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**THE BROAD IDEA OF LABOUR LAW:  
INDUSTRIAL POLICY, LABOUR MARKET  
REGULATION AND DECENT WORK**

*John Howe*

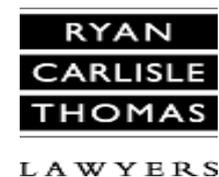
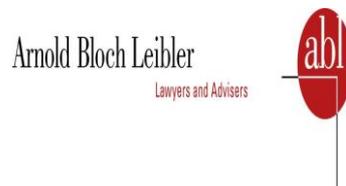


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# The Broad Idea of Labour Law: Industrial Policy, Labour Market Regulation and Decent Work

*John Howe\**

“The “old” Protection had contented itself with making good wages possible.

The “new” Protection seeks to make them actual.’<sup>1</sup>

## 1. Introduction

The traditional ‘idea’ of labour law is a combination of subject matter and purpose. According to Kahn-Freund’s famous articulation of labour law, it is generally considered to be the law which regulates the employment relationship with the goal of correcting an imbalance in bargaining power between employer and employee in order to secure a more just working relationship for the worker.<sup>2</sup>

In Australian labour law, the so-called *Harvester* case<sup>3</sup> from 1907 is perhaps the most iconic court decision in the history of the field. In that case, the second President of the Australian Court of Conciliation and Arbitration, Justice H.B. Higgins, made observations which could be considered a forerunner to Kahn Freund’s later and more internationally recognised articulation of the protective purpose of labour law. Higgins observed that the provision for ‘fair and reasonable remuneration’ in the relevant legislation ‘must be meant to secure to [employees] something which they cannot get by the ordinary system of individual bargaining with employers’, which Higgins referred to as “the higgling of the market” for

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\* Centre for Employment and Labour Relations Law, Melbourne Law School, University of Melbourne. This is a revised version of a paper prepared for a Workshop with the theme ‘On the Very Idea of Labour Law’, held at Cambridge University on 8-9 April 2010. I thank the organisers of that Workshop, Guy Davidov and Brian Langille, for permission to publish this Working Paper. Thanks also to Beth Gaze, Richard Mitchell, Joo-Cheong Tham, Sean Cooney and Tess Hardy for their comments and suggestions.

<sup>1</sup> *Explanatory Memorandum in Regard to New Protection*, Commonwealth Parliamentary Papers, Vol. 2, 1907-1908, pp 1887-9.

<sup>2</sup> ‘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...and indeed most labour legislation altogether must be seen in this context’: O. Kahn-Freund, *Labour and the Law* (Stevens, London, 1972), p. 8.

<sup>3</sup> *Ex Parte HV McKay* (Harvester Case) (1907) 2 *Commonwealth Arbitration Reports* 1. The case is known as the Harvester case because HV McKay was the owner of the Sunshine Harvester Works in Melbourne, Australia, a manufacturer of combine harvesters and other agricultural machinery.

labour'. Instead, fair and reasonable remuneration must have as its starting point 'the cost of living as a civilised being'.<sup>4</sup>

The *Harvester* case is therefore famous for setting a precedent that legal minimum wages in Australia were to be a 'living wage', and confirming that the underlying purpose of Australian labour law is the protection of employees. However, this decision was not made under the *Conciliation and Arbitration Act* 1904, at that time the still nascent federal industrial relations legislation in Australia (although subsequently Higgins' concept of the fair and reasonable wage came to be applied under that Act). Instead, the case had been chosen as the first implementation of the policy and legislation package known as the 'New Protection',<sup>5</sup> which linked tariff protection with protection of wages, and the decision was actually made under the *Excise Tariff Act* 1906 (Cth). Under that legislation, in return for exemption from an excise tax (thereby gaining an advantage over foreign competitors), Australian manufacturers of agricultural machinery were required to demonstrate that they paid their workers fair and reasonable remuneration. At the time of the decision then, the determination of a living wage for many workers was inextricably tied up with industrial policy in the form of tariff protection legislation. To all intents and purposes, the tariff legislation was labour law – but we would not normally think of tariff protection as being within the scope of labour law, or having a social protection function.

The overarching goal of this paper is to re-state the case for a broader interpretation of the traditional subject matter and purpose of labour law, and to locate industrial policy within that broader perspective. Over recent years, for reasons which are explored later in the paper, there has been considerable support in labour law scholarship for the reformulation of labour law around a wider, labour market regulation perspective of the subject (the LMR perspective).<sup>6</sup> Efforts to develop the LMR perspective have been particularly strong in Australia.<sup>7</sup> On this view, labour law encompasses various forms of labour market regulation in addition to employment regulation, including social security law, active labour market policy and as I argue in this paper, industrial policy. The paper will use the example of the implementation of the New Protection during the early beginnings of federal labour regulation in Australia to illustrate the importance of industrial policy settings to the subject matter and goals of traditional labour law. I will also consider the advantages to both

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<sup>4</sup> *Ibid*, pp 3-4.

<sup>5</sup> J. Rickard, *The Rebel as Judge* (1984), p 171.

<sup>6</sup> See, for example, R. Mitchell (ed) *Redefining Labour Law: New Perspectives on the Future of Teaching and Research*, Centre for Employment and Labour Relations Law, University of Melbourne, 1995; M. D'Antona, 'Labour Law at Century's End: An Identity Crisis?', in J. Conaghan, R.M. Fischl and K. Klare, *Labour Law in the Era of Globalisation* (2002); J. Conaghan, 'Labour Law and the "New Economy Discourse"' (2003) 16 *Australian Journal of Labour Law* 9; S. Sciarra, 'The "Making" of EU Labour Law and the "Future" of Labour Lawyers', in C. Barnard, S. Deakin and G. Morris, *The Future of Labour Law* (2004); P. Davies, K.D. Ewing and M. Freedland, 'General Editors' Preface' to S. Deakin and F. Wilkinson, *The Law of the Labour Market* (2005); Lobel, O. 'The Four Pillars of Work Law' (2006) 104 *Michigan Law Review* 1539; R. Mitchell and C. Arup, 'Labour Law and Labour Market Regulation', in C. Arup, P. Gahan, J. Howe, R. Johnstone, R. Mitchell and A. O'Donnell (eds) *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2006).

<sup>7</sup> An excellent overview of Australian developments can be found in A. Frazer, 'Reconceiving LabourLaw: the Labour Market Regulation Project' (2008) 8 *Macquarie Law Journal* 21.

scholarship and labour policymaking and practice of including industrial policy within the idea of labour law.

There are many definitions of industrial policy. In this paper, I adopt Rodrik's 'middle of the road' definition: 'policies that stimulate specific economic activities and promote structural change'.<sup>8</sup> Today, we might use a broader definition of industry than was common in the *Harvester* days. International competition is as likely to occur in services such as call centres as it is in manufacturing. Indeed, Rodrik's definition is not limited to industry at all, and can include subsidies to agricultural activities. It encompasses a number of state policies designed to foster economic growth. Thus, tariff protection might be considered industrial policy, as might trade liberalisation and adjustment assistance to alleviate the effects of trade liberalisation, expenditure on infrastructure development, public procurement, and financial incentives to attract investment, business or to stimulate economic growth.<sup>9</sup>

As noted earlier with regard to tariff protection, labour lawyers would not normally consider industrial policy as within the scope of labour law. However, as the *Harvester* case example illustrates, the versatility and mobility of capital and its capacity to seek out labour markets with lower labour standards and costs, is one of the longstanding challenges to the effectiveness of the social protection function of labour law.<sup>10</sup> Industrial policy is a state response to capital mobility which is often justified by its capacity to create or retain jobs. The New Protection was explicitly intended to protect jobs *and* the living standards which those jobs deliver. More recently, industrial policy and strategies in the form of trade liberalisation -- an industrialisation strategy that has often been associated with lower labour standards -- has been more popular than trade protection. In either guise, industrial policy is an important aspect of state constitution and regulation of a labour market, and a crucial factor in the effectiveness of traditional labour law in achieving its goals.

There has been resistance to the LMR perspective among some labour law scholars. Critics have argued that it shifts the normative focus of labour law away from its protectionist philosophy and toward objectives more concerned with enterprise productivity and economic efficiency.<sup>11</sup> Some have been concerned that taking a broad perspective will undermine the coherence and logic of the field. In this paper, I argue that concerns about the shift in normative focus are based on a fundamental misunderstanding of the purpose and functions of traditional labour law, and of the LMR perspective. As Richard Mitchell and others have emphasised, the adoption of a LMR perspective does not signify the

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<sup>8</sup> D. Rodrik, *Normalizing Industrial Policy*, Working Paper No. 3, Commission on Growth and Development, 2008. It is Aiginger who describes such a definition as 'middle of the road', somewhere between narrow and broad definitions. For discussion of narrower and broader definitions, see K. Aiginger, 'Industrial Policy: A Dying Breed or Re-Emerging Phoenix?' (2007) 7 *Journal of Industry, Competition and Trade* 297 at 299-300.

<sup>9</sup> For consideration of the latter within a labour law paradigm, see J. Howe and I. Landau, 'Do Investment Attraction Incentives Create Decent Jobs? A Study of Labour Conditions in Industry Assistance Contracts' (2009) 19(3) *Labour and Industry* 97-136.

