

RESEARCH REPORT

**WHAT IS LABOUR LAW
DOING ABOUT ‘PARTNERSHIP AT
WORK’? BRITISH AND AUSTRALIAN
DEVELOPMENTS COMPARED**

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Table of Contents

1	Introduction.....	4
2	The Principles and Practice of Partnership in Britain.....	6
2.1	Strategic HRM and Enterprise Competitiveness.....	7
2.2	Trade Unions and the Politics of Collective Action.....	9
2.3	Partnership in Practice.....	14
3	Partnership at Work and British Statutory Labour Law.....	16
3.1	Trade Union Recognition.....	17
3.2	Information and Consultation.....	18
3.3	Minimum Standards and Individual Rights.....	20
4	Partnership in Australia.....	20
4.1	Co-operation' and the Trajectory of Australian Labour Law Policy.....	21
4.2	Partnership at Work and Australian Statutory Labour Law.....	24
4.2.1	Trade Union Rights and the Regulation of Bargaining.....	24
4.2.2	Information and Consultation Rights.....	26
4.3.3	Minimum Standards.....	28
5	Conclusion.....	30

1. Introduction

The past twenty to thirty years have seen a sustained shift in labour law systems in Australia and elsewhere, away from structured adversarialism. The question as to what organising principle is taking the place of adversarial industrial relations is less easy to pinpoint. Increasingly, the emphasis within labour law systems is on ‘co-operative’ workplace relations, and the belief that such co-operative relations are pivotal to competitive advantage. Yet to speak simply of ‘co-operative’ industrial relations largely begs the question.

A key labour law issue within adversarial systems was the establishment of institutions and processes that attempted to balance what were seen as the contending and inherently antagonistic forces of labour and capital. Within collective bargaining systems, such balancing may have represented little more than a mutual accommodation between forces of roughly equal strength; within Australia’s system of compulsory conciliation and arbitration, such a balancing was also done with an eye to the public interest. Such labour law systems necessarily entailed some degree of co-operation, if only of a limited and negative kind: for example, unions abstained from workplace militancy in return for material concessions from management. The trajectory away from such a system, which aimed to create institutions which channelled and institutionalised adversarialism between the parties, can follow either of two contrasting directions.¹

A new ‘co-operative’ set of arrangements may be grounded in employee and trade union acquiescence to managerial prerogative and a restriction of the range of matters which are jointly determined between the parties. Such acquiescence is presumably to further the long-term business interests of the enterprise, in which employees clearly have a stake. Many advocates of co-operation in this sense may not deny a potential divergence of interests between workers and employers around pay and possibly the control of the organization, pace and content of work, issues which comprised the traditional agenda of adversarial bargaining. Rather, they would suggest that these conflictual issues should be bypassed in favour of a focus on shared interests which can provide the basis for less adversarial, more co-operative relations.

If workers, however, are seen as having interests separate from or in addition to the competitive success of the enterprise, then co-operation that is limited to worker acquiescence to management power is inherently one-sided. That is, it entails no co-operation by employers with workers. Co-operation that is mutual or reciprocal would involve capital as well as labour making concessions. The aim of such co-operation — or collaboration — is to bring gains to both workers and management. It recognises that workers and employers have shared interests in the long-run viability of the enterprise, but that while employers are concerned with training and skill development, technological change, and the reorganisation of work to meet competitive challenges and expand the enterprise, workers have their own set of developmental interests, based around wages and working conditions, training and job security and so on which may flow from competitive success but which are also valued in their own right.² Furthermore, even where mutual co-operation is promoted, it may take individualised or collectivised forms. That is, workers’ co-operation and commitment to the enterprise may be secured either on the basis of employer concessions made to individual employees, or through employer co-operation with organised associations of workers.

¹ Here and elsewhere in this introduction we are drawing on Erik Olin Wright’s analogous discussion of ‘class compromise’: see Erik Olin Wright, ‘Working Class Power, Capitalist-Class Interests, and Class Compromise’ (2000) 105 *American Journal of Sociology* 957.

² See Paul Edwards, Jacques Bélanger and Martyn Wright, ‘The Bases of Compromise in the Workplace: A Theoretical Framework’ (2006) 44 *British Journal of Industrial Relations* 125.

Similarly, employers may expect co-operative engagement with business goals either on the part of employees as individuals or on the part of a trade union. In this sense, it is possible a shift from adversarialism may be characterised both by the growth of co-operative relations between employers and employees, but also with a decline in trade union power and legitimacy.

This latter notion of co-operation, of mutual concessions for (potential) mutual gains, of the sharing of knowledge, information and power for the purposes of both common and individual reward in the longer term, is a form of co-operation more akin to a partnership. Indeed, the promotion of labour-management ‘partnerships’, has become a dominant theme in recent industrial relations policy debate in several OECD countries. The Blair government’s ‘Third Way’ politics actively seeks the promotion of a ‘Partnership at Work’ agenda as part of a new ‘industrial relations settlement’,³ and the British Trade Unions Congress (‘TUC’) has adopted six principles it sees as underpinning enterprise level partnership.⁴ The rhetoric seems matched in practice by a growth in the number of so-called partnership agreements.⁵ The apparent acceptance of a partnership agenda by management, unions *and* government, and the spread of such an agenda beyond Britain,⁶ suggests we might in fact be seeing the emergence of a fundamentally new paradigm for industrial relations.⁷

Yet it is unclear the extent to which the concept of ‘partnership’ furthers our understanding of what ‘co-operative’ work relations might entail. Rather, we are just brought back to the same questions we had as regards co-operation. Does partnership at work indicate a genuinely *mutual* co-operative arrangement, or simply the reassertion of managerial prerogative, unfettered by any oppositional employee power, indicating capitulation rather than reciprocal bargain? Arguably the looseness of the term ‘partnership at work’ — similar to attendant notions of ‘co-operation’ and ‘high commitment’ workplaces — means it can be mobilised to describe both scenarios. The current debate over industrial relations policy in Britain highlights precisely this indeterminacy: for some commentators, partnership represents a weakened trade union making its accommodation with enhanced employer power while attempting to put a positive gloss on it; for others it represents an acknowledgement that ‘high trust’ relations between workplace ‘partners’ represent the key to economic competitiveness in a new global economy. According to this latter view, rather than signifying union acquiescence, partnership represents a maturing of both employee and employer attitudes in the light of new economic imperatives and in the hope of ‘mutual gains’.

The key concern of our inquiry in this paper is to ask how — if at all — statutory labour law in Britain and Australia is being reconstructed in the light of the ‘partnership’ idea. This necessarily entails some examination of contrasting notions of partnership: which

³ Tony Blair, ‘Foreword’ in *Fairness at Work*, Cm 3968, 1998.

⁴ TUC, *Partners for Progress: New Unionism at the Workplace*, TUC, London, 1999.

⁵ See, eg, the database maintained by the Industrial Partnership Association at www.partnership-at-work.com and the case studies in John Knell, *Partnership at Work*, Employment Relations Research Series No 7, Dept of Trade and Industry, London, 1999.

⁶ See, eg, European Commission, *Green Paper: Partnership for a New Organisation of Work*, COM(97)128, Office for the Official Publications of the European Communities, Luxembourg, 1997; *Partnership 2000 for Inclusion, Employment and Competitiveness*, Government Publications Office, Dublin, 1996; Daryl D’Art and Thomas Turner, ‘Union Recognition and Partnership at Work: A New Legitimacy for Irish Trade Unions?’ (2005) 36 *Industrial Relations Journal* 121. In the United States, promotion of the ‘mutual gains’ enterprise, although employing a different vocabulary, can be said to be analogous to this notion of partnership: See, eg, Thomas Kochan and Paul Osterman, *The Mutual Gains Enterprise: Forging a Winning Partnership among Labor, Management and Government*, Harvard Business School Press, Boston, 1994.

⁷ Knell, above n 5, also observes that ‘the very fact that the use of the term partnership has become so prominent does signify a genuine change’: at p 9.

understanding of partnership prevails is important because it will arguably be reflected in the trajectory of statutory labour law. When law makers mandate the formation of partnerships at work they are often not only attempting to encourage a higher incidence of partnerships, but also to influence their character. Unilateral co-operation by employees might entail an enhancement of managerial prerogative — through, say, the fettering of trade union power and the stripping back of minimum standards — and little more: what we have come to recognise as a ‘deregulatory’ agenda. Collaborative partnership, based on mutual and reciprocal co-operation, however, might be characterised by various regulatory initiatives (or re-regulation) which either strengthen employees’ collective representation and collective voice within workplaces or provide the mechanisms that increase individual employees’ stake in the firm and its organisational success. Whilst legislative initiatives cannot force the parties to cooperate, legislation can specify the institutions of partnership, the level of the business hierarchy at which they are to operate, the parties that are to be involved, the range of matters which are to be determined in partnership, and so on. All of these factors impact upon the type of partnership which is fostered, as well as influencing the likelihood that the parties will adopt or participate in the institution.

Our first task in this paper, then, is to explore some of the contrasting meanings of partnership. We do this by exploring the debate around partnership in Britain, where the partnership agenda, at least in political terms, is well advanced, and trying to discern whether ‘partnership’ refers to a form of labour-management co-operation based on high involvement workplaces, collective representation of employees and mutual co-operation, or whether it simply refers to employee acquiescence to management power, or some mixture of these, depending on context. We examine both the origins of the agenda and how it has played out in practice. We then move to a key concern of our inquiry: do ideas about partnership at work help us in characterising the nature of contemporary labour law in Britain? We then go on to explore the trajectory of Australian labour law over the past decade or so from a similar perspective. Australian industrial relations share a strong adversarial or pluralist tradition with Britain. We note the absence to a large degree of any formal ‘partnership’ agenda in Australia. However, discourses that are the functional equivalent of partnership at work are clearly emerging in Australian labour law policy. Again, our main concern is whether recent shifts in the statutory appearance or formal apparatus of contemporary Australian labour law can be accounted for by reference to an emerging idea of ‘partnership at work’.

2. The Principles and Practice of Partnership in Britain

Some commentators have observed that part of the attractiveness of partnership lies in the theoretical and practical imprecision of the term itself: ‘who could possibly be against partnership?’⁸ It potentially encompasses everything and anything from suggestion boxes to co-determination.⁹ Tony Blair has summed up the core of partnership culture as ‘voluntary understanding and co-operation’ between employer and employee.¹⁰ Yet this succinct definition begs many questions. What practices and strategies are to be taken as either securing co-operation or as indicative that a co-operative relationship is in fact in place? To what extent do new attempts at co-operation displace or operate alongside traditional union strategies based on bargaining? How does this current emphasis on co-operative relations differ — if at all — from earlier industrial relations paradigms such as the promotion of employee participation and industrial democracy, the ‘stakeholder corporation’, the human relations school, human resource management, or high performance work systems?

⁸ Knell, above n 5, p5.

⁹ Chris Howell, ‘Is There a Third Way for Industrial Relations?’ (2004) 42 *British Journal of Industrial Relations* 1 at 14.

¹⁰ Blair, above n 3.

The diffusion of the term itself has been facilitated by a number of institutions contributing to what some have referred to as an active ‘market’ in partnership.¹¹ The UK Department of Trade and Industry (DTI) ‘Partnership Fund’ encourages and finances joint working on matters about quality of working life, aiming to provide examples and benchmarks of partnerships that can then act as points of reference for other employers; the UK government, as employer, has developed a range of partnership initiatives within the public sector (eg, the NHS); and a range of independent bodies play an important role: the Involvement and Participation Association (‘IPA’: founded in 1884 as the ‘Labour Association for Promoting Co-operative Production based on the Co-Partnership of the Workers’, or ‘Co-Participation Association’ for short, to counteract Marxist ideas of class struggle with rival notions of profit sharing and labour-capital co-operation) disseminates best practice and advice and has developed its own set of partnership principles (the current director of the IPA is chair of the DTI Partnership Fund Committee); the TUC has established a Partnership Institute (‘PI’: a wholly owned subsidiary of the TUC but which claims to act on an autonomous and independent basis as a labour-friendly consultancy and training body for those employers and unions wanting to construct partnership practices); and bodies such as the Advisory, Conciliation and Arbitration Service (‘ACAS’) and the Industrial Society (now the Work Foundation) have also contributed to the debate.

One way of understanding partnership at work is to examine two factors underlying its rise to prominence. These are, firstly, the intensification of international competition, and secondly, a weakening of trade union power.

2.1 *Strategic HRM and Enterprise Competitiveness*

Whereas the competitive advantage of many firms in industrialised economies in the postwar period was based on the exploitation of economies of scale through techniques of mass production, the past two decades or so have seen new and complex patterns of competitive pressure emerge. One is the challenge of lower-cost producers in newly-emerging countries; another is the scope for new technologies to allow customisation of products for particular markets. The latter allows firms to compete through a ‘value added’ strategy, either through increased efficiency or the production of higher quality, high design products that are less price sensitive.¹² A common perception in Anglo-Saxon countries in the 1980s was that some international competitors, such as the Germans and Japanese, were stealing market share because they offered products that were superior in their intrinsic characteristics, especially in quality and innovation. This in turn was based on the emergence of a new production paradigm, involving close relationships with suppliers, just-in-time inventory and, importantly for our discussion, a new method of human resource management (‘HRM’).¹³

Increasingly managers realized that to compete on the basis of quality or innovation required attention to a company’s internal resources, and on seeing competitive advantage as based on

¹¹ Miguel Martinez Lucio and Mark Stuart, ‘Assessing Partnership: The Prospects for, and Challenges of, Modernisation’ (2002) 24 *Employee Relations* 252.

¹² Karen Legge, *Human Resource Management: Rhetorics and Realities*, Macmillan, London, 1995, p 77.

¹³ The literature on the new paradigm is immense. A classic statement is found Michael Piore and Charles Sabel, *The Second Industrial Divide*, Basic Books, New York, 1984. An early application of the analysis to industrial relations can be found in Thomas Kochan, Harry Katz and Robert McKersie, *The Transformation of American Industrial Relations*, Basic Books, New York, 1986. A number of researchers have specifically argued that HRM has had a greater impact on productivity and profits in leading-edge firms than a range of other factors such as research and development, quality and technology: see, eg, Malcolm Paterson et al., *The Impact of People Management on Business Performance*, IPD, London, 1997; Mark Huselid, ‘The Impact of Human Resource Management on Turnover, Productivity and Corporate Financial Performance’ (1995) 38 *Academy of Management Journal* 635.

the skills and knowledge of employees rather than their cost, and that the innovative deployment of labour could lead to efficiency gains not easily copied by competitors.¹⁴ Thus a new conventional wisdom as regards work organisation began to emerge: gains in productivity depended on changes in work organisation such as broad job definitions, employees with multiple competencies working without close supervision, and the use of teams, employee problem-solving groups and quality circles.

A number of labels have emerged to describe these new management strategies: high commitment management,¹⁵ high involvement management¹⁶ and high performance management or high performance work systems.¹⁷ The common point of such labels is their attempt to define a range of non-taylorist work practices perceived to offer business a 'competitive advantage' in a global economy through the strategic integration of enterprise objectives and employee commitment and participation. Beyond that, the use of each term can encompass a range of possible meanings, as well as indicating subtle differences in emphasis between each. 'High commitment' management focuses largely on practices which affect the organisational commitment of employees and assumes that changes in organisational commitment will directly affect organisational performance, whereas 'high involvement' suggests a slightly wider range of (non-commitment) routes to improved performance, including the enlarging of employee skills and competencies, but there appears to be considerable overlap between the two terms.¹⁸ 'High performance work systems' ('HPWS') is the most recently emerged term. In some cases the term HPWS is no more than a synonym for the other two terms, and its recent ascendancy merely reflects a growing confidence in the economic effects of new HRM approaches as research has begun to demonstrate positive outcomes. It is also an attractive term in highlighting benefits when marketing HRM models to managers concerned with bottom-line results.¹⁹ However, reference to HPWS is also often used to encompass a broader range of practices associated with Total Quality Management, team working, quality circles and so on, broadening the focus away from employee attitudes and commitment and towards skill formation, work structuring (such as functional flexibility), goal setting and performance management: that is, practices where performance is targeted directly, not indirectly via attitudinal restructuring.²⁰

The relationship between HRM and partnership at work is complex. HRM tends to emphasise the *individual* relation between the enterprise and the employee as pivotal in the formation of work practices which engender enterprise success. Predominantly HRM thus endorses a shift from collectivism to individualism in the employment relation and consequently could be viewed as favouring non-union approaches to personnel strategy. Yet HRM can take 'hard' or 'soft' forms. The first views human resources largely in a quantitative and calculative manner, and relies on top-down command and control management, maximising economic return from labour resources through just-in-time production matched to greater production flexibility; the second is more concerned with treating employees as valued assets, a source of competitive

¹⁴ Keith Whitfield and Michael Poole, 'Organizing Employment for High Performance: Theories, Evidence and Policy' (1997) 18 *Organization Studies* 745

¹⁵ See, eg, Richard Walton, 'From "Control" to "Commitment" in the Workplace' (1985) 63 *Harvard Business Review* 77.

¹⁶ See, eg, Edward Lawler, *High Involvement Management*, Josey-Bass, San Francisco, 1986.

¹⁷ See, eg, Edward Lawler et al., *Creating High Performance Organisations*, Josey-Bass, San Francisco, 1995.

¹⁸ Stephen Wood, 'Human Resource Management and Performance' (1999) 1 *International Journal of Management Reviews* 367 at 370.

¹⁹ *Ibid*, p 371.

²⁰ *Ibid*, p 371. In particular, performance-related pay and incentive compensation systems often play a pivotal role in HPWS, whereas earlier proponents of 'high commitment' management were somewhat sceptical of these personnel practices: See, eg, Lawler et al, above n 17, who favoured profit sharing and group based incentives, while seeing individual incentive plans as not supportive of a commitment strategy.

advantage through their commitment and adaptability and releasing untapped reserves of 'human resourcefulness'.²¹ A general focus in much of the 'soft' HRM research is on elements which can enhance the value of the employee's contribution to the business and the efficacy of a range of mechanisms in building employee commitment and loyalty to the enterprise. These can take the form of performance related reward systems (such as profit sharing and employee share ownership schemes) but, importantly for our discussion of 'partnerships', also empowerment of the employee through participation in workplace decision-making (including team work, consultative committees and so on).

It is clear then that much of this HRM literature broadly speaking is in many ways complementary to 'partnership at work': it promotes, in a very pragmatic or instrumental sense, the value of high-trust, high commitment, non-adversarial relationships and participative workplace structures for securing performance improvements. Taylor and Ramsay also note that the assumption of shared objectives and interests between employers and employees, the stress on competitive advantage, and the prioritising of communication techniques that engender commitment are shared by both HRM and partnership approaches.²² Knell goes so far as to claim that 'the key features of the new HRM...are now regarded as essential elements of partnership approaches'.²³ According to this view, and adapting the tripartite framework that Gospel used in his historical examination of employer strategy in Britain,²⁴ a change in *work relations* towards HPWS is encouraging change in *employment relations* towards the adoption of practices which promote worker flexibility and commitment which, in turn, are selecting a change in *industrial relations* towards the adoption of workplace partnership.²⁵

2.2 Trade Unions and the Politics of Collective Action

Whereas the emergence of new production paradigms and HPWS provides, in some instances, theoretical support for the emergence of 'partnerships at work' as an industrial relations strategy, a far more immediate impetus for the emergence of the partnership paradigm can be found in the political context of Britain in the 1990s. In particular, there has been a decline in trade union membership and efficacy and a corresponding search by unions to find a renewed or extended role in a changing environment. This has coincided with the election of a Labour government concerned to distinguish its industrial relations policies both from those of its Conservative predecessors and from that of the previous Labour administration of 1974–9.

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- ²¹ Paul Blyton and Peter Turnbull, 'HRM: Debates, Dilemmas and Contradictions' in P Blyton and P Turnbull (eds) in *Reassessing Human Resource Management* Sage, London, 1992, p 4. Stephen Deery and Janet Walsh, 'The Character of Individualised Employment Arrangements in Australia: A Model of "Hard" HRM' in Stephen Deery and Richard Mitchell (eds), *Employment Relations: Individualisation and Union Exclusion*, Federation Press, Sydney, 1999.
- ²² Phil Taylor and Harvie Ramsay, 'Unions, Partnership and HRM: Sleeping with the Enemy?' (1998) 6 *International Journal of Employment Studies* 115 at 117.
- ²³ Knell, above n 5, p 12. However, the organisational problem pinpointed by high-commitment management — difficulties in attracting, retaining and motivating the kind of workforce that companies need to compete effectively — can also often be addressed primarily through high pay and benefits, career prospects and so on, or through appraisal and performance-pay systems, rather than policies of employee involvement and participation: Caroline Lloyd, *High Involvement Work Systems: The Only Option for UK High Skill Sectors?* SKOPE Research Paper No 11, University of Warwick, 2000.
- ²⁴ Howard Gospel, *Markets, Firms and the Management of Labour in Modern Britain*, Cambridge University Press, Cambridge, 1992.
- ²⁵ Ed Heery, 'Partnership versus Organising: Alternative Futures for British Trade Unionism' (2002) 33 *Industrial Relations Journal* 1 at 24.

The 1980s had seen a sustained ideological, political and legal assault on British trade unions, resulting in greatly decreased union density, reduced coverage of collective agreements, and a decline in national and sector-level bargaining.²⁶ As well, a series of deep recessions led to high levels of unemployment and widespread job insecurity, especially in manufacturing industries. As early as the first half of the 1980s, some British trade unions were entering what have been described as co-operative, ‘no strike’, ‘new-style deals’ with employers.²⁷ According to this ‘new realism’, unions, faced with the prospect of job loss and plant closure or the possibility that employers would proceed with new management techniques regardless of union opposition, needed to moderate their traditional demands and stances, meet employer interests, support non-bargaining institutions and moderate or cease industrial action. The choice facing unions was, in effect, one between non-militant unionism or no unionism at all. A similar debate was occurring in the United States. Although not utilising the term ‘partnership’, US industrial relations theorists from the late 1980s argued that union membership, and hence unions’ capacity to improve terms and conditions of employment, could be enhanced and renewed if unions sought to play a less adversarial role²⁸ — a theme picked up by the AFL-CIO.²⁹ This would mean demonstrating to management unions’ commitment to the long-term success of the firm by considering how best to implement new work practices. In the US, arguments for this new role for trade unions were supported by examples and case studies of firms that achieved ‘excellence’ or high performance precisely through management collaboration with unions and the training and involvement of workers in decision-making.³⁰

By the early 1990s, some British unions also were extolling the importance of ‘partnership’ with employers based on ‘common interest’ issues such as productivity growth, training and health and safety.³¹ The TUC saw partnership approaches as delivering mutual gains to employees (in terms of greater job security, greater investment in skills and training, and control over working time), the union movement (improved membership levels and facilities) and employers (less time spent on grievances, better staff morale, more flexible approaches to work organisation).³² One clear statement can be found in the TUC’s *Partners for Progress — New Unionism at the Workplace*. These six principles — or mix of essential commitments and required practices³³ — are meant to suggest an understanding of contemporary market

²⁶ The proportion of union members in workplaces with more than 25 workers fell from 65 per cent in 1980 to 36 per cent in 1998; full-time employees affected in some way by a collective agreement fell from around 66 per cent in 1980 to around 40 per cent in the late 1990s, with the fall particularly marked in the private sector. See Simon Deakin and Gillian Morris, *Labour Law*, 3rd ed, Butterworths, London, 2001, pp 33–46.

²⁷ John Kelly, ‘Union Militancy and Social Partnership’ in Peter Ackers et al., *The New Workplace and Trade Unionism*, Routledge, London, 1996. The new style deals of the 1980s were normally instigated by employers, often Japanese electrical companies operating on Greenfield sites.

²⁸ Thomas Kochan and Kirsten Wever, ‘Industrial Relations Agenda for Change: The Case of the United States’ (1988) 2 *Labour* 21; Kochan and Osterman, above n 6.

²⁹ AFL-CIO, *The New American Workplace: A Labor Perspective*, American Federation of Labor and Congress of Industrial Organizations, 1994.

³⁰ Kochan and Osterman, above n 6. A commonly cited example is the General Motors ‘Saturn’ plant: see Thomas Kochan and Saul Rubinstein, ‘Toward a Stakeholder Theory of the Firm: The Saturn Partnership’ (2000) 11 *Organization Science* 367.

³¹ See, eg, *A New Agenda: Bargaining for Prosperity in the 1990s*, General, Municipal and Boilermakers Union and the Union of Communication Workers, London, 1990.

³² See *Partners for Progress: Next Steps for a New Unionism*, Trade Union Congress, London, 1997; *Partners for Progress: New Unionism at the Workplace*, Trade Union Congress, London, 1999; *Partners for Progress: Winning at Work*, Trade Union Congress, London, 2001.

³³ Mark Stuart and Miguel Martínez Lucio, ‘Trade Union Representatives’ Attitudes and Experiences of the Principles and Practices of Partnership’ in Mark Stuart and Miguel

imperatives, but also stress the centrality of issues of employee voice, job security and quality working conditions. Four emphasised the importance of the commitment by both sides of industry to co-operation as a means of improving business performance:

1. a shared commitment to the success of the organisation;
2. a renewed focus on the quality of working life, giving workers access to opportunities to improve their skills, focusing attention on improving job content and enriching the quality of work;
3. openness and a willingness to share information;
4. adding value – unions, workers and employers must see that partnership is delivering measurable improvements;

Two of the principles implied that such a commitment by workers was *not* to be thought of as unconditional:

5. a recognition by both the union and employer that they each have different and legitimate interests.’
6. a commitment by the employer to employment security in return for which the union agrees to a higher level of functional flexibility in the work place.

In stressing ‘persuasion and dialogue’ over ‘threat and offer’, and ‘consultation’ rather than ‘bargaining’, TUC secretary John Monks has drawn attention to what he sees as a mutual interest of management and worker, as well as government, in ensuring corporate success, while arguing that there was a close connection between economic success and social justice for workers. That is, greater job security, investment in skills, and greater worker involvement in decision-making would benefit employers by delivering highly skilled, committed staff with a flexible approach to work organisation, fewer grievances and better decision-making.³⁴ For Monks, these mutual interests provide the basis for ‘partnership’ or dialogue with ‘good’ employers, while not ruling out the imposition of legal standards on the rest. Participation, meanwhile, did not mean a democratic and equal sharing of managerial power, but was focussed more on extending workers’ ‘influence’. Nevertheless, from the TUC’s point of view, such influence would still need to be exercised collectively, with unions as the means for individuals to exercise their voice.³⁵ Thus this model of partnership clearly promised a continued and renewed role for trade unions, albeit one which entailed a rhetorical break with an adversarial past and which entailed a less voluntaristic and more legalistic or ‘employment rights’ framework.

Many British commentators have remained ambivalent as to the role ‘partnership’ might play in revitalising the union movement, building its membership or enhancing its influence. Collaboration between unions and management may only increase unions’ vulnerability to management initiatives at change by signalling that members will not be mobilised to fight them;³⁶ union officers are co-opted into decision-making processes organised around the employer’s agenda; and/or new non-union channels of employee participation are established. Employers, faced with a weakened union, might pursue ‘partnership’ agreements to secure employer gains rather than mutual gains. Or, a weak union may acquiesce to such an

Martínez Lucio (eds), *Partnership and Modernisation in Employment Relations*, Routledge, London, 2005, p 105.

³⁴ See *Partners for Progress: Winning at Work*, above n 32.

³⁵ Peter Ackers and Jonathan Payne, ‘British Trade Unions and Social Partnership: Rhetoric, Reