workers' compensation). On the other hand, Australia matched Italy on standards constraining the employers' actions *vis a vis* the employees (unjust discharge) and pulled ahead of Italy on occupational health and safety.

Table 10.2: Comparative Ranking of Labour Standards in Australia and Italy in 1979 and 2000

Standard/Country and Ranking	1979		2000	
	Australia	Italy	Australia	Italy
Minimum Wage	1	2	1	2
Overtime	1	2	1	2
Paid Time Off	1	2	1	2
Unemployment Insurance	1	2	1	2
Workers Compensation	1	2	2	1
Collective Bargaining	1	2	1	2
Equal Employment Opportunity	2	1	2	1
Unjust Discharge	2	1	-	-
Occupational Health and Safety	2	1	1	2
Large-Scale Layoffs	2	1	2.	1

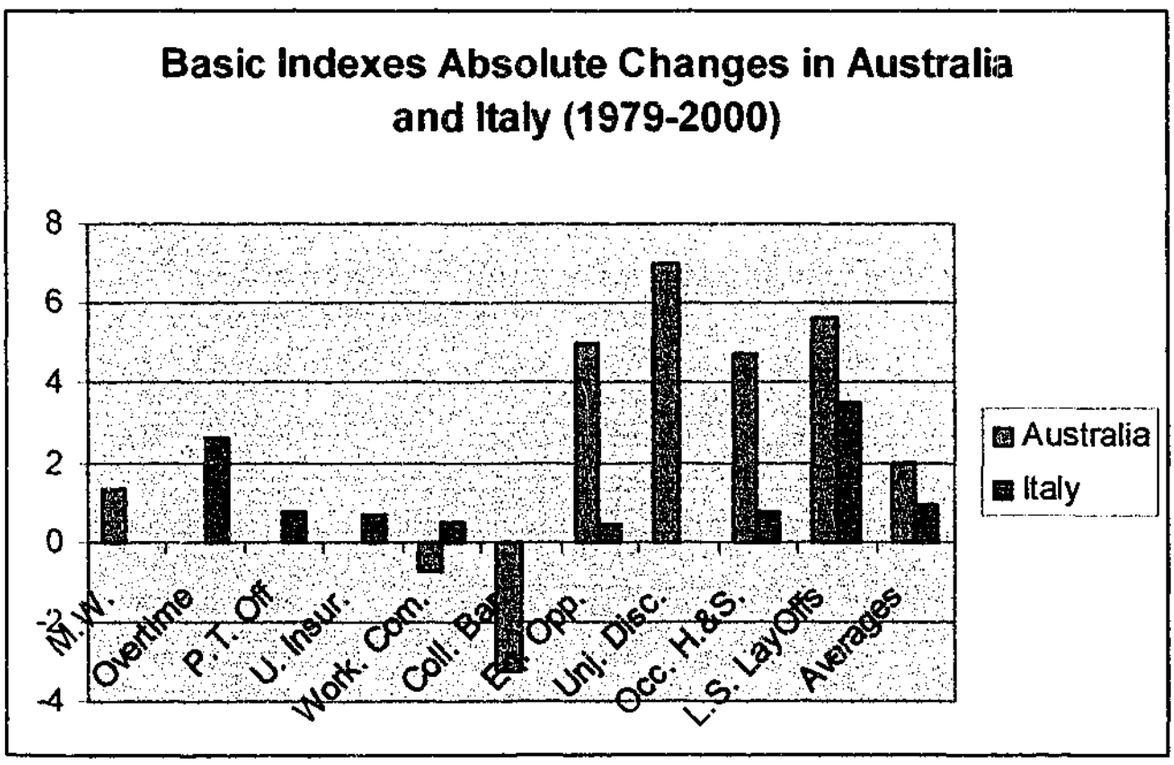
Importantly, five indices increased in Australia (minimum wage, equal employment opportunity/employment equity, unfair dismissal, occupational health and safety and large-scale layoffs) and seven in Italy (overtime, paid time off, unemployment/employment insurance, workers' compensation, equal employment opportunity/employment equity, occupational health and safety and large-scale layoffs) with such increases averaging 1.96 for Australia and 0.92 for Italy.

While in Italy the increases mostly involved standards requiring employers' payments (overtime, paid time off, unemployment insurance and workers' compensation) in Australia protective legislation strengthened the protection accorded to standards constraining the employers' actions *vis a vis* the employees (equal employment opportunity/employment equity, unjust discharge, occupational health and safety and large-scale layoffs). Two standards, collective bargaining and workers' compensation, decreased in Australia. Table 10.3 provides a summary of the absolute changes and their averages. The results are graphically displayed in figure 10.1.

Table 10.3: Basic Indexes Absolute Changes in Australia and Italy in 1979 and 2000

Standard/Country	Australia (1979/2000)	Italy (1979/2000)
Minimum Wage	1.32	0.00
Overtime	0.00	2.62
Paid Time Off	0.00	0.73
Unemployment Insurance	0.00	0.70
Workers Compensation	-0.75	0.47
Collective Bargaining	-3.25	0.00
Equal Employment Opportunity	5.00	0.40
Unjust Discharge	7.00	0.00
Occupational Health and Safety	4.72	0.73
Large-Scale Layoffs	5.60	3.50
Averages	**1.96**	**0.92**

Figure 10.1



There has been an overall convergence in relation to the employment protection systems of the two countries over the two decades examined. Tables 10.4 and 10.5

provide a summary of both the absolute differences and the ratios of the indexes in 1979 and 2000. The lower the differences and the ratios, the closer the standards.

Table 10.4: Comparative Absolute Differences in Australia and Italy in 1979 and 2000 (Higher Standard-Lower Standard)

Standard/Year	1979	2000
Minimum Wage	1.51*	2.83*
Overtime	8.15*	5.53*
Paid Time Off	1.31*	0.58*
Unemployment Insurance	2.50*	1.80*
Workers Compensation	0.24*	0.98**
Collective Bargaining	5.25*	2.0**
Equal Employment Opportunity	4.80**	0 .0**
Unjust Discharge	7.00**	7.00**
Occupational Health and Safety	1.88**	2.11*
Large-Scale Layoffs	4.00**	1.90**
Averages	**3.66**	**1.79**

* *Australia-Italy*, ** *Italy-Australia*

Table 10.5: Comparative Ratios in Australia and Italy in 1979 and 2000 (Higher Standard/Lower Standard)

Standard/Year	1979	2000
Minimum Wage	1.23*	1.43*
Overtime	7.04*	2.39*
Paid Time Off	1.16*	1.07*
Unemployment Insurance	1.53*	1.33*
Workers' Compensation	1.04*	1.16**
Collective Bargaining	2.10*	1.42*
Equal Employment Opportunity	2.92**	1.03**
Unjust Discharge	5.70**	1.00**
Occupational Health and Safety	1.63**	1.38*
Large-Scale Layoffs	3.00**	1.25**
Averages	**2.73**	**1.35**

* *Australia/Italy*, ** *Italy/Australia*

Six standards converged at a higher level: overtime, paid time off, unemployment/employment insurance, employment equity, unjust discharge and large-scale layoffs, while only one standard, collective bargaining, converged at a lower level. The convergence was particularly relevant for overtime, equal employment opportunity/employment equity, unjust discharge and large-scale layoffs. Two standards slightly diverged (minimum wage and workers' compensation). Figures 10.2 and 10.3 provide a graphic outlook of the results displayed in tables 10.4 and 10.5.

Figure 10.2

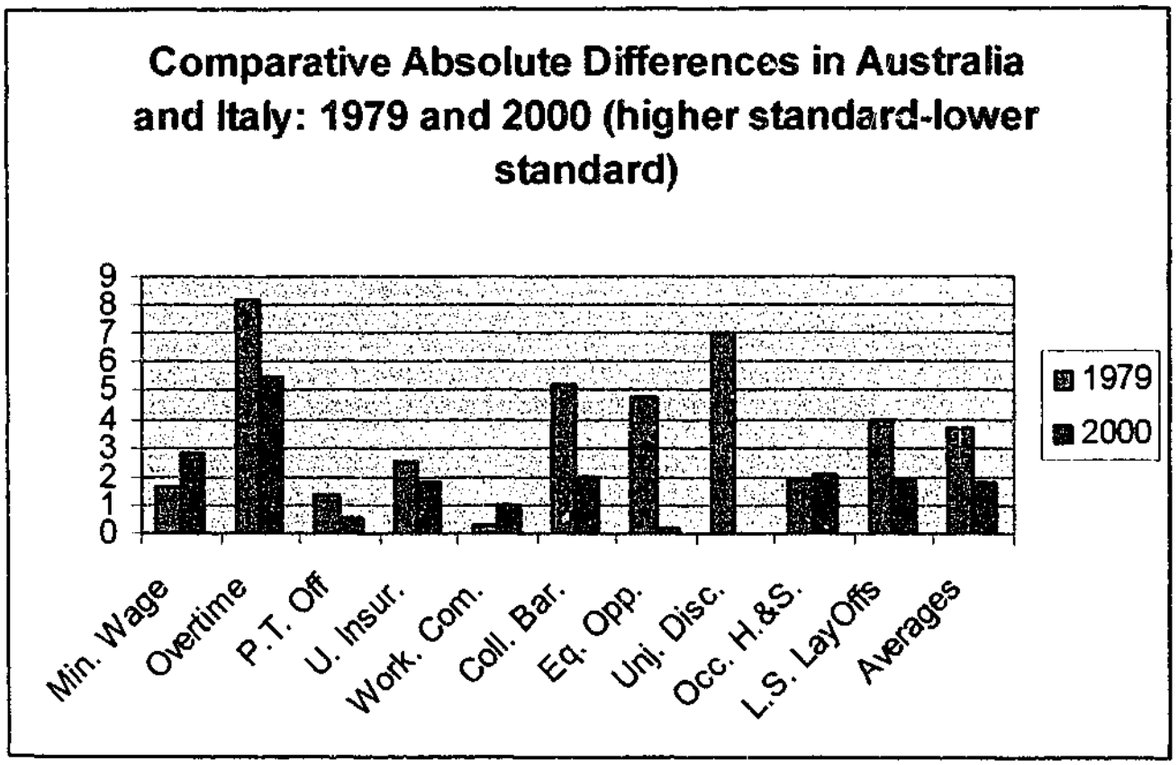
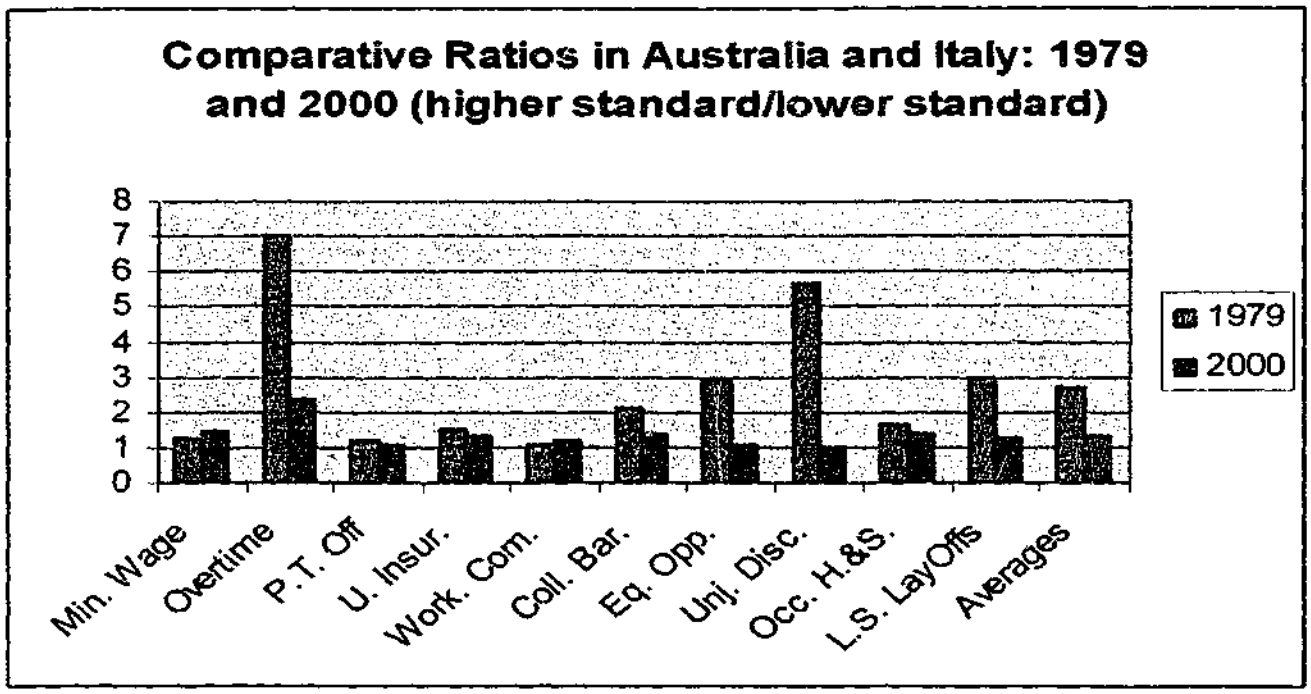


Figure 10.3



The next section will analyse in detail the provisions for each standard that determined the observed pattern.

10.3 Labour Standards in Australia and Italy 1979-2000

10.3.1 Minimum Wage

The minimum wage diverged slightly over the two decades studied. Australia was scoring 8.08 in 1979 and 9.4 in 2000, while the index for Italy was 6.57 in both years. This discrepancy was due to the minimum wage level, which slightly increased in real terms in Australia (due to a change in the standard working hours which decreased from 40 in 1979 to 38 in 2000), while working hours remained stable in Italy (see sections 5.1.2; 8.1). It should be noted that the method utilised does not capture some peculiar features concerning the legal system of minimum wage fixation in Italy. Italy is characterised by a far-reaching system of wage protection, though a minimum is not legally established. As explained in section 7.2, the Italian Constitution provides for the mandatory application of the wage level prescribed by the relevant collective

agreement where an employee is not covered by a collective agreement. In order to ensure conformity with the definition of minimum wage, the lowest possible wage level prescribed by collective agreements[91] was chosen. This procedure underestimated the score for Italy, as only a small proportion of the workforce is paid at that level.

10.3.2 Overtime

The standard for overtime converged at a higher level in the two decades. The index in Australia remained stable at 9.5 while it increased in Italy from 1.35 in 1979 to 3.97 in 2000. This was mainly due to the introduction of Law 196/1997 which reduced the legal working hours from 48 to 40. The method effectively captures the extension of the protection in the two countries and correctly characterises the nature of the legal sources. Awards in Australia provide for more generous entitlements than legislation in Italy (see sections 5.2; 8.2.1; 8.2.2). This is due to the nature of awards that incorporate contractual aspects, while legislation in Italy only provides for an across-the board minimum.

10.3.3 Paid Time Off

The index for paid time off converged at a higher level. Australia was scoring 9.29 in 1979 and 2000 while Italy increased the protection accorded to this standard from 7.98 in 1979 to 8.71 in 2000. Italy had more public holidays (up from 9 to 12) than Australia in 2000 and less in 1979 (see sections 8.3.1; 8.3.2). Annual leave are better paid in Australia with an annual leave loading standard of 17.5% compared to zero in Italy. Both countries provide for four weeks of paid leave after one year of continuous

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[91] This was the wage prescribed by the metalworker agreement for a new hired employee at the 1st level.

service and the number of days of leave and the time after which an employee becomes eligible to take annual leave did not change in either country between 1979 and 2000.

10.3.4 Unemployment/Employment Insurance

The standard for unemployment/employment insurance converged at a higher level. The score for this index in Australia was 7.2 in 1979 and 2000 while in Italy it was 4.7 in 1979 and 5.4 in 2000. This was the result of increases in Italian unemployment benefits from 5.4% of the workers' average monthly wage in 1979 to 30% in 2000. This figure is higher than the Australian one. In this country, unemployment benefits have ranged between 21% and 23% of the average weekly wage. However, the eligibility requirements and the length of time a recipient is entitled to receive unemployment benefits have been consistently more favourable in Australia than in Italy. Legislation in Australia holds that in order to be eligible a recipient must be unemployed while Italy requires at least three months of continuous employment (see sections 5.4; 8.4.1; 8.4.2). In addition, Australian unemployment benefits can be enjoyed for much longer than in Italy (see sections 5.4; 8.4.1; 8.4.2). A significant difference, which is not captured by the applied scale, relates to the fact that unemployment benefits are means tested in Australia but not in Italy.

10.3.5 Workers' Compensation

The standard for workers' compensation diverged between the two countries. The workers' compensation index decreased in Australia (Victoria) from 6.68 in 1979 to 5.93 in 2000 and increased in Italy from 6.44 in 1979 to 6.91 in 2000. The decrease in Australia was due to the modification of the enforcement procedure which was transformed from an adversarial, internal and non-appealable system under the *Workers' Compensation Act (1958)(Vic)* to one based on conciliation under the

Accident Compensation Act (1985) (Vic). However, if conciliation fails the matter may be dealt with by the Judiciary (see section 5.5.2). In Italy, the index for workers' compensation increased due to the introduction of more extensive coverage provided to work-related diseases (see section 8.5.2). Looking at the sub-components of the standard, Victorian legislation is more complete with respect to the benefits level. Although actual benefits tend to be slightly higher in Australia than in Italy, Australia generally provides less extensive benefits to widows and survivors in the event of death (see sections 5.5.1; 5.5.2; 8.5.1; 8.5.2).

10.3.6 Collective Bargaining

Collective bargaining is the only standard that converged at a lower level. The basic index was scoring 10 in Australia in 1979 and 6.75 in 2000 while in Italy it was 4.75 for both years. The enactment of the *Workplace Relations Act (1996)(Cth)* in Australia substantially curtailed the institutional protection accorded to collective bargaining. The introduction of individual agreements, the repealing of first agreement arbitration and the constraints imposed upon the powers of the Australian Industrial Relations Commission significantly eroded the level of protection accorded to this standard (see section 5.6.2). This process was compounded by the adoption of more severe penalties against secondary boycotts and the introduction of provisions reducing the trade unions' rights of entry (see section 4.3.2). The standard for Australia in 2000 was still higher than the index for Italy due to the presence of a mechanism of conciliation.

The changes introduced by the *Workplace Relations Act (1996)(Cth)* brought the legal framework in Australia closer to the Italian system of collective bargaining. In this country, the failure to implement section 39 of the Constitution led to a substantial lack of rules regulating the bargaining process (see sections 7.3; 8.6). This resulted in the same level of protection being accorded to individual and collective

agreements, in the absence of first agreement arbitration and in the lack of an enforcement procedure (see section 8.6). It should be mentioned that the right to strike is better protected in Italy than in Australia. The right to undertake industrial action was not granted in Australia in 1979 and was limited in 2000 (see sections 5.6.1; 5.6.2). In Italy, section 40 of the Constitution provides for extensive protection of this right (see sections 7.3; 8.6). In short, the lack of a legal framework regulating collective bargaining in Italy has been counter-balanced by the greater protection accorded the right to undertake industrial action. This represents a significant difference between the two countries.

10.3.7 Equal Employment Opportunity/Employment Equity

The index for EEO/EE converged at a higher level. Equal Employment Opportunity/ Employment Equity scored 2.5 in 1979 and 7.5 in 2000 in Australia while the values for Italy increased slightly from 7.3 in 1979 to 7.7 in 2000. In 1979, Italy provided for stronger EEO/EE protection than Australia. Italian legislation covered areas such as gender, religion, political beliefs, disability, paid maternity leave and equal pay for work of equal value which were neglected in Australia. By 2000, Australia had caught up with Italy on most of these grounds while both countries introduced statutory provisions on reasonable workplace accommodation for disabled employees. It should be emphasised that Italy has stronger legislation than Australia in relation to family leave and that Australia in 2000 still did not provide compulsory paid maternity leave. Sexual harassment is a proscribed ground of discrimination in Australia but not in Italy. In both countries, age and sexual preference/orientation are not considered proscribed grounds of discrimination. The Judiciary in Australia and Italy administrates the enforcement procedure.

10.3.8 Unjust Discharge

This standard converged at a higher level. The index for Australia scored 1.5 in 1979 and 8.5 in 2000, while in Italy it has remained 8.5 during the period studied. In 1979, Australian legislation did not provide for statutory protection against unfair dismissal while in Italy Law 604/1966 and the *Statute of the Workers' Rights* (Law 300/1970) granted extensive protection to this standard (see sections 5.8.1; 8.8.1). The improvement of this standard in Australia was due to the enactment of the first federal unfair dismissal legislation in 1993 (see section 5.8.2). In Italy in 1979 unfair dismissal laws did not apply to workers employed in firms with less than 15 employees. This omission was corrected in 1990 by Law 108/1990 that extended the scope of Law 604/1966 to firms with less than 15 employees. Unfair dismissal legislation does not cover part-time, casual and probationary employees in either country.

It should be noted that the unfair dismissal regime is more effective in Italy than in Australia. In Italy, once a judge ascertains that a dismissal occurred without a just cause, the reinstatement is compulsory and takes place immediately (in firms with more than 15 employees). In addition, the Italian legislation provides for a far more expeditious and effective system of enforcement than the one envisaged by the ordinary procedure. This stands in contrast with Australia where the reinstatement of the discharged employee is left to the discretion of the AIRC while the enforcement procedure is an ordinary one. In addition, the unfairly dismissed employee in Italy is entitled to all the money owed by the employer during the period of dismissal (in firms with more that 15 employees) and to a sum in lieu of compensation in firms with less than 15 workers.

10.3.9 Occupational Health and Safety

The standard for occupational health and safety converged at a higher level. Australia scored 2.99 in 1979 and 7.71 in 2000, while the index for Italy was 4.87 in 1979 and 5.6 in 2000. The discrepancy between the two standards in 1979 was due to the following factors: Italian legislation provided for a general duty clause; violators of OHS regulations could be imprisoned for longer in Italy than in Australia; Italian legislation provided for penal as well as civil liabilities and the enforcement procedure in Italy was internal with the possibility of appeals against the Authority decisions being constrained (see sections 5.9.1; 8.9.1). Occupational health and safety increased in Australia largely because the new occupational health and safety laws introduced: general duty clauses, more severe fines, compulsory health and safety committees and compulsory record-keeping (see section 5.9.2). In Italy, the index increased due to the adoption of compulsory occupational health and safety committees and mandatory record-keeping (see section 8.9.2).

Overall, the level of protection in the two countries is similar, though Italy has a more effective system of enforcement. The difference between the 1979 and the 2000 scores in the two countries is due to the level of penalties which is significantly higher in Australia than in Italy. As the level of fines heavily biases the scale applied, the 2000 index for Australia is higher than the Italian one. This underscores the level of protection accorded to occupational health and safety in Italy since the severity of penalties is not an accurate indicator of the degree of effectiveness of occupational health and safety legislation.

10.3.10 Large-Scale Layoffs

The standard for large-scale layoffs converged at a higher level. The index for Australia was 2 in 1979 and 7.6 in 2000 while Italy scored 6 in 1979 and 9.5 in 2000. Legislation in Italy in 1979 provided for advance notice of dismissal, notice to the

affected employee and severance pay. In Australia, only notice to the affected employee was granted at common law level (see sections 5.10.1; 8.10.1). It should be emphasised that in 1979 both countries did not have a comprehensive legal framework regulating large-scale layoffs. The more generous entitlements provided in Italy were due to individual unfair dismissal legislation (see section 8.10.1).

By 2000, both countries enacted laws strengthening the protection granted to large-scale layoffs. However, Australia falls short of Italy. In both countries legislation provides for: the same minimum number of employees (15) who are necessary to trigger the redundancy procedure, advance notice, notice to the affected employee, notice to government and severance pay (see sections 5.10.2; 8.10.2). In addition, Italian legislation contains a compulsory mechanism of conciliation, requires the employer to specify the maximum period within which the discharge must occur and to notify the intention to initiate the redundancy procedure to the most relevant union (see section 8.10.2). Both countries are characterised by an ordinary procedure to enforce the standard. It should be emphasised that severance pay is more generous in Italy than in Australia. In Italy a dismissed employee is entitled to at least a month of regular pay for each year worked while in Australia pursuant to the prescriptions contained in the *Technological Change and Redundancy Test Case*, the AIRC usually grants up to a maximum of eight weeks pay (see sections 5.10.2; 8.10.2)

10.4 Marketisation, Neo-Corporatism, and the Evolution of Labour Standards in Australia and Italy 1979-2000

In 1979, the employment protection systems were significantly different across the two countries. On one hand, the functioning of compulsory conciliation and arbitration ensured that the legal protection accorded to standards requiring employers' payments was higher in Australia. The extensive protection granted to overtime, paid time off and minimum wage reflected the nature of awards that incorporated contractual as well as legal aspects (see section 4.2.2). On the other

hand, the employment protection system in Italy was more effective with regard to standards constraining the employers' actions *vis a vis* the employees including unfair dismissal, large-scale layoffs, occupational health and safety and equal employment opportunity/employment equity. Thus, in Italy, workers were better protected against market volatility and hence in any weakening in their bargaining power that might be induced by a weakening of their market power. In addition, in Italy several other aspects of the employment relationship were regulated by law. The use of part-time, fixed-term contracts and outsourcing was severely restricted, the possibility to rotate jobs was limited by article 2103 of the Civil Code and great emphasis was placed on industrial democracy at the workplace through the provisions contained in the *Statute of Workers' Rights* (see section 7.3).

Overall, the areas regulated by law were far more numerous in Italy than in Australia in 1979. Four factors underpinned this development: First, the greater capacity of the Italian trade unions to exert pressure on governments to increase labour standards in comparison with their Australian counterparts; second, the historical connections between trade unions and the political parties in Italy; third, the political contexts and fourth, the different legal systems in the two countries.

In Italy, economic growth during the 1962-1974 period and the achievement of full employment substantially strengthened the capacity of trade unions to promote labour standards. This capacity was reinforced by the social and political uprising that erupted in 1969 and continued through the 1970s. Labour standards improvements in Italy followed a consistent pattern. From 1962 to 1969, trade unions campaigned for job and wage security. From 1969 to the late 1970s, on the wave of the Hot Autumn, the workers' organisations "upped the ante" by shifting their focus to industrial democracy and equal employment opportunity (see section 9.2). This strategy was facilitated by the political climate. Trade unions' claims were supported by the PCI,

while the shift in leadership that occurred within the Christian Democrats made this party more inclined to strengthen the legal protection accorded to labour conditions.

This development was also influenced by the features of the institutional framework. The failure to implement section 39 of the Constitution generated a void in the legal structure governing collective bargaining. As noted in section 7.2, collective agreements are only binding for the members of the signatory organisations. As a result, the bargaining process in Italy was traditionally based on *Collective Laissez Faire* and it was also influenced by the relative power position of the actors. The growing market power of Labour in the 1960s and 1970s was utilised to re-address this lacuna by initially campaigning for job security and subsequently for industrial democracy. The aim of this strategy was twofold: first, to provide a minimum level of protection to the workers at the bottom end of the labour market and second, to strengthen the capacity of the workforce to organise and bargain with the employers at the enterprise level.

The scenario was significantly different in Australia in 1979. The operation of compulsory conciliation and arbitration ensured that a sustained level of institutional protection was granted to the right of trade unions to bargain with the employers and rendered the basic conditions of employment homogeneous amongst the workforce and considerably higher than in Italy. It should be noted that most of the standards requiring employers' payments (minimum wage, overtime and paid time off) increased in Australia during the mid-1970s as a consequence of the sustained economic growth and full employment. Furthermore, the protection accorded to equal employment opportunity, an area where Australia had traditionally lagged behind Italy, began to receive protection after the election of the Whitlam government (see sections 6.2; 6.3).

This situation dramatically changed over the following two decades. From the early 1980s, a process of labour standards re-regulation has taken place in Australia

and Italy. This process was part of a broader development which aimed to increase the reliance on market forces and led to a decline in the relevance of society-based regulatory institutions. More specifically, the five institutional forms of regulation, identified by French Regulation theorists (see section 3.3), were subjected in both countries to profound revisions which aimed to expand the realm of the market, encourage a new process of capital accumulation and "reproduce" the capitalist mode of production. In particular, three forms of regulation, the forms of competition, the relations of the state with the economy and the relations of the economy with the international system (see section 3.3) were amended in a way that greatly affected the wage labour nexus and ultimately labour standards.

The rules and procedures regulating the forms of competition were increasingly weakened in Australia and Italy over the period considered. Access to foreign capital and credit markets was made easier by allowing foreign credit groups to operate in both national contexts also enabling domestic corporations to acquire funds on off-shore capital markets. While in Australia this development was initiated by the Hawke government's competition policy, in Italy the urgency to join the Economic European Union in the mid 1980s put pressure on different governments to remove restrictions on capital mobility. This development had two important implications to understand subsequent events that affected labour standards: first, domestic capital operators were subjected to enhanced international competition thus forcing the former to restructure their internal organisation by increasing Labour productivity and second, the greater availability of financial resources enabled firms to acquire new technologies to replace labour-intensive productions, retrench employees and weaken the power position of workers. In addition, State monopolies (such as telecommunications, transports and services) were dismantled or substantially downgraded so that large segments of the workforce in key industries were exposed to further competitive pressure. However, while in Australia this process was quickly endorsed by Federal and State governments, in Italy trade unions

and governments resisted the European enthusiasm for increased competition for most of the 1980s-early 1990s.

The relations of the State with the economy is the second institutional form of regulation that was subjected to substantial modifications. The common feature across the two countries was a continuos withdrawal of the State from the management of macro-economic issues and an increased reliance of society on privately earned incomes. In Australia the access to welfare benefits was tightened up, pensions were changed from a "pay as you go" system to a superannuation system funded through private contributions while the financial burden of Medicare was progressively shifted from the State to the citizens. This process was compounded by cuts in direct taxes for business and individuals that limited the availability of financial resources to governments and extensive programs of privatisation. In Italy, this development was slower than in Australia in the mid 1980s-early 1990s as during this period it only involved restricted reforms of Medicare and the pension system but dramatically accelerated after the creation of the European Union in 1992.

Finally, the last institutional form of regulation, the relation of the economy with the international system, dramatically changed in Australia and Italy. Both countries were increasingly integrated into the global economy. In Australia critical developments were the floating of the currency, the cutback in trade tariffs, the repealing of industrial and agricultural subsidies and the privatisation of public assets. Italy was characterised by similar reforms urged by the inception of the European Union. These developments restricted the capacity of Labour and the State to control Capital's activity also exposing the national economies to external financial and economic shocks. The critical point of this process was that the neo-liberal ideology that shaped the regulatory characteristics of the international system (see sections 2.4 and 2.4.1) enabled Capital to override, to a considerable extent, domestic regulations. Although this was true for both national contexts, Australia was far more exposed to

international shocks than the Mediterranean country because the latter was integrated into the international system via the European Union which constrained the freedom of non-European capitals.

The dominant element across changes in these institutional contexts was the adoption of market-based forms of regulation. This greatly influenced the fourth institutional context, the wage labour nexus (see section 3.3), and the evolution of labour standards. In particular, sustained competition and the possibility to access global capital markets enabled Capital to increase Labour's productivity by introducing new technologies, while the withdrawal of the State from the management of the welfare system enhanced both the power position of Capital and the reliance of Labour on competitive outcomes. In this scenario, Capital became the primary agent of labour standards reforms by quickly electing the market as its preferred form of regulation. As noted by French Regulation theorists, Capital attempts to change the institutional forms of regulation were dictated by an erosion of the margins of profitability which began in the late 1960s in Australia and in the mid 1980s in Italy coupled with declining rates of productivity (see sections 3.3, 6.2, 6.3, 6.4, 6.5, 9.2, 9.3, 9.4 and 9.5). The restructuring advocated by the employers was part of a broader development which aimed to strengthen the interests of Capital by breaking down the forms of regulation that characterised the social democratic compromise and facilitated a prolonged period of Capital accumulation in the aftermath of Second World War.

Turning to the industrial relations and labour standards processes, the features of the institutional framework informed the actions of the social partners in selecting which standards were to be included in the process of marketisation. In Australia attention was placed on the dismantling of compulsory conciliation and arbitration, while in Italy the governments' policies focused on lifting the rigidity of provisions constraining the employers' freedom to utilise the workforce (see sections 4.2; 6.3;

6.4; 7.2; 9.3). Reform was initially achieved in Australia through the enactment of the *Industrial Relations Act (1988)(Cth)* and subsequently via the *Industrial Relations Reform Act (1993)(Cth)* and the *Workplace Relations Act (1996)(Cth).* As previously argued, these legislative changes flanked a process of marketisation that exposed the Australian economy to international market forces. Five measures were particularly relevant in enhancing the reliance on market forces: the floating of the Australian dollar in 1983; the deregulation of the banking sector; drastic reductions in tariffs; the privatisation of public assets and the adoption of the OECD active society model of social security.

In Italy, given the unregulated nature of collective bargaining, greater scope for the market was attained through the weakening of laws constraining the use of part-time and fixed-term contracts, outsourcing and by lifting the limitations prescribed by article 2103 of the Civil Code (see section 7.3). The need to achieve a greater reliance on the market explains why collective bargaining converged downwards. In order to obtain more flexibility in Australia, it was deemed necessary to decrease the influence of industrial tribunals. In Italy, the weakening of legislation regulating collective bargaining was not a priority given the low level of institutional protection that has traditionally characterised this standard and workers' resistance to any dilution of their ability to organise for collective bargaining purposes (see section 7.2).

Three common factors underpinned the process of marketisation in Australia and Italy. First, both countries experienced economic difficulties in the early 1980s. High rates of inflation and unemployment, coupled with sluggish economic growth in Australia and a chronically high public deficit in Italy, induced governments to abandon Keynesian economics and endorse neo-liberalism (see sections 6.3; 6.4; 9.2; 9.3). In Italy, this shift was greatly influenced by the emphasis placed, by European Union institutions, on the creation of fully competitive financial and commodity

markets and by the necessity to achieve a low GDP/public deficit ratio and to contain inflation. The latter requirement severely curtailed the governments' capacity to utilise expansive fiscal policies and imposed market discipline on the social partners (see section 9.5). Second, there has been a shift in relation to the ideological legacies of the centre-left parties in both countries during the 1980s. These parties supported the introduction of neo-liberal economics and associated policies. However, while economic rationalism was relatively quick at capturing the intelligentsia of the Labor Party in Australia, in Italy the adoption of neo-liberal economic policies was more a necessity dictated by the inception of the European Union than a deliberate choice.

The more favourable attitude towards neo-liberal economic policies in both countries also changed the relationship between the political constituencies and the employers. In Australia, both the Hawke and Keating governments strengthened the internal links within the ranks of the employers and, indeed, actively sought to strengthen the capacity of big Capital to act collectively. In particular P.M. Hawke, by encouraging the creation of the BCA, hoped that a united body of employers, with whom the government could negotiate, would facilitate the endorsement of corporatism (McEachern 1991). In Italy the dominant political personality was, for most of the 1980s, Bettino Craxi who transformed the traditional legacy of the Italian Socialist Party from a reformist social democratic party into a governing agent inclined to negotiate equally with employers and trade unions (see section 9.3). The third factor that furthered the expansion of market forces was the increase in the employers' capacity to exert pressure on governments and trade unions. Unlike in the 1970s, during the 1980s the employers' associations were able to submit comprehensive proposals to reform labour standards and by the end of the decade were the major agent of reform. The employers in both countries emphasised the need to increase the relevance of the market in establishing and regulating labour conditions and to decrease the influence of industrial tribunals in Australia and protective legislation in Italy. This was made clear in Australia through the reforms

advocated by both the BCA and the H.R. Nicholls Society. In Italy, the employers' demands for flexibility were contained in the proposals put forward by the *Federmeccanica* and the *IRI* (see sections 6.4; 9.4). The increased voice of employers was strengthened by a steady decline in trade union density, though this was more pronounced in Australia. From 1976 to 2000 trade union density dropped from 51% to 24% in Australia and from 49% to 33% in Italy.

While both countries increased their dependence upon the market, the approach to marketisation and flexibility endorsed by Australia and Italy differed significantly. Australia adopted a neo-liberal profile by reducing the influence of industrial tribunals and decreasing the power of trade unions to bargain (see sections 4.3; 4.4). By contrast, in Italy flexibility was achieved by moderating the rigidity of the *garantismo giuridico*, while concomitantly strengthening the right of trade unions to be involved in the process of marketisation. As noted in section 7.3, the laws granting more flexibility in Italy contain compulsory mechanisms of negotiation between the employers and the workers' organisations.

Several factors contributed to this divergence. First, the weakness and instability of the Italian governments, coupled with the power of trade unions in this country, compelled successive governments to continuously seek the collaboration of the workers' organisations (see sections 9.3; 9.4). Second, all of the governments ruling Italy from 1979 to 2000 (with the exclusion of the first six months in 1994) were sympathetic to Labour (see section 9.3). In addition, ruling political parties maintained the traditional connections with the CGIL, the CISL and the UIL. Third, the continuing divergences between the CGIL, the CISL and the UIL, and the militant strategy adopted by the PCI led to the collapse of corporatism during the early 1980s. This development further weakened the governments and the employers in their attempts to forge an alliance with Labour that would assist the adoption of an extensive neo-liberal agenda. Fourth, the employers were still recovering from the

massive protests of the late 1960s-early 1970s and were willing to accept a greater involvement of Labour in return for industrial peace. By contrast, in Australia governments were strong and able to hold office for prolonged periods and employers were not as affected by the wave of industrial and political struggles that erupted in the late 1960s as their Italian counterparts. In addition, corporatism was relatively stable from 1983 to 1995 and this stability facilitated the move away from compulsory conciliation and arbitration (see section 6.4). The greater legal rights granted to Italian trade unions over the management of flexibility is almost certainly a key factor that helps explain why trade union density declined considerably less in Italy than in Australia.

As shown in section 10.2, the increasing reliance on the market was countervailed by a general strengthening in labour standards protection in both countries. Using Rodrik's metaphor, the State acted as an insurance agency to prevent negative shocks on labour conditions, that could occur as a result of marketisation (Rodrik 1998(b)). The increase in labour standards' protection was part of an explicit deal achieved between the social partners in both countries. This clearly emerges from the analysis of the genesis of the *Industrial Relations Reform Act (1993)(Cth)* and the *Workplace Relations Act (1996)(Cth)* in Australia and the shift from *garantismo giuridico* to negotiated labour standards in Italy. In 1993, under the Accord Mark VII, the Keating government exchanged the introduction of a non-union stream of collective agreements (the Enterprise Flexibility Agreements) and the partial emasculation of the AIRC powers, with a floor of minimum labour standards (see section 7.4). Some of these standards were subsequently maintained. Despite the declared neo-liberal ideology of the Howard government, the Coalition was unable to completely annihilate the employment protection system adopted by the previous government. However, a relevant distinction between the Labor Party and the Coalition was that the expansion of the market and labour standards protection were

both considered relevant matters under Labor governments, while the Coalition clearly favoured the market (see section 7.5).

In Italy, the accord between the social partners was implemented through: legislation on flexibility that enhanced the freedom of employers to utilise the workforce and simultaneously strengthened the right of trade unions to bargain with management; the extension of the unfair dismissal regime to firms with less than 15 employees; the increase in unemployment benefits that followed the privatisation of the employment services and the repealing of legislation prohibiting the outsourcing and the involvement of trade unions in determining the extent to which outsourced workers could be utilised by employers. This process was accelerated by the inception of the European Union which played a contradictory role. On one side European legislation was used to further strengthen the protection accorded to equal employment opportunity/employment equity, occupational health and safety and large-scale layoffs (see sections 9.4 and 9.5). On the other side, the stringency of the European requirements negatively affected the capacity of centre-left governments and trade unions, during the 1990s, to conclude satisfactory agreements and favoured the employers in their attempts to reduce workers' market power (see section 9.5). As with Australia, the mid-1990s were characterised by a change in the employment protection-market liberalisation mix in favour of the latter.

The increase in labour standards protection was closely related to the capacity of trade unions to bargain with governments and employers. Both countries endorsed corporatist arrangements. However, while neo-corporatism was stable in Australia and lasted for nearly 14 years, in Italy trilateral practices have been unsteady through the 1980s-early 1990s. Moreover, the models of corporatism were different. In Australia, the Accord envisaged the participation of the ACTU and the government while the employers' associations chose not to be involved directly, preferring to influence the ALP-unions negotiations from the side-lines. In Italy, neo-corporatism

involved the employers as well as trade unions and governments. Overall, the capacity of Labour to exert pressure on the executive was a more relevant factor in reforming labour standards than the adoption of neo-corporatism. It should be emphasised that in Italy the shift from *garantismo giuridico* to negotiated labour standards and the strengthening of provisions constraining the employers' actions *vis a vis* the employees, occurred at a time when corporatist arrangements were not in place. By contrast, the attention placed on labour standards declined through the 1990s when corporatism was operative.

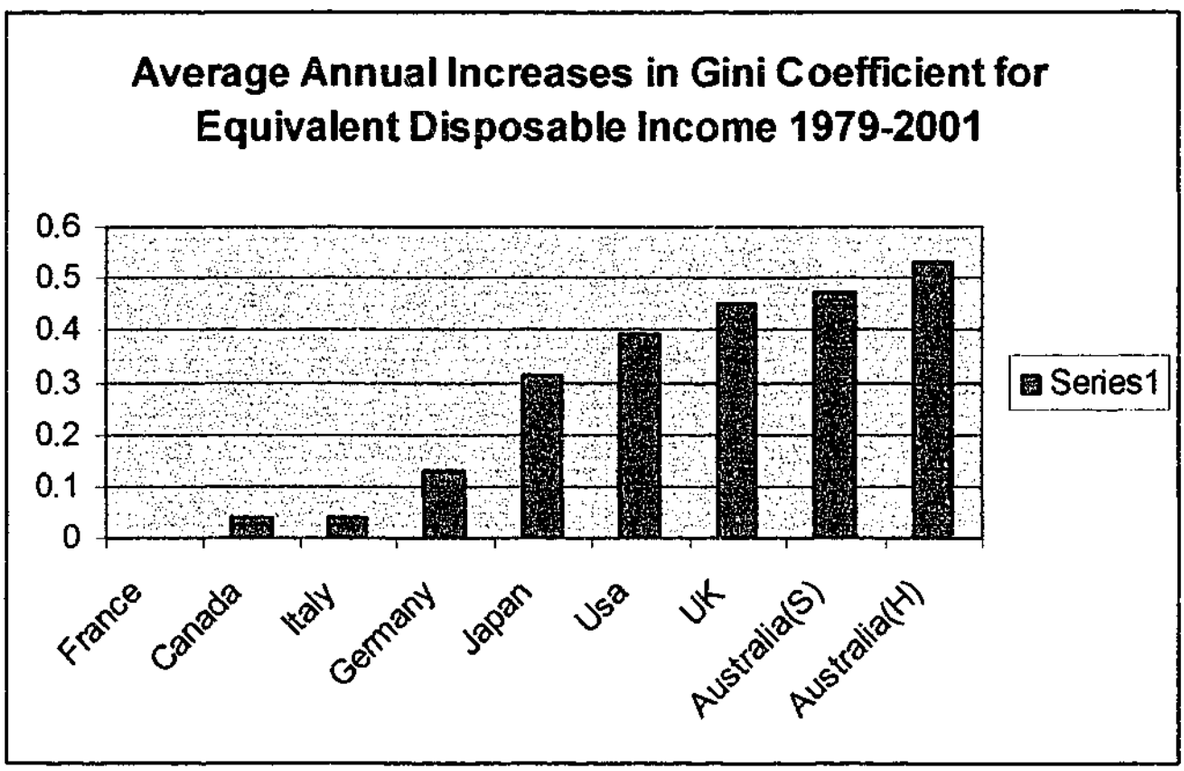
In both countries the contractual power of trade unions declined over the two decades after 1979 while their political influence rose (until the mid-1990s). Labour's political influence was strengthened by the office held by centre-left governments in Australia during the 1980s early 1990s and in Italy until 2001. However, the political power of Labour began to decline in 1993 in Italy and in 1995 in Australia. In Italy, this was due to the creation of the European Union which, as previously mentioned, imposed neo-liberal boundaries and significantly constrained the bargaining capacity of both governments and trade unions (see section 9.5). In Australia, the election of the anti-Labour Howard government halted the political exchange between Labour and the executive (see section 6.5). Since these changes have taken place, the enactment of protective labour law has slowed significantly in Italy and has partially rolled back the employment protection system in Australia.

A concluding remark concerns the strategies of trade unions and their perception of neo-corporatism. In Australia, the ACTU remained bound to the Accord for the entire duration Labor remained in government and displayed a more co-operative (submissive) attitude than its Italian counterparts. In addition, strong trade unions greatly contributed to the downgrading of compulsory conciliation and arbitration and to the move towards enterprise bargaining (see section 6.4). In Italy trade unions, in particular the CGIL, were reluctant to offer extensive compromises

with governments and employers and have disregarded their commitments in several circumstances (see sections 9.3; 9.4). The more confrontationist strategy adopted by Labour in Italy exerted a significant pressure on governments and employers. This tactic was effective and contributed to strengthen Labour's legal rights to supervise management's activity.

In retrospect, the confrontational stance of the Italian trade unions and their persistent determination to maintain their bargaining power appear to have been more effective strategies than those adopted by their Australian counterparts. Both countries have been increasingly exposed to the operation of market forces. However, the negative effects of this development on the labour market, in terms of employment casualisation and wage dispersion, have been more severe in Australia than in Italy. Part-time employment rose in Australia from 5.34% for male employees and 35.29% for women in 1980 to 12.42% for men and 44.46% for women in 1999 (ABS 1987; 1999) while in Italy, in 1999, only 7% of the workforce was employed part-time (Eurostat 1999). The use of fixed-term contracts remained limited in Italy (from 6.6% in 1983 to 7.5% in 1999; Eurostat 1999) while casual employment consistently rose in Australia from 18.9% in 1988 to 26.9% in 1998 (ABS 1999). In addition, wage dispersion increased considerably more in Australia than in Italy. In Italy the Gini coefficient increased on average 0.04% during 1979-2001 while in Australia it increased at a much faster rate having been estimated at 0.47% by Saunders (2001) and 0.53% by Harding and Greenwell (2001). Figure 10.4 shows the average annual increases in Gini coefficient in eight developed countries during the 1979-2001 period.

Figure 10.4



Sources: Burtless 2001; Saunders 2001; Harding and Greenwell 2001.

The marginal increase in part-time and fixed-term contracts in Italy was due to the constraints imposed on the employers with regard to the use of these means and to the extensive supervisory rights granted to trade unions. Labour's extensive legal rights to bargain and to countervail management action was also a relevant factor in ensuring that increases in wage dispersion were considerably more contained in Italy than in Australia.

10.5 Conclusion

The employment protection systems of Australia and Italy tended to converge in the past two decades. Most of the labour standards analysed increased in both countries. These increases mainly involved in Australia standards constraining the employers' actions *vis a vis* the employees and in Italy both: standards requiring employers' payments and standards constraining the employers' activity.

It was argued that the main factor underpinning this development was the interaction of two contrasting forces: market liberalisation and employment protection. In the early 1980s, both countries began a process of marketisation that not only involved the labour market but also extended to other areas of the economy. The process of marketisation, facilitated by the endorsement of neo-classical economics by the ruling parties, impinged upon labour standards. In Australia, a greater reliance on the market was achieved by reducing the influence of industrial tribunals and curtailing the rights of trade unions to bargain. In Italy marketisation proceeded through the weakening of the constraints imposed upon the use of fixed-terms and part-time contracts, outsourcing and the limitations prescribed by article 2103 of the Civil Code.

The power and the capacity of trade unions to influence the governments' decisions ensured that the realm of the market was constrained during the 1980s-early 1990s. In Australia, this development unfolded through the enactment of a floor of minimum standards while retaining a role for industrial tribunals. In Italy, the countervailing demand for employment protection focused on enhancing the protection accorded to standards that place constraints on the employers' freedom to allocate the workforce and standards requiring employers' payments. In addition, in Italy this process was compounded by the strengthening of trade unions' rights to bargain with the employers. The latter development constitutes a significant divergence between the two countries. It was argued that the greater capacity of the

Italian trade unions to defend their market power during the 1980s can be ascribed to two important differences in comparison with events that concomitantly took place in Australia: the continuing weakness of the Italian governments and the collapse of corporatism in 1984 due to the refusal of the CGIL to endorse the Saint Valentine accord. These two key factors forced the employers to accept a compromise with Labour according to which the former obtained more flexibility and the latter strengthened its capacity to supervise the management's activity.

The balance between market liberalisation and employment protection achieved in the early 1990s changed in subsequent years in favour of the former. In Italy, this was due to the inception of the European Union which, by imposing neo-liberal boundaries, reduced Labour's capacity to bargain and concomitantly strengthened the relative power position of Capital. In Australia, the election of a conservative government furthered marketisation and partially met the employers' demands for the decentralisation of the bargaining locus and the downsizing of the powers of the AIRC. Despite these developments, the realm of the market remained constrained. In Italy, paradoxically, European legislation was utilised by centre-left governments to increase the protection accorded to occupational health and safety, overtime, equal employment opportunity and large-scale layoffs while in Australia the Howard government was forced into a partnership with the Democrats which moderated the extension of the labour standards' reforms initially envisaged by this administration.

Finally, it was also argued that the continuing weakness of the Italian governments, coupled with the confrontationist strategy adopted by the CGIL and the consequent collapse of corporatism in the early 1980s, were crucial factors ensuring that market forces and their negative costs were more effectively constrained in Italy than in Australia. More specifically, employment casualisation and wage dispersion increased considerably more in Australia than in Italy during the 1979-2000 period.

CHAPTER ELEVEN

CONCLUSION

In this thesis, labour standards were measured in Australia and Italy in 1979 and 2000 and their evolution was compared. The relevance of this study stems from the fact that since the late 1970s the extension of legal protection granted to labour conditions has generated a vigorous debate at both political and intellectual levels. Paradoxically, this debate has not been enriched by comprehensive research evaluating the extent to which labour standards have actually changed over time. With the exception of an OECD study in 1999 which partially tried to map changes that occurred to employment protection in OECD countries over the 1993-1998 period (see section 3.4; OECD 1999), there has been a considerable scarcity of empirical research in this area. The theoretical arguments were the focus of chapter 2, which considered the perspectives of legal analysts and economists on labour standards. It was argued that no final agreement has been so far achieved concerning the level and type of legal protection that should be accorded to Labour and the effects of labour standards on economic efficiency. This chapter also highlighted the international dimension of labour standards and the relevance of the "social clause" debate within the process of globalisation.

The major finding of this thesis was that, throughout the studied period, there had been a convergence between the employment protection systems in Australia and Italy. While Australia strengthened the statutory protection accorded to standards constraining the employers' actions *vis a vis* the employees (equal employment opportunity/employment equity, unfair dismissal, occupational health and safety and large-scale layoffs), but did so while concomitantly weakening the collective bargaining standard, Italy increased the protection offered by provisions regulating both standards requiring employers' payments (overtime, paid time off,

unemployment/employment insurance) and standards constraining the employers' actions. This result was achieved by utilising a methodology devised by Block and Roberts (2000) which is based on an accurate definition of labour standards and *a priori* constructed scales incorporating multiple provisions.

The main argument proposed by this thesis when analysing this outcome maintains that the convergent pattern between the two countries can be explained by investigating the interaction of two opposite forces: the drives for market liberalisation and for employment protection and by considering changes in the power position of Labour, Capital and the State over time. This perspective originates mainly in the economic and industrial relations literatures and is commonly associated with the insights provided by Polanyi, French Regulation, "Strategic Choice" and "Systems" theories. Chapter 3 considered the theoretical frameworks which were deemed relevant for the analysis of labour standards over time. It was found that an analytical construct can be extrapolated by melding together industrial relations, economics and labour law. Industrial relations contributes by identifying the actors whose interaction has the potential to influence the evolution of labour standards and the different levels at which this interaction occurs. However, little explanation is provided by industrial relations theory with regard to the factors that can induce a change in employment protection over time. This shortcoming is addressed by Polanyi's "Double Movement" and French Regulation theory. Both frameworks emphasise the relevance of labour standards in containing the negative effects associated with a sustained reliance on market forces. Finally, labour law, through the insights offered by Khan-Freund, contributes to the construction of a theoretical model by explaining the dynamic relationship between changes in Labour's political power, the use of protective legislation and the operation of collective bargaining.

The increase that occurred to most labour standards in Australia and Italy was due to the perceived need to counteract a growing reliance on market forces. This

double movement affected the institutional features governing labour standards across the two countries (see chapters 4 and 7). In Australia in 1979 labour standards were established mainly through arbitrated awards while legislation and common law played a marginal role. This institutional arrangement was mainly determined by the constraints imposed by the Constitution upon the Federal government's capacity to override the States' legislative powers. This framework underwent a dramatic change over the studied period. While increasing market governance was achieved by narrowing the scope of awards and decentralising the locus of bargaining to the enterprise or to the individual levels, the countervailing demands for employment protection resulted in the enactment of a legislated floor of minimum standards which derived its constitutional legitimacy from the External Affairs and Corporations powers. The market liberalisation-employment protection mix changed over time. The *Industrial Relations Reform Act (1993)(Cth)* encouraged the adoption of enterprise bargaining although the functions of the Commission were, in the main, retained, while the *Workplace Relations Act (1996)(Cth)* reduced arbitration to 20 allowable matters, introduced individual bargaining, established a more hostile legal framework for trade unions and diluted the scope of the legislated minimum standards.

In Italy in 1979 the institutional framework was completely different from the one operating in Australia. This difference, it was argued, was due to the fact that Italy is a typical civil law country and labour standards have been mainly established through legislation though two standards, minimum wage and paid time off, have been regulated with reference to collective agreements. In 1979, the areas regulated by legislation were far more numerous in Italy than in Australia and included part-time and fixed-term contracts, the outsourcing, the possibility to rotate jobs, unfair dismissal, paid maternity leave and severance pay. These provisions conformed to the juridical principle denominated *garantismo giuridico* and could not be easily derogated. As for Australia, this framework was exposed to the countervailing demands for marketisation and employment protection in the following two decades.

While the rigidity of provisions regulating part-time and fixed-term contracts, outsourcing, job rotation was partially weakened, the trade unions legal capacity to bargain was strengthened with this feature marking the shift from *garantismo giuridico* to negotiated labour law. An important factor that contributed to this development was the inception of the European Union, whose requirements had a double effect. On one side the features of European labour law encouraged the involvement of trade unions in the process of marketisation and labour market flexibility. On the other side, the European economic requirements limited Labour's capacity to bargain with both Capital and the State.

The interaction between market liberalisation and employment protection was further considered in chapters 6 and 9 which analysed the industrial relations processes that generated the changes outlined in chapters 4, 5, 7 and 8. Important similarities and differences between the two countries were found. Both national contexts were afflicted by economic problems during the two decades studied and embraced neo-classical economics, albeit with different degrees of enthusiasm. In Australia, enhanced market governance was achieved by dismantling most of the protective features that characterised the Australian settlement policies. In particular, tariff barriers, which sheltered Australian industry for more than 80 years, were drastically reduced, the financial and exchange markets liberalised, many public assets privatised and the influence of compulsory conciliation and arbitration restricted. In Italy, the expansion of the market arose from the establishment of the European Union and the necessity to conform to its economic requirements. In particular, the need to achieve a low public deficit/GDP ratio and to reduce inflation curtailed the ability of governments to use fiscal policies and impose market discipline upon the social partners.

Relevant differences between the two countries emerged concerning the attitude of the social partners with regard to the ways in which a greater reliance on

the market was to be achieved and the labour standards which were to be included in the process of marketisation. In Australia, employers and governments focused their actions on narrowing the scope of industrial tribunals and, by so doing, weakened the bargaining power of trade unions. This development affected trade unions with little market power which lost much of the shelter provided by compulsory conciliation and arbitration. The restriction of the scope of awards was supported by unions with great industrial power which, dissatisfied with the decision of the Commission during the years of centralised wage indexation, campaigned to move the system of employment protection away from arbitration while concomitantly trading this concession for the introduction of a floor of legislated minimum standards. This trade-off was embodied by the *Industrial Relations Reform Act (1993)(Cth).* It was argued that this arrangement, which started to take place while the Labor Party was in office, was inappropriate because trade unions were negotiating with partners committed to allow the market a freer hand and Labour's market power was a crucial issue that failed to be adequately addressed. In short, the unions settled for reforms that were ineffective in containing the capacity of employers to undermine the well being of Australian workers. The shortcoming of the trade unions' strategy of not focussing on sustaining their bargaining power as the capacity of the Commission was weakened became clear in 1996 when the conservative Howard government was able to expand the reach of the market by further curtailing Labour's legal rights to bargain. In so doing, the Coalition was merely continuing a process initiated by the ALP.

By contrast, in Italy the countervailing demands for employment protection consistently focused on trade unions rights to supervise management's activity and to negotiate the terms and conditions of marketisation. This is a crucial difference between the two countries and ensured that in Italy the unions were able to contain the negative effects of liberalisation on the labour market. As was observed in chapter 10, the rates of part-time and fixed-term contracts and the average increases in wage dispersion have been considerably lower in Italy than in Australia through the studied

period. The different strategies adopted by Labour in the two countries also explain why, on average, labour standards increased more in Australia than in Italy. In Australia, trade unions placed greater emphasis on a minimum set of legislated provisions and accepted the emasculation of the Commission's powers. In Italy, trade union demands focused more on Labour's legal rights to bargain than on legislation.

There were three main factors that engendered this outcome. First, governments in Italy were weaker than in Australia and were unable to support the growing employers' demand for market liberalisation. In addition, Italian trade unions have traditionally maintained their connections with the political parties which ruled the country from 1979 to 2000. These two features forced both Capital and the many governments to seek Labour's collaboration to expand the realm of the market and explain why the shift from *garantismo giuridico* to negotiated labour law granted extensive supervisory rights to trade unions. In Australia, trade unions acquired considerable political power only during the years of the Accord while the Labor Party was not linked to the trade union movement as closely as was the case in Italy. In addition, Australian governments have traditionally been able to hold office for comparatively longer periods. This meant that labour market policies in Australia could be implemented with less emphasis having to be placed on constantly renewing broad-based agreements with the social partners. The Howard government, for example, could move away from the framework established by the *Industrial Relations Reform Act (1993)(Cth)* and support the employers' demand for market liberalisation without negotiating the matter with Labour.

Second, the adoption of neo-classical economics has been faster in Australia than in Italy. As observed in chapters 6 and 9, economic rationalism has captured the intelligentsia of the two major political parties in Australia, while in Italy the adoption of neo-liberal economic policies was more dictated by the necessity to conform to the European requirements than by a genuine enthusiasm for neo-liberal prescriptions on

part of the political constituencies. This difference helps explain the contradictory policies adopted by Italian governments in comparison with their Australian counterparts.

Third, the endorsement of corporatist arrangements influenced the evolution of labour standards far more in Australia than in Italy. In Australia, corporatism was stable from 1983 to 1995 and allowed the social partners to drastically reform the employment protection system. In Italy, corporatist practices were highly unstable during the 1980s while in the 1990s they became more stable only because of the necessity to join the European Union. Labour standards only marginally entered the political exchange between the social actors. However, trade unions political influence greatly contributed to determine the shift from *garantismo giuridico* to negotiated labour law and ensured that trade unions' legal rights to bargain were better defended in Italy than in Australia. In Italy Labour's political influence was a far more important factor than the adoption of corporatism in shaping the character and timing of labour standards reforms.

It is crucial to point out that in both countries the dynamic underpinning the increase in labour standards during the period studied was different in comparison with the late 1960s-late 1970s, and marked a change in the balance of power between Capital and Labour in favour of the former. As was repeatedly observed through the thesis, the major agent of labour standards reform during the 1979-2000 period became Capital, which was able to promote a neo-liberal agenda and put Labour on the defensive. The trade unions' capacity to bargain was constantly eroded in Australia and Italy. The weakening of Labour's market power occurred in Australia through legislation while in Italy, despite trade union attempts to defend their market power, the creation of the European Union imposed market discipline thus enhancing Labour's subordination to Capital. This development has the potential to prove extremely dangerous as, according to both Polanyi and Khan-Freund, Labour's legal

right to bargain is one of the most important tools to constrain the market's domain and the constant erosion which affected this standard during the 1979-2000 period could reproduce the devastating effects that followed previous expansions of market forces.

This thesis is the first study that has measured and compared the evolution of labour standards in two countries over a prolonged period. Some directions for future research are recommended. With regard to the methodology adopted, it would be important to construct coverage-deflated indexes as there has been a consistent growth, in all developed countries, of atypical forms of employment (part-time, temporary and fixed-term employment) which usually receive only partial legal protection. The coverage deflated indexes would provide a more accurate picture concerning the evolution of labour standards over time and would enable researchers to evaluate the extent to which the workforce is legally protected at a time when market forces are allowed a freer hand in several national contexts. Given the scarcity of studies comparing labour standards across nations and over time, it is necessary to undertake comparable research in the future on other developed and developing nations so that a clearer picture can emerge in relation to the extent of changes that affected labour standards and the dynamic forces which influenced these changes. This exercise would help to engender a clearer understanding of the ways in which the interaction between market liberalisation and employment protection have affected labour standards in different national contexts. It would also provide theorists with new insights that can help them understand whether and to what extent evolving forms of labour standards regulation are contributing to new regimes of Capital accumulation.

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