<sup>10</sup> C. Arup, 'Labour Market Regulation as a Focus for a Labour Law Discipline', in Mitchell, *Redefining Labour Law*, above n 6, p 31-33; K. Klare, 'The Horizons of Transformative Labour and Employment Law', in Conaghan, Fischl and Klare, above n 6, p. 7.

<sup>11</sup> See, for example, R. McCallum, 'In Defence of Labour Law' (Sydney Law School Research Paper No. 07/20, 2007).

abandonment of normative concerns in labour law, nor does it suggest that the traditional subject matter of labour law should be abandoned.<sup>12</sup> While the LMR perspective acknowledges that there may be conflicting purposes in labour law – labour law may be implemented for a variety of goals, some of which may not be protective of workers interests – in this paper, I argue that inclusion of industrial policy is crucial to the achievement of the objective of ensuring the creation and retention of quality jobs, or ‘decent work’ for all, to draw on International Labour Organisation parlance. While this objective is perhaps broader than that articulated by Kahn-Freund, it is nonetheless normative. I argue that a broader perspective will not undermine labour law’s coherence. To the contrary, the adoption of a broader perspective is crucial to the future health and vitality of labour law scholarship.

In support of my argument, in the next section I consider the historical and cultural contingency of the traditional subject matter of labour law, and in Section 3 I consider why a broader LMR perspective is a powerful alternative conception of the field. In section 4, I explore both the historical contingency of labour law and the relevance of industrial policy to labour law through a discussion of the importance of industrial policy to the establishment of the Australian conciliation and arbitration system and the maintenance of high living standards at the beginning of the twentieth century. In the fifth section of the paper I give brief consideration to some of the advantages of the inclusion of industrial policy within a broader LMR perspective on labour law, before concluding.

## **2. Time and Place: The Historical and Cultural Contingency of Traditional Labour Law**

Labour lawyers might agree that the industrialisation strategies and policies of a particular government form part of the broader *context* in which labour law operates. However, in my view certain industrial policies should form part of a broader conception of the field of labour law itself. This argument is consistent with the call made by a number of scholars for a longer term time-frame for labour law analysis.<sup>13</sup> The broader conception will also take into account differences in what forms of labour regulation matter to workers not only over time, but also according to place: across different countries and regions.<sup>14</sup>

The starting point for a discussion of the importance of a broader perspective on labour law is with the limitations of the traditional perspective. Heeding Mitchell and Arup’s call for labour lawyers to ‘remain alive to the historically contingent nature of labour law and be prepared to revise our present understanding of the field by reference to its historical

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<sup>12</sup> R Mitchell, ‘Introduction: A New Scope and a New Task for Labour Law’, in Mitchell, above n 6, p xiv; J. Howe, R. Johnstone and R. Mitchell, ‘Constituting and Regulating the Labour Market for Social and Economic Purposes’, in Arup et al, above n 6, pp 307-308.

<sup>13</sup> Mitchell and Arup, above n 6; S. Deakin, ‘The Comparative Evolution of the Employment Relationship’, in G. Davidov and B. Langille, *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Hart, Oxford, 2006); Deakin and Wilkinson, above n 6.

<sup>14</sup> J-C. Javillier, ‘The Employer and the Worker: the Need for a Comparative and International Perspective’, in Davidov and Langille, above n 13.

legacy',<sup>15</sup> it is first necessary to recognise that what is considered to be the traditional subject matter of labour law is historically and culturally contingent. Labour law scholarship only emerged as a distinct field of endeavour during the 1950s, a time when the employment relationship took hold as the most common work arrangement under the then-dominant 'Taylorist' management theory, in the conditions of full employment that industrialised countries enjoyed in the 1950s and 1960s.<sup>16</sup> However, historical analysis of work relationships before the Second World War,<sup>17</sup> and the growth in non-standard employment since the 1980s, demonstrates that the stable employment model on which the traditional subject matter of labour law is based was relatively short-lived in the history of labour market regulation.<sup>18</sup>

Another important aspect of the development of traditional labour law is that the field has been dominated by European and North American labour law and industrial relations scholars. The concerns of those scholars have, for the most part, reflected the issues of most currency in economic conditions and industrial practices of their jurisdictions, with some exceptions which are outlined below. The issues confronting workers and policy makers in other jurisdictions during this period may have been quite different, but if so, they were unlikely to be heard outside their own jurisdictions.

There are a number of reasons why the traditional discourse has lost traction and deprived labour law of what Mitchell and Arup describe as 'its descriptive and normative capacity'.<sup>19</sup> Most of these have been well canvassed by others, and include: changing labour market practices, both within the enterprise and beyond it (such as the increase in non-standard employment arrangements) rendering traditional labour law prone to avoidance; the globalisation of capital and the subsequent challenge to the capacity and willingness of national governments to maintain social protection; the rise to prominence of new economic theories of the labour market, especially neoliberal perspectives (which have impacted on the policy goals behind labour regulation); the decline in union membership and the rise of more sophisticated human resource practices; and wider changes in the structure of society, such as changes in the working patterns of women, so that the typical household is no longer a male wage-earner supporting his spouse and children.<sup>20</sup>

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<sup>15</sup> Mitchell and Arup, above n 6, p 7.

<sup>16</sup> For an eloquent discussion of the conditions under which traditional labour law evolved, see B. Langille, 'What is International Employment Law For?' (2009) 3 *Law and Ethics of Human Rights* 47 at pp 57-58.

<sup>17</sup> S. Deakin, 'The Evolution of the Contract of Employment, 1900-1950', in N. Whiteside and R. Salais (eds), *Governance, Industry and Labour Markets in Britain and France* (1998); J. Howe and R. Mitchell, 'The Origins of the Contract of Employment in Australia: A Discussion' (1999) 12 *Australian Journal of Labour Law* 113.

<sup>18</sup> Mitchell and Arup, above n 6, p 6. See also D'Antona, above n 6, p 33; M. Quinlan, 'Contextual Factors Shaping the Purpose of Labour Law: A Comparative Historical Perspective', in Arup et al, above n 6.

<sup>19</sup> Mitchell and Arup, above n 6, p 6.

<sup>20</sup> R. Mitchell, 'Where Are We Going in Labour Law? Some Thoughts on a Field of Scholarship and Policy in Process of Change' (Monash University Workplace and Corporate Law Research Group, Working Paper No. 16, 2010); Mitchell and Arup, above n 6, p 6; S. Deakin, 'A New Paradigm for Labour Law' (2007) 31 *Melbourne University Law Review* 1161 at 1162. See also Langille, above n

The latter category includes social and economic changes in developing countries, where we are seeing a growing interest in labour law, especially in fast-industrialising nations such as China and India, but also in countries struggling to generate sustainable economic growth and to reduce poverty. Traditional labour law, while it is important to development, does not necessarily capture all of the issues presently confronting workers in those economies, where unemployment, or employment in the informal economy, leaves those workers outside the scope of labour law with little hope of protection in the absence of economic growth and formalisation.<sup>21</sup>

Labour law is therefore under pressure to cope with factors relating to the realms of both time and place. The concerns of workers will depend on the pressing matters of the time in their local economic, political and social context. In the present climate, economic development policies, including industrial policy, are crucial to the interests of many workers in both industrialised and developing countries.

There is no better illustration of this than the global financial crisis of 2008 and its effect on maintenance of social protection through traditional labour law. For example, in the United States, where the GFC has had a significant negative impact on the economy, the main concern of many American workers at present is the high rate of unemployment and the availability of paid work. This has pushed much needed reform of a traditional labour law subject – collective bargaining laws in the form of the *Employee Free Choice Bill* – to the back burner. Much greater attention has been given to the Bush Administration’s Rescue Package and the Obama Administration’s Economic Stimulus Package, and the extent to which each has or is likely to create or save jobs, and whether those jobs will exist in sustainable industries. For example, key debates have been over the wisdom of directing funds to ailing car manufacturers, and the extent to which the Obama Administration’s Green Jobs initiatives will create decent jobs.<sup>22</sup>

The GFC has also impacted on jobs and economic growth in developing countries. The International Labour Organisation (ILO) called for a Global Jobs Pact in the wake of the crisis, emphasising (among other things) the need for ‘coordinated global policy options’ to protect and increase jobs through ‘sustainable enterprises’ as well as building and maintaining social protection systems.<sup>23</sup> The Jobs Pact continues the ILO’s campaign to make the availability of employment a more important issue in global labour regulation debates, especially in relation to developing countries. Under the ‘Decent Work’ framework, the ILO set itself the goal of securing decent work for men and women throughout the world. Importantly, the objective of decent work is intended to promote the creation of not just any type of job, but

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16; H. Arthurs, ‘What Immortal Hand or Eye? – Who Will Redraw the Boundaries of Labour Law’, in Davidov and Langille, above n 13.

<sup>21</sup> K. Sankaran, ‘Protecting the Worker in the Informal Economy: the Role of Labour Law’, in Davidov and Langille, above n 13; C. Fenwick, J. Howe, I. Landau and S. Marshall, *Labour and Labour-Related Laws in Micro and Small Enterprises*, SEED Working Paper No. 81 (ILO, Geneva, 2007); T. Teklé (ed), *Labour Law and Worker Protection in Developing Countries* (Hart, 2010).

<sup>22</sup> Good Jobs First, *High Road or Low Road? Job Quality in the New Green Economy* (Washington DC, 2009).

<sup>23</sup> International Labour Organisation, *Recovering from the Crisis: A Global Jobs Pact*, Adopted by the International Labour Conference, 98<sup>th</sup> Session, June 2009.

'the creation of jobs of an acceptable quality'.<sup>24</sup> It has been argued that the Decent Work agenda has shifted the focus of the ILO from goals to outcomes, and has helped to emphasise that economic and social policies are development policies serving a common purpose: 'improving people's economic and social well-being through economic development'.<sup>25</sup>

This brief discussion of the importance that has been placed on generating employment and economic development in recent times serves to emphasise that the debate over regulation of working conditions has, both historically and in contemporary debates, moved on from one that is confined to regulation of working relationships as a means of protecting workers. It has been recognised that it cannot be assumed that having a decent set of labour laws in place will necessarily secure justice for working people. Economic policies, including labour market policies such as employment programs, are also important mechanisms for addressing social inequality and reducing poverty. There is thus a growing interest in the *impact* of labour market regulation on working conditions and poverty and social inequality (eg. the emphasis on outcomes under the Decent Work agenda).<sup>26</sup> I argue that the LMR perspective is well placed to take account of this change in what matters, and what is happening, in terms of law and policy affecting working conditions and social equality over time and space.

### **3. Including Industrial Policy Within the LMR Perspective – Historical Precedents and Justifications**

Under the LMR perspective, in place of a focus on protecting employees, the scope of labour law should encompass the concerns of those people who are dependent on their labour to earn a living<sup>27</sup> (i.e. who are not owners of capital), whether they are in employment, are engaged in other forms of working arrangements, or are 'out in the labour market'.<sup>28</sup> The new subject of labour law is the 'worker' or 'active labour market participant': 'not the full-time employee pursuing a specific "job for life", but a person moving between periods of

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<sup>24</sup> J. Somavia, 'Employment-intensive Growth in the Context of Globalization', speech by the Director-General of the ILO to a public meeting on the Social Summit+5, organized by the Swiss Agency for Development and Cooperation (SDC), in Bern, 11 May 2000. Downloadable at: <http://www.ilo.org/public/english/bureau/dgo/speeches/somavia/2000/bern.htm> [visited 11 March 2010]. See also International Labour Organisation, *Decent Work*, Report of the Director-General to the 87th Session of the International Labour Conference (Geneva, 1999).

<sup>25</sup> G.S. Fields 'Decent Work and Development Policies' (2003) 142 *International Labour Review* 239 at 240.

<sup>26</sup> See also S. Deakin and P. Sarkar, 'Assessing the Long-run Economic Impact of Labour Law Systems: A Theoretical Appraisal and Analysis of New Time Series Data' (2008) 39 *Industrial Relations Journal* 453.

<sup>27</sup> C. Arup, J. Howe, R. Mitchell, A. O'Donnell and J. Tham, 'Employment Protection and Employment Creation: the Contested Terrain of Australian Labour Law', in M. Biagi (ed), *Job Creation and Labour Law* (Kluwer, 2000).

<sup>28</sup> C. Arup, 'Labour Law as Regulation: Promises and Pitfalls' (2001) 14 *Australian Journal of Labour Law* 229 at 233.

employment [and unemployment], other forms of paid work, unpaid work, training and so on over the course of a lifetime'.<sup>29</sup>

Based on this perspective, labour lawyers can legitimately be interested in regulation which constitutes and shapes labour markets, including regulation which impacts on the demand and supply of labour in the external labour market, as well as that which is constitutive of the labour market at the level of the firm, the internal labour market. The LMR perspective is also based on a pluralist conception of regulation, whereby it is recognised that a variety of regulatory approaches might operate in achievement of substantive goals, including legislation, but extending to other regulatory mechanisms, such as 'soft law', financial incentives and so on.<sup>30</sup>

In recent years, in response to the challenges to traditional labour law outlined earlier in the paper labour law scholars have explored the role of legal and policy fields such as social security law, employment policy, training and education, and immigration in constituting and regulating labour markets. In particular, a number of commentators have investigated how regulation which impacts on the unemployed, such as conditional income support, or job creation policies and other active labour market programs, helps to constitute the nature of the 'employed' section of the labour market and regulate access to the means for subsistence.<sup>31</sup>

However, beyond these labour market programs, the fallout from the global financial crisis illustrates that in any economy, government policies and regulation designed to stimulate 'industry demand' will be crucial to the demand for labour in the labour market. In the introduction to this paper, I drew on Rodrik's definition of industrial policy as encompassing a number of different state initiatives designed to stimulate economic activity and promote structural change. Under the LMR perspective, labour lawyers should be interested in the role and impact of a range of industrial policies, including tariffs, industry support schemes, and other 'regulation which affects the distribution of labour between sectors of the economy and different industries',<sup>32</sup> and indeed between nations.

There are some historical precedents for the broader, LMR perspective on labour law in labour policymaking and labour studies scholarship.<sup>33</sup> The examples which follow suggest that from time to time the concerns of the labour movement, business, government and

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<sup>29</sup> R. Mitchell, J. Murray and A. O'Donnell, 'Labour Law and a New Social Settlement', *Growth 49* (Committee for the Economic Development of Australia, 2001), p 73. See also R. Owens, 'Reproducing Law's Worker: Regulatory Tensions in the Pursuit of "Population, Participation and Productivity"', in Arup et al, above n 6.

<sup>30</sup> P. Gahan and P. Brosnan, 'The Repertoires of Labour Market Regulation', in Arup et al, above n 6.

<sup>31</sup> See, for example, P. Davies and M. Freedland, *Labour Law: Text and Materials* (2<sup>nd</sup> ed, 1984), Chapter 1; A. O'Donnell and C. Arup, *Social Security and Labour Law: Constructing the Labour Market Subject*, Working Paper No. 24, Centre for Employment and Labour Relations Law (Melbourne, 2001); T. Carney, G. Ramia and A. Chapman, 'Which Law is Laggard? Regulation and the Gaps Between Labour Law and Social Security Law' in Arup et al, above n 6; J. Howe, *Regulating for Job Creation* (Federation Press, 2008).

<sup>32</sup> 'Project Outline: Law and Regulation of the Labour Market', Appendix to C. Arup, 'Labour Market Regulation as a Focus for a Labour Law Discipline', in Mitchell, *Redefining Labour Law*, above n 6.

<sup>33</sup> See Mitchell, 'Introduction', above n 12.

scholars have moved beyond regulation of the employment relationship, and in some cases have included industry planning and regulation of industry demand.

Scholarship in labour law is often traced to the German professor of law and sociology Hugo Sinzheimer, as the teacher of Kahn-Freund. Sinzheimer was important both for his contribution to the development of the theory of industrial democracy, but also for his role in implementing his vision as a parliamentary representative during the Weimar Republic.<sup>34</sup> While Kahn-Freund's focus became industrial relations at the level of the workplace, Sinzheimer seemed to have a broader view of the role of industrial democracy as encompassing decision-making regarding industrial development. In addition to workers' councils which would represent workers' interests at the workplace, he envisaged the establishment of industrial or economic councils which would be responsible for the regulation of production.<sup>35</sup> Article 165 of the Weimar Republic's Constitution called workers, 'to participate, in community with the employers and with equal rights, in the regulation of wages and conditions of employment *as well as the overall economic development of the productive forces*' (my emphasis).<sup>36</sup> For various reasons, although works councils continue to form an important element of German labour law, no industrial councils were ever formed.<sup>37</sup> It was Kahn-Freund who, in the post-WWII period, was so influential in shaping labour law scholarship around collective bargaining at the workplace level.

At the same time that Sinzheimer was developing his scholarship in labour law, the international labour movement was pushing for the formation of an international labour body. The first director of the International Labour Office, Stephan Bauer, included a wide range of topics in his report on International Labor Legislation in 1919, including labour migration, international regulation of social insurance, and the protection of health.<sup>38</sup> The early conventions adopted by the International Labour Organisation were similarly broad. As well as adopting conventions to improve working conditions for individual workers, the Constitution was also empowered to determine broader policies and strategies to preserve universal peace by addressing 'the regulation of the supply of labour', 'the prevention of unemployment', and the 'organisation of vocational and technical education'.<sup>39</sup> With the onset of the Great Depression in the 1930s, the ILO gave greater attention to solving the unemployment problem. Significantly, the President of the ILO from 1932-1938, Harold Butler, 'continued to stress the interdependence of social, economic and financial policy; in his view, a cure for unemployment could not be found in isolation from considerations of economic and financial policy'.<sup>40</sup>

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<sup>34</sup> R. Dukes, 'Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund, and the Role of Labour Law' (2008) 35 *Journal of Law and Society* 341 at 345.

<sup>35</sup> *Ibid* at 349.

<sup>36</sup> Constitution of the Weimar Republic (1919), English translation in B. Hepple (ed), *The Making of Labour Law in Europe: A Comparative Study of Nine Countries up to 1945* (1985), p 385.

<sup>37</sup> Dukes, above n 34, at 350.

<sup>38</sup> S. Bauer, *International Labor Legislation and the Society of Nations*, Bulletin of the United States Bureau of Labor Statistics (1919).

<sup>39</sup> ILO Constitution, Section I, Preamble. See also J. Murray, *Transnational Labour Regulation: the ILO and EC Compared* (2001), p. 37.

<sup>40</sup> D. Morse, *Origins and Evolution of the I.L.O. and Its Role in the Community* (1969), p 20.

Outside Europe, there is evidence that some early scholarship in labour law included a wide range of topics. For example, in the United States, Commons and Andrews' *Principles of Labor Legislation*, first published in 1916, includes topics we associate with traditional labour law, such as the labour contract, individual and collective bargaining, minimum wages and maximum hours of work. However, the book also deals with subjects such as 'Unemployment' - including the regulation of private and public employment exchanges and 'the regularization of industry,' and 'Social Insurance' - including health and unemployment insurance.<sup>41</sup>

After the Second World War, before the now-traditional subject matter took hold, some scholars continued to advocate a broader perspective for labour law, including topics such as industrial policy and industry assistance. This was most likely due to the fact that in the immediate post-war period, restructuring of wartime industry was a major activity of government and a key concern of workers, especially returning soldiers. WF Frank's book *The New Industrial Law* took up Professor Levy's earlier call (in the second volume of the *Industrial Law Journal*)<sup>42</sup> for greater attention to 'economic legislation' in the study of labour law with particular gusto.<sup>43</sup> Frank's book largely eschewed the traditional subject matter of labour law, focusing instead on British government policy and legislation concerning location of industry, industrial organisation and development, regulation of competition, and ownership of inventions, along with education and training and labour placement and mobility.

More recently, with the emergence in the 1970s of some of the challenges to traditional labour law identified in Section 2 of the paper, labour lawyers began to look to the relevance of a wider range of labour market issues. Davies and Freedland did so in the UK context, without going to the extent of characterising this as a reconceptualisation of labour law.<sup>44</sup> Although Davies and Freedland did consider the regulation of labour demand to be a relevant consideration for labour lawyers, they did not give consideration to industrial policy. By contrast, in early 1990s Japan, structural change in the Japanese economy, the resulting push for labour law reform, and the growing influence of law and economics scholarship led Japanese labour lawyers to give greater attention to the relationship between external labour market conditions and regulation of the internal labour markets of organisations.<sup>45</sup> In this context, Japanese labour law scholar Kazuo Sugeno has argued that industrial policy is a key mechanism by which the state influences industrial relations.<sup>46</sup>

Notwithstanding this evidence of diversity, labour law scholarship in Europe and the US in the post-war period largely coalesced around the traditional subject-matter of labour law, even though European labour law was quite different to labour law in some other

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<sup>41</sup> J.R. Commons and J.B Andrews, *Principles of Labor Legislation* (Rev. Ed., 1920).

<sup>42</sup> H. Levy, 'The Scope of Industrial Law' (1948) 2 *Industrial Law Review* 34.

<sup>43</sup> W.F. Frank, *The New Industrial Law* (1950).

<sup>44</sup> See Davies and Freedland, above n 31, Chapter 1.

<sup>45</sup> T. Araki, 'Labor Law Scholarship in Japan' (2002) 23 *Comparative Labor Law and Policy Journal* 735 at 743-744. For an example, see K. Sugeno, *Japanese Labor Law* (translated by L. Kanowitz)(University of Washington Press, Seattle, 1992).

<sup>46</sup> K Sugeno, 'Japan: The State's Guiding Role in Socio-Economic Development' (1993) 14 *Comparative Labor Law and Policy Journal* 302.

jurisdictions. For example, the Australian and New Zealand model of conciliation and arbitration did not really conform to the British or North American collective bargaining models, given the significant status accorded unions within the system, its industry focus and compulsory arbitration of disputes.<sup>47</sup>

Nevertheless, European models of labour law were transplanted in many countries throughout the world as a result of colonialism. However, while many developing countries inherited the principles of labour law developed in Europe in the pre- and post-war period, in practice, this model was not necessarily relevant to conditions in developing economies. As Teklé recently noted, 'there is an historical mismatch between the realities of the developing world and the dominant labour law model, with its underlying assumptions'.<sup>48</sup> As noted earlier, a key problem has been one of impact - the application and enforcement of labour law has frequently been inadequate, leaving many workers unprotected. In developing countries, the traditional subject matter of labour law has therefore been of less relevance to many workers. Chronic unemployment or underemployment in many countries is a major cause of inequality, making job creation in the formal sector a key means of achieving poverty alleviation.<sup>49</sup>

Indeed, in some developing countries, notwithstanding their inheritance of the traditional labour law model, greater attention has been paid to broader labour market issues in domestic labour law over time. As Cooney et al note in their book on labour law and labour market regulation in East Asia:

It is an interesting characteristic of labour law in many East Asian states that there has been less of an estrangement between the formal 'traditional' model of employee protection and the broader labour market dimensions of state policymaking and intervention.<sup>50</sup>

Moreover, a number of studies by labour law and industrial relations scholars have noted that the industrial policy (or industrialisation strategy) adopted by developing countries has had a significant impact on the form of that country's industrial relations and human resources policies and outcomes.<sup>51</sup>

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<sup>47</sup> KD Ewing, 'Australian and British Labour Law: Differences in Form or Substance?' (1998) 11 *Australian Journal of Labour Law* 44.

<sup>48</sup> T. Teklé, 'Labour Law and Worker Protection in the South', in Teklé, above n 21.

<sup>49</sup> For discussion in the context of Southern Africa, see C. Fenwick and E. Kalula, 'Law and Labour Market Regulation in East Asia and Southern Africa: Comparative Perspectives' (2005) 21(2) *International Journal of Comparative Labour Law and Industrial Relations* 193 at 205-206.

<sup>50</sup> Footnote omitted. The authors cite the example of the Philippines. S. Cooney, T. Lindsay, R. Mitchell and Y. Zhu, 'Labour Law and Labour Market Regulation in East Asia States: Problems and Issues for Comparative Inquiry', in S. Cooney, T. Lindsay, R. Mitchell and Y. Zhu (eds), *Law and Labour Market Regulation in East Asia* (2002), p 2.

<sup>51</sup> *Ibid*; Fenwick and Kalula, above n 49 at 222-223; S Kuruvilla, 'Linkages between Industrialisation Strategies and Industrial Relations/Human Resources Policies: Singapore, Malaysia, the Philippines and India' (1996) 49 *Industrial and Labor Relations Review* 635; V.B. Coutinho, 'Economic Liberalisation and the Task of Implementing Strict Standards of Occupational Health and Safety in Asian Countries', in R. Mitchell and J. Min Aun Wu, *Facing the Challenge in the Asia-Pacific Region:*

I will return to these matters later in the paper, but at this stage these factors provide significant grounds for adopting a broader LMR perspective which includes industrial policy on labour law. There are two key advantages to the LMR perspective. First, it provides greater clarity on changes in the purpose and nature of labour regulation and the changing problems and issues confronting workers over time, taking account of variations across different jurisdictions. As Mitchell has recently argued, it is important to know more about the 'reality' of labour law:

'there is always labour law in some shape or form according to different stages of economic development and different systems of production. Labour law is simply part of the political economy. ... Those approaching labour law from this perspective think there is value (and formative value) in trying to understand the complexity of this regulation, and to provide an analysis of how it operates and what impact it has'.<sup>52</sup>

Javillier has also emphasised the importance of finding out more about what is happening in labour law and practice 'around the world', and 'to avoid developing new theories or conclusions, which are linked mainly or only to one specific context such as, for example, developing countries and the post-industrial relations system'.<sup>53</sup>

However, the comparative perspective outlined above illustrates that the LMR perspective can also be used to advance a normative view, one that is more likely to capture current issues in labour regulation which impact on social inequality. The adoption of a broader LMR perspective does not signify an abandonment of concern for justice or egalitarian redistribution.<sup>54</sup> It is instead an acknowledgement that achieving such goals is not always simply a matter of addressing the imbalance in bargaining power between employers and employees. Imbalance in power can occur across the labour market, often by reason of unemployment or underemployment, and this type of imbalance can itself lead to widespread inequality and poverty. It also recognises that from time to time, regulation of the employment relationship has been conducted for a range of purposes, including the advancement of micro-economic efficiency, national competitiveness and macro-economic regulation (such as when incomes and employment policies have been pursued through labour law).<sup>55</sup>

For those who believe that labour law *should* operate to achieve justice for workers, the broader perspective is a better platform for achieving such a goal, or discussing policies which might. These days, to focus on the traditional subject matter of labour law is to neglect

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*Contemporary Themes and Issues in Labour Law* (Centre for Employment and Labour Relations Law, Melbourne, 1997).

<sup>52</sup> Mitchell, 'Where are we Going in Labour Law?', above n 20.

<sup>53</sup> Javillier, above n 14. See also Mitchell, 'Where are we Going in Labour Law?', above 20.

<sup>54</sup> Klare argues that 'a commitment to egalitarian redistribution and the empowerment of subordinated groups should inform legal work, in practice and in scholarship': Klare, 'The Horizons of Transformative Labour and Employment Law', in Conaghan, Fischl and Klare, above n 6, p 4.

<sup>55</sup> See, for example, H. Collins, 'Regulating the Employment Relation for Competitiveness' (2001) 30 *Industrial Law Journal* 17; Arup et al, 'Employment Protection and Employment Creation', above n 27; Mitchell and Arup, above n 6, pp 10-11.

the interests of others dependent on their labour for a living. If our goal is, for example, the ILO's Decent Work proposal, then we need to be studying 'the legal and regulatory policy which shapes labour's position in society',<sup>56</sup> not just employment regulation, but employment policies, unemployment regulation, immigration law, and of particular relevance to this paper, industrial policy.

What follows is a modest contribution to the broad idea of labour law I have just charted. To illustrate the important role that industrial policy has played (and might come to play) in labour market regulation and the achievement of decent work in both an industrialised and a developing economy context, the next section of the article examines the introduction of tariff protection and the adoption of conciliation and arbitration in Australia at the beginning of the 20<sup>th</sup> century.

#### **4. Labour Law as Labour Market Regulation and the Role of Industrial Policy: 'New Protection' and the Foundations of Australian Labour Law**

Taking up the challenge of revising our understanding of labour law with reference to its historical legacy, this section of the paper discusses the Australian Government's adoption of the New Protection policy at the time of the establishment of the Australian conciliation and arbitration system. The aim is to illustrate the value of a perspective which recognises that the subject of labour regulation is historically and culturally contingent, and to emphasise that a LMR perspective is necessary in order to encompass a number of issues which may be of interest to working people at any given point in time and space.

Although Arup and Mitchell identified industry assistance as an area of interest within the labour market perspective, there is very little scholarship on the role of industry policy as labour market regulation in Australia.<sup>57</sup> This is interesting because as noted earlier, looking back to Federation and the establishment of conciliation and arbitration, industry policy in the form of tariff protection was crucial to the introduction of a new labour relations system.

At the beginning of the twentieth century, the newly established Commonwealth of Australia implemented a number of innovative economic and social policies. Of most interest to labour lawyers was the enactment of the *Conciliation and Arbitration Act* 1904, which established a labour tribunal that was empowered to settle interstate industrial disputes between employers and trade unions.<sup>58</sup> However, other key initiatives during the first few years of the federation included the adoption of the White Australia immigration policy, and in 1906, the New Protection tariff policy.

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<sup>56</sup> Mitchell, 'Where Are We Going in Labour Law?', above n 20.

<sup>57</sup> An exception is P. Smyth, 'Closing the Gap? The Role of Wage, Welfare and Industry Policy in Promoting Social Inclusion' (2007) 50(4) *Journal of Industrial Relations* 647. See also D. Plowman, 'Protectionism and Labour Regulation', Proceedings of the HR Nicholls Society Meeting, Adelaide, November 1992, available at <http://www.hrnicholls.com.au/archives/vol13/vol13-4.php> (last visited 24 August, 2010).

<sup>58</sup> For an historical account of the enactment of this legislation, see S. Macintyre and R. Mitchell (eds), *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration 1890-1914* (OUP, Melbourne, 1989).

Journalist Paul Kelly has described the combination of racially based immigration controls, tariff protection and conciliation and arbitration (along with state paternalism and imperial benevolence) as a uniquely 'Australian Settlement' which defined Australian politics and society until the 1980s.<sup>59</sup> Although that term has subsequently been criticised,<sup>60</sup> commentators agree that by design or otherwise these different policies were complementary to the establishment of high living standards for workers in the Australian context.<sup>61</sup> A racist immigration policy prevented competition from cheap labour from the Asia-Pacific region,<sup>62</sup> tariff policy soothed business concerns that conciliation and arbitration would increase labour costs by offering protection from overseas competition, which in turn delivered domestic business prosperity. Conciliation and arbitration, in theory, ensured an equitable distribution of that prosperity.

The use of tariffs to encourage and sustain local industries by imposing a tax on imported goods was a carryover from the colonial period, and had often been justified on the grounds that it helped safeguard employment. It was also an important source of revenue for colonial governments. After Federation, there was concern that Australia was too reliant on primary industry and exports for economic growth, and as a result tariffs were favoured as a mechanism to secure a more self-sufficient model of growth through the promotion of secondary industry.<sup>63</sup>

To what extent was tariff protection a 'labour issue' at the time, as distinct from a purely business concern on the part of domestic Australian industrialists? It is important to note that at the beginning of the twentieth century, the Australian economy was in the midst of a transition from a largely agrarian base to one with more developed secondary industry. It had experienced a depression in the early 1890s, from which it was only just recovering, with the result that unemployment and industrial unrest had been a significant issue for over a decade. Although the Australian economy had acquired many of the structural characteristics of urban industrial societies in Europe and North America, such as a strong primary industry sector (agriculture and mining), and a developing services sector, its manufacturing sector was still relatively small.<sup>64</sup> As a result, while wages were a major focus of the labour movement and of the public at this time, tariffs and the creation of industrial employment were also key concerns.<sup>65</sup>

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<sup>59</sup> P. Kelly, *The End of Certainty: the Story of the 1980s* (1992).

<sup>60</sup> P. Smyth and B. Cass (eds), *Contesting the Australian Way: States, Markets and Civil Society* (Cambridge University Press, 1998).

<sup>61</sup> See, for example, S. Macintyre, *The Labour Experiment* (1989); K. Hancock and S. Richardson, 'Economic and Social Effects', in J. Isaac and S. Macintyre (eds), *The New Province of Law and Order: 100 Years of Conciliation and Arbitration* (2004).

<sup>62</sup> A. O'Donnell and R. Mitchell, 'Immigrant Labour in Australia: the Regulatory Framework' (2001) 14 *Australian Journal of Labour Law* 269; M. Crock and L. Friedman, 'Immigration Control and the Shaping of Australia's Labour Market: Conflicting Ideologies or Historical Imperatives', in Arup et al (eds), above n 6.

<sup>63</sup> Macintyre, *The Labour Experiment*, above n 61, p 21.

<sup>64</sup> R. Maddock and I.W. McLean, 'The Australian Economy in the Very Long Run', in R. Maddock and I.W. McLean (eds), *The Australian Economy in the Long Run* (Cambridge University Press, Melbourne, 1987), p 19.

<sup>65</sup> F. Crowley, '1901-14', in F. Crowley (ed) *A New History of Australia* (1974), p 278.

It should be noted that the politics of the newly formed Australian Parliament were complex. There were three key factions in the first decade of the Australian Parliament: Labour, Liberal Protectionists and the more conservative 'Free Traders'. Each grouping struggled to form a majority in Parliament in their own right, so was dependent on attracting one of the other factions to its agenda. One of the Labour caucus' key goals was the passage of legislation to protect union activity and working conditions in the form of arbitration legislation. However, the Conciliation and Arbitration Act was only passed with the support of non-labor liberals, some of whom had played an important role in the advancement of this particular form of labour regulation.<sup>66</sup>

The Liberal Protectionists favoured tariff protection as a means by which to protect business and provide room for social development, but the first federal tariff set in 1902 (or 'old' protection) was widely regarded as a temporary measure that was only weakly protective. However, Labour parliamentarians were soon convinced that tariffs could be used to improve workers standard of living, and joined Liberal Protectionists in pursuing a more comprehensive tariff policy which became known as the 'New Protection'. In 1906, Liberal Protectionists and Labour parliamentarians formed an alliance which allowed the Deakin Government to pass the New Protection into federal law. There is some disagreement among historians about whether the New Protection was designed by Liberals to attract the support of the Labour party and defeat the opposition of the Liberals' more conservative Free Trade opponents, or whether it was forced upon the Liberals by Labour as a condition of their support in Parliament.<sup>67</sup> Whatever the correct version of events, there was disagreement within the Labour ranks in the late nineteenth and early twentieth century about the merits of protective tariffs as a policy that would benefit working people. In Parliament, there were Labour 'Free Traders' who were concerned that tariffs would increase the prices of necessities, thereby increasing the cost of living for working people (a concern shared with conservative Free Traders).<sup>68</sup> On the other hand, Labour 'Protectionists' believed the tariff would keep unemployment down and facilitate the payment of higher wages.<sup>69</sup> Eventually the Labour Party formally adopted New Protection as part of its policy platform at its Inter-State Labour Conference in 1908.<sup>70</sup>

The New Protection was an explicitly labourist form of tariff protection. To address Labour's concern that domestic businesses would not automatically share the gains from a higher

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<sup>66</sup> S. Macintyre, 'Neither Capital Nor Labour', in Macintyre and Mitchell, above n 58, p 189.

<sup>67</sup> 'Historians have tended to assume that the doctrine [of New Protection] was devised and elaborated by Deakin to convert the Labour party, divided in its fiscal beliefs, to the firm support of a protective tariff, though as a humanitarian Liberal he was doubtless happy to pay the price. By contrast, his contemporaries, in pride or criticism, asserted that it was forced upon him'. La Nauze notes St Ledger, a free trade conservative, observed that Deakin had only adopted the New Protection 'At the point of the sword': *Australian Socialism* (London, 1909). But La Nauze notes that W.G. Spence (Labour) wrote that 'what is known as the 'New Protection' is a proposal which entirely originated with the Labour party'. *Australia's Awakening* [1909] (Brisbane, 1942), p 340, both quoted in J.A. La Nauze, *Alfred Deakin: A Biography* (1965), p 410 and footnote 8, p 658.

<sup>68</sup> P.G. McCarthy, 'Employers, the Tariff, and Legal Wage Regulation in Australia - 1890-1910' (1970) 12 *JIR* 182. At 184. See also Crowley, above n 65, p 268.

<sup>69</sup> J. Hagan, 'The Australian Labour Movement: Context and Perspective, 1850-1987, in W Ford and D Plowman (eds), *Australian Unions: an Industrial Relations Perspective*, Melbourne, 1989, pp 19-22.

<sup>70</sup> J.A. La Nauze, above n 67, p 436. See also Crowley, above n 65, p 285.

level of protection with their workers, the New Protection sought to link trade protection with working conditions by requiring the beneficiaries of tariff protection to provide 'fair and reasonable' wages and working conditions for their employees.<sup>71</sup> The New Protection was a suite of legislation that combined import tariffs, excise duties and industrial tribunals. So, for example, the *Customs Tariff Act 1906* (Cth) provided protection to agricultural implement manufacturers by imposing duties on imported machinery, while the *Excise Tariff (Agricultural Machinery) Act 1906* imposed an excise on Australian manufactured agricultural machinery of approximately 50% of the customs tariff.<sup>72</sup> As noted earlier in relation to the *Harvester* decision, the *Excise Tariff Act* then declared that the excise would not be payable by manufacturers whose employees were paid a 'fair and reasonable' wage, to be assessed by industrial tribunals such as the Court of Conciliation and Arbitration.

This goal of ensuring that the benefits of protection were distributed between capital and labour is apparent in the quote at the beginning of this paper, from the Explanatory Memorandum to the New Protection policy. The practice of connecting social protection legislation and the tariffs can be traced back to at least the 1890s, when the Victorian Government established a system of Wages Boards to regulate working conditions in protected industries under the *Factories and Shops Act 1896* (Vic).<sup>73</sup> Like that initiative, the New Protection had a number of express labour market objectives, including the promotion of demand for labour, and 'to render stable the conditions of labour and to prevent the standard of living of the employes (sic) in [protected industries] from being depressed to the level of foreign standards'.<sup>74</sup> Indeed, part of the impetus for the implementation for the New Protection came from the threat that international manufacturers of agricultural implements posed to the local industry (including HV McKay) which at that time employed almost 3,000 workers.<sup>75</sup>

Tariff protection was therefore very much part of the Australian labour movement's agenda in the early part of the twentieth century. It is important to observe here that Australian labour movement had followed a different trajectory to its US and European counterparts when it came to involvement in the political system. As Macintyre has observed:

'Whereas labour movements in other countries regarded the state as oppressive, and argued long and hard over the dangers of concentrating their political efforts on state activity, there were few such reservations in Australia. The early labour movement assumed that it could employ its electoral strength to wrest the state away from the control of its enemies and use it to bring about a new economic and social order'.<sup>76</sup>

Moreover, the concerns of the labour movement at the turn of the century were distinctly 'labourist' (as opposed to socialist) and reflected the pressing issues faced by workers at this

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<sup>71</sup> La Nauze, *Ibid*, p 410.

<sup>72</sup> For further consideration, and discussion of other legislation enacted before 1908 which was consistent with the New Protection policy, see Plowman, 'Protectionism and Labour Regulation', above n 57, pp 1-2.

<sup>73</sup> Alfred Deakin, Prime Minister in 1906, had also been instrumental in the development and passage of the Victorian Factories legislation. See La Nauze, above n 67, p 411.

<sup>74</sup> *Explanatory Memorandum in Regard to New Protection*, above n 1, pp 1887-9.

<sup>75</sup> La Nauze, above n 67, p 413; Tariff Commission, *Report on the Agricultural Implements Industry*, 1906.

<sup>76</sup> Macintyre, *The Labour Experiment*, above n 61, p 11.

point in Australian history. Some of these concerned job security and wage rates, however given the still-recent experience of mass unemployment in the 1890s 'and against a continuing background of seasonal unemployment, it [the working class] wanted to ensure that jobs were available to all'.<sup>77</sup>

The New Protection was relatively shortlived. Only two years after its implementation, as a result of employer legal challenges, the legislation implementing the policy was declared unconstitutional by the High Court of Australia.<sup>78</sup> However, tariff protection for domestic industry continued, although it was just one element of Australian industrial policy at this time. The federal government also provided other forms of domestic industry assistance, as well as infrastructure spending, and the establishment of public enterprises to compete with private capital in certain sectors, such as banking.<sup>79</sup> For example, financial subsidies were a more attractive form of assistance for those industries which were less susceptible to competition, such as the iron and steel industries.<sup>80</sup> Moreover, there were clear connections between industrial policy and a broader agenda of social protection among both labour and liberal political activists. Smyth has argued that what was distinctive about Australia's industrial policy compared to other industrialised countries at the same time was not that it was protectionist, but that the state had played such an important role in ensuring that the gains from protection were spent on infrastructure and social investment, including education and health.<sup>81</sup> This then, was the 'high road' to economic development - the use of tariff protection as part of an industrial development strategy to achieve 'a higher-wage economy with a broader, more diverse structure of opportunities available to its citizens', citizens who would be self-supporting individuals with no need for welfare or charity from the state - and business was on board as an important driver of social policy along with political liberals and the political arm of the labour movement.<sup>82</sup>

In the first two decades of the twentieth century, traditional labour law was therefore only one piece of a complex policy puzzle that delivered high living standards to many Australian workers. Despite the demise of a direct connection between trade protection and labour standards in 1908, tariff policy continued to be an important factor in the high wage levels enjoyed by Australian workers until the late 1920s, at least as important as the conciliation and arbitration system.<sup>83</sup> Although Higgins' concept of the 'fair and reasonable wage' from

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<sup>77</sup> *Ibid*, p 19.

<sup>78</sup> *R v Barger* [1908] HCA 43; (1908) 6 CLR 41. On the employers campaign against both the New Protection and the Conciliation and Arbitration Act, see D. Plowman, 'Forced March: the Employers and Arbitration', in S Macintyre and R Mitchell (eds), *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration 1890-1914* (1989).

<sup>79</sup> J. Pincus, 'Evolution and Political Economy of Australian Trade Policies' in R. Pomfret (ed), *Australia's Trade Policies* (OUP, Melbourne, 1995), p 62; Macintyre, *The Labour Experiment*, above n 61.

<sup>80</sup> Pincus, *ibid*, p 62

<sup>81</sup> Smyth, above n 57.

<sup>82</sup> *Ibid* at 653. For further consideration of the concept of the high road approach to economic development, see S. Deakin and F. Wilkinson, 'Rights vs Efficiency? The Economic Case for Transnational Labour Standards' (1994) 23 *Industrial Law Journal* 289.

<sup>83</sup> Hancock and Richardson, above n 61 at pp 186-187, referencing the Brigden Committee Report on tariff protection in the first three decades after Federation: J.B. Brigden, D.B. Coplan, E.C. Dyason, L.F. Giblin and C.H. Wickins, *The Australian Tariff: an Economic Inquiry* (1929).

the *Harvester* case was applied in federal award determinations under the Conciliation and Arbitration Act, in the first two decades of the legislation's operation it had limited impact. Only a small number of workers were covered by federal awards, with many working in non-standard work arrangements and thus outside the scope of the system, and the living wage principles were not applied consistently until the 1920s.<sup>84</sup> The Committee of eminent economists appointed to review the Australian tariff in the late 1920s (the Brigden Committee) argued that the success of the tariff policy in decreasing Australia's dependence on agricultural and pastoral polices and fostering the development of the manufacturing sector may have had had a greater impact on living standards than minimum wage levels in awards. The maintenance of protection ensured the growth of secondary industry, thereby increasing employment opportunities and facilitating population growth. The Brigden Committee further argued that the tariff had a distributional function in that it raised the prices of local products, redirecting income from landholders in primary industry to workers in retail and manufacturing sectors.<sup>85</sup> This distributional function was supported by the conciliation and arbitration system, in that the standard of wage regulation adopted by the Conciliation and Arbitration Court reflected the overall average income generated by the tariff, and ensured that employers were not tempted to undercut average wage levels.<sup>86</sup>

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In the preceding discussion of the new protection, I am not intending to suggest that the emergence and development of arbitration was dependent upon protectionist trade policy. Instead, this discussion of the early years of Australian labour regulation shows that arbitration and protection (a form of industrial policy) were closely related, and that it is difficult to consider the effectiveness of one in the achievement of better labour standards without the other. Although Australia's industrial policy settings changed over time, industrial policy continued to be an important form of labour market regulation over the remainder of the twentieth century, and is still important in present day political debates. The question of just how important industrial policy has been as an instrument of labour market regulation in recent decades is a matter for further research. However, for present purposes, it remains to draw some conclusions about the implications of this discussion for the inclusion of industrial policy within a broader, LMR perspective of labour law.

## 5. The New Industrial Policy as Labour Law

In the previous section, it was shown that industrial policy was a key factor in the social protection of workers in early twentieth-century Australia. It is arguable that under the Australian Settlement, the adoption of tariff protection along with immigration restrictions was crucial to the establishment of a legal system regulating labour relations for the benefit of employees.

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<sup>84</sup> Smyth, above, at 651; see also S. Macintyre, 'Arbitration in Action', in Isaac and Macintyre, above n 61; On the extent of non-standard work arrangements, see O'Donnell and Arup, above n 31.

<sup>85</sup> Brigden Committee, above n 83, p 96.

<sup>86</sup> Brigden Committee, *ibid.* See also Hancock and Richardson, above n 61, p 187 and Plowman, 'Protectionism and Labour Regulation', above n 57, p 3.

Independently of this, the New Protection itself explicitly connected industrial policy (in the form of tariff protection) with labour standards (in the form of minimum wage requirements). Indeed, supporters of the New Protection, whether Liberal or Labour, were for the most part as much concerned with social protection and investment as they were with the profits of protected businesses. This once again confirms that labour regulation can have both economic and social justifications. Moreover, it appears that after the minimum wage requirements of the New Protection were struck down by the High Court, tariff policy was at least as important to the wage levels achieved in the early part of the twentieth century as the minimum wages set by federal awards.

The New Protection also played a significant role in the constitution of Australia's labour market by stimulating labour demand within Australia. By encouraging labour demand through industrial development, the policy influenced the *pattern* of employment, the types of jobs that would be available in the Australian economy. Under the New Protection, the government was privileging manufacturing jobs over employment in agriculture (Australia's farmers faced lower prices for their exports, and higher costs in getting their produce to market).

The preference for industry over agriculture, and the insulation of industry from international competition, in turn had some influence on maintenance of wage levels and the quality of life of workers and their families over the first two decades of the twentieth century. To that extent, tariff protection was inseparable from traditional labour law's protective function.

I have argued that the broader, LMR perspective on labour law is better suited to investigating the nature and impact of labour regulation across time and place. While it is difficult to be sure without further research into the role of industrial policy in other jurisdictions, parallels can be drawn between the relevance of industrial policy settings to working conditions in Australia in the early twentieth century and current debates about the role of industrial policy in both industrialised and developing countries in the twenty-first century.

Australia was not alone in employing a protectionist industrial policy to buttress capitalist economic development during key phases of its industrialisation. There is evidence that the UK, USA, Germany, Sweden and Japan used active tariff and non-tariff measures to promote industrial development in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries.<sup>87</sup> Moreover, industrialised countries maintained their tariff protections until the 1980s, in part enabling them to maintain social protection systems including traditional labour law.<sup>88</sup> Industrialised countries have also made extensive use of government procurement, another form of industrial policy, to regulate labour standards of employees of firms benefiting from

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<sup>87</sup> A useful overview can be found in H-J. Chang, 'Kicking Away the Ladder: Infant Industry Promotion in Historical Perspective' (2003) 31(1) *Oxford Development Studies* 21, at 24-27.

<sup>88</sup> A. Blackett, 'Trade Liberalisation, Labour Law and Development', in Teklé, above n 21, p 100.

government contracts.<sup>89</sup> It is at least possible to speculate that industrial policy may have had something to do with labour law and labour market developments in those countries.

There is also evidence that some developing countries have from time to time made use of industrial policies to foster economic development and job growth. However, these initiatives began later, and since the 1980s have been curtailed by the so-called 'Washington consensus' around the approach which nation states should adopt in the pursuit of economic development. To simplify, it has been strongly argued that the path to development and poverty alleviation must be based on trade liberalisation strategies and labour market deregulation – in other words, that developing nations should adopt free trade and laissez-faire industrial policy, and introduce greater flexibility into employment regulation, to lower the cost of hiring and firing workers, in order to achieve economic growth.<sup>90</sup> This has been characterised as the 'low road' to economic development, which can be contrasted with the 'high road' referenced earlier, where development is pursued by stimulating economic growth through the creation of quality jobs in sustainable industry.<sup>91</sup>

While those in favour of free trade might paint industrialisation strategies involving more active state promotion of economic activity as detrimental to economic growth,<sup>92</sup> another view is that active industrial policies were key to the economic development and high living standards of industrialised countries. As one commentator has suggested, the dominance of trade liberalisation as an industrialisation strategy means that developing countries have not had the 'privilege of cushioning the adverse domestic effects of market exposure'.<sup>93</sup> In other words, historically industrialised countries experienced development in very different

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<sup>89</sup> See C. Barnard, 'Procurement Law to Enforce Labour Standards', Paper presented to Workshop 'On the Very Idea of Labour Law', Cambridge University, 8-9 April 2010; C. McCrudden, *Buying Social Justice: Equality, Government Procurement and Legal Change* (2007); J. Howe, 'The Regulatory Impact of Using Public Procurement to Promote Better Labour Standards in Corporate Supply Chains', in K. Macdonald and S. Marshall, *Fair Trade, Corporate Accountability and Beyond: Experiments in Globalizing Justice* (2010).

<sup>90</sup> For example, for a number of years the World Bank has been disseminating its 'Employing Workers' index as part of its annual 'Doing Business' report. The report rates countries against a range of indices that measure the theoretical 'ease' of doing business under particular legal and institutional models, where 'ease' appears to be assessed according to estimated cost and other 'burdens' associated with compliance with legal and administrative rules and procedures across a range of policy areas. One of the key indices in the Doing Business reports in the 'Employing Workers' index (EW index), a composite indicator which reports on matters such as the ease of 'hiring and firing workers'. The EW index appears to be included on the assumption that higher formal labour standards in the organised sector lead to an increase in informal employment, and therefore lower growth. See J. Berg and S. Cazes, 'Policymaking Gone Awry: The Labor Market Regulations of the Doing Business Indicators' (2008) 29(4) *Comparative Labor Law and Policy Journal*; S. Lee, D. McCann and N. Torm, 'The World Bank's "Employing Workers" Index: Findings and Critiques – A Review of Recent Evidence' (2008) 147 *International Labour Review* 416-432.

<sup>91</sup> Good Jobs First, above n 22.

<sup>92</sup> See, for example, H. Pack and K. Saggi, 'Is There a Case for Industrial Policy? A Critical Survey' (2006) 21(2) *The World Bank Research Observer* 267-297.

<sup>93</sup> J Ruggie, *Taking Embedded Liberalism Global: the Corporate Connection* (2003), p. 11, quoted in Blackett, above n 88, p 100.

circumstances to those facing developing countries, and certainly not under conditions of 'free trade' and in the absence of industrial policy.<sup>94</sup>

Trade liberalisation is just one of a number of industrialisation strategies that developing countries might pursue. In recent years there has been some reaction against trade liberalisation by many developing countries in the absence of a greater commitment by industrialised countries to winding back tariff protections and other subsidies. It is also apparent that notwithstanding the apparent consensus around trade liberalisation and abstinence from active industrial policy, industrialised and developing countries continue to pursue economic policies involving active promotion of innovation and industry.<sup>95</sup> However, the practice and analysis of industrial policy has also become more sophisticated. In relation to encouragement of industrial development, what has been described as the 'new industrial policy' is less focused on tariff protection and 'picking winners', that is, government selecting particular industries which it sees as being more sustainable and a better fit with local labour market conditions and business expertise than others. Although there is still plenty of this going on, new industrial policy is more directed through horizontal measures which encourage 'innovation' and competitiveness across in particular regions or across an economy rather than being confined to particular sectors.<sup>96</sup>

Much of the debate about the role of industrial policy in both industrialised and developing countries at present is connected to the debate about the appropriate path to economic development. There is evidence to suggest that the strong connection between industrialisation strategy, industrial policy and traditional labour law that was apparent in Australia's New Protection policy is also apparent in relation to industrialisation strategies pursued by developing countries. As noted earlier, comparative studies of labour market regulation in East Asia and Southern Africa have observed that states will endeavour to shape their industrial relations regulation to fit the industrialisation strategy they pursue. For example, in the East Asian context, Cooney et al argue that 'East Asian states have progressed through stages of industrialisation, from import-substitution to export-oriented and then to higher-value export oriented; and that industrial relations strategies change to accordingly to reflect those different strategies'.<sup>97</sup>

Kuravilla identified a number of different industrialisation strategies in a study of East Asian countries in the early 1990s, distinguishing them on the basis of their 'inward' or 'outward' orientation and by their sectoral focus. Kuravilla contrasts an import substitution industrialisation strategy, which 'typically focuses on the promotion of locally owned industries catering to a relatively large domestic market in order to conserve foreign exchange and to promote industrialisation and local entrepreneurship' on the one hand, and export-oriented industrialisation, where foreign exchange earnings are seen as the basis for economic development and growth, and where 'appropriate incentives for inward foreign

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<sup>94</sup> H-J. Chang, 'Kicking Away the Ladder: Infant Industry Promotion in Historical Perspective' (2003) 31(1) *Oxford Development Studies* 21.

<sup>95</sup> In relation to industrialised countries such as the USA, see F. Block, 'Swimming Against the Current: The Rise of the Hidden Developmental State in the United States' (2008) 36 *Politics & Society* 169. In relation to developing countries, see, for example, Rodrik, above n 8.

<sup>96</sup> See, for example, Aiginger, above n 8.

<sup>97</sup> Cooney et al, above n 50, p 6.

investment are enacted by the state'.<sup>98</sup> A trade liberalisation strategy which is an export-focused strategy might have different implications for labour regulation and industrial relations practices than a more protective import replacement strategy. Thus, export-oriented strategies have often relied on exporting labour-intensive goods where low costs of labour and production are the chief source of competitive advantage.<sup>99</sup> For example, he notes that Singapore's export-oriented industrialisation strategy led to efforts to encourage workplace flexibility by restricting the subject matter of enterprise bargaining, and to contain industrial disputation by restricting the right to strike.<sup>100</sup> States which have followed a more inward-focused industrialisation strategy have been more willing to maintain stronger labour protections.<sup>101</sup> There are many variations within these simplified categories, and it is not possible to conclude simply that export-oriented strategies are more likely to be associated with lower labour standards and downward pressure on labour protections than more inward-looking policies. However, it is apparent that there are connections between industrial policy and labour law settings which are a legitimate subject for inquiry under a LMR perspective.

What is the relevance of these findings to contemporary debates over the idea of labour law? I have argued that the inclusion of industrial policy within an LMR perspective on labour law is important to the legitimacy of the field across time and space. In terms of the scope of labour law, it is important to include industrial policy within the LMR perspective as it contributes to both the constitution and regulation of labour markets through its impact on the supply and demand of labour, as well as the conditions of those in work. Moreover, as my discussion of industrial policy in Australia at the turn of the twentieth century demonstrates, from a normative perspective, industrial policy settings can be very important to economic development, and hence social protection and quality of life. There is often a relation between labour law and industrial policy which cannot be ignored. Moreover, the broad approach, I have argued, is useful for comparing jurisdictions and exploring the intersection between international trade regulation and domestic labour regulation settings.

However, there may be concern that the broad idea of labour law could become too broad, therefore undermining the coherence of the field. Some identification of the extended scope and the reasons for particular extensions scope seems desirable. In response, I conclude with some remarks about what aspects of industrial policy and industrialisation strategies should be included within the LMR perspective on labour law. In other words, what topics would be of relevance when examining industrial policy as labour market regulation?

First, the LMR perspective enables examination of a number of topics which do not necessarily assume the existence of a particular economic system, or variety of capitalism.<sup>102</sup>

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<sup>98</sup> Kuruvilla, above n 51, at 636-637.

<sup>99</sup> *Ibid* at 637.

<sup>100</sup> *Ibid* at 640.

<sup>101</sup> For example, India: *Ibid*; see also P.V. Dutta, 'Trade Protection and Industry Wages in India' (2007) 60(2) *Industrial and Labor Relations Review* 268.

<sup>102</sup> P. Hall and D. Soskice (eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press, Oxford, 2001); H. Gospel and A. Pendleton (eds), *Corporate Governance and Labour Management: An International Comparison* (Oxford University Press,

For example, one might consider the question of public versus private *ownership of capital* as a relevant concern. One possible industrial policy open to nation states is government delivery of goods and services, whether by way of a monopoly or as a competitor with private capital. Given that public sector employment in capitalist economies is often assumed to offer better and more secure employment than many private sector employers, one might at least speculate that a high rate of public ownership of capital would have implications for working conditions across an economy. With respect to private sector employers, it is arguable that different varieties of capitalism exist with implications for labour law and its application in each country context. There has already been extensive consideration of the variation in labour management practices across different national capitalist systems. One approach offers two categories of the latter, the liberal market model and the co-ordinated market model, with some scholarship suggesting that co-ordinated market economies have historically been more supportive of cooperative labour market institutions than liberal market systems.<sup>103</sup>

Second, we should include regulation which affects *industrial structure and the stability of industry*. Here, we should be interested in policies which are designed to maintain existing structures or facilitate structural adjustment through industry assistance, or which open up new industries by attracting new investment and industry and encouraging innovation. Reacting against the hegemony of trade liberalisation strategies and associated downward pressure on labour costs in recent years, there has been an increase in interest from labour regulation scholars in economic development strategies which are consistent with the creation of decent work.<sup>104</sup> Arguably, such a topic is of much interest to workers in developing nations who are employed in the informal economy, with little hope of enjoying the legal minimum in terms of working conditions.

Third, regulation which impacts on the geographic *location of industry* within a country would also be of key importance to the LMR perspective. This category would include public procurement with 'local content' requirements along with other policies which encourage industry to move to, or commence in, regions with high unemployment rather than locating in areas with stronger labour demand.<sup>105</sup> It might also address competition between regional governments for investment and industry, and the extent to which states use their high or low labour standards as a bargaining chip in that competition.

Of course, consideration of this subject matter necessarily brings the labour lawyer with a broad LMR perspective into contact with the field of trade regulation, usually regarded as an aspect of economic policy, but also defined by legal regulation. The dominance of trade

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Oxford, 2005); S. Marshall, R. Mitchell and I. Ramsay (eds), *Varieties of Capitalism, Corporate Governance and Employees* (Melbourne University Press, Melbourne, 2008).

<sup>103</sup> For a critique of this dual characterisation of national capitalist systems, see N. Wailes, J. Kitay and R.D. Lansbury, 'Varieties of Capitalism, Corporate Governance and Employment Relations Under Globalisation', in Marshall, Mitchell and Ramsay (eds), *ibid*.

<sup>104</sup> As evidenced by the formation of the Regulating for Decent Work Network in 2008. The RDW Network held its first conference at the ILO in 2009: <http://www.ilo.org/public/english/protection/condtrav/publ/rdw.htm>, last visited on 12 March 2010. See also Fenwick et al, above n 21.

<sup>105</sup> See, for example, McCrudden, above n 89.

liberalisation as an industrialisation strategy, implemented through bilateral and multilateral trade agreements, means that industrialisation strategies which depart from the trade liberalisation model may come into conflict with free trade rules. Yet the intersection (or conflict) between labour law and trade law is one with which labour lawyers have become increasingly comfortable with over the last decade.<sup>106</sup>

In relation to all of these categories, it will be possible to ask questions which can be derived from traditional labour law scholarship. From a normative perspective, including industrial policy within a LMR perspective would not signify an abandonment of interest in the protective function of labour law. One of the rationales for including industrial policy in the study of labour law is that it will provide more information about why traditional labour law – protection of working conditions – is or is not effective. Industrial policy, which can be equated with economic development strategy, will have significant implications for the achievement of decent work for all, and social and economic equality. This approach will enhance empirical scholarship in labour law which takes as its main concern the *impact* of labour law and labour market regulation.

Moreover, it will be possible to inquire as to whether industrial policy is determined by the state, or is conducted through a process which provides workers or representative organisations with a role in determining appropriate strategies. To what extent has Sinzheimer's idea of industrial councils seen the light of day in one context or another? The labour lawyer's interest in legal standards and their content can also be maintained through the study of industrial policies as labour market regulation. Some studies have already sought to examine whether, like the New Protection, states not only set targets for the number of jobs that are to be created by financial assistance to industry, but also set minimum labour standards through public procurement and/or industry assistance contracts.<sup>107</sup>

## 6. Conclusion

This paper has argued in favour of a broad, labour market perspective in labour law. Including industrial policy within the scope of labour law would have a number of benefits for both scholarship and policymaking in this field. The LMR perspective view reinforces that markets and labour markets are not autonomous and self-generating, by showing the importance of state policy in constituting and regulating those markets. Industrial policy helps to shape labour demand, which is not only important in the constitution of labour markets, but in turn impacts on what sort of labour standards can be achieved. The broader perspective assists in conducting more complete, long term analysis of regulation which pertains to the person dependent upon their labour for subsistence. It is less prone to crises related to avoidance of traditional labour law and changing work relationships, because the subject matter is not tied to a particular form of work relationship, and allows for analysis of

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<sup>106</sup> See, for example, B. Hepple, *Labor Laws and Global Trade* (2005); V.A. Leary and D. Warner (eds), *Social Issues, Globalisation and International Institutions : Labour Rights and the EU, ILO, OECD and WTO* (2005) ; A. Blackett, 'Trade Liberalisation, Labour Law and Development', in T. Teklé (ed), *Labour Law and Worker Protection in Developing Countries* (2010).

<sup>107</sup> Howe, above n 89; Howe and Landau, above n 9.

variation in working arrangements by industry. Finally, it facilitates comparative study as findings will foster greater understanding of how different countries at different stages of development, and with different economic systems, have regulated labour.

I suggest that the inclusion of at least some aspects of industrial policy within labour law is essential because not only does it give us a better understanding of how labour markets are constituted and regulated across different jurisdictions, it also helps in understanding why traditional labour laws are effective or ineffective in achieving greater social equality and reducing poverty. This in turn suggests that the broader LMR perspective can also be helpful in a normative sense - for the achievement of socially just working conditions which are accessible to all those who are dependent on their labour for a living.

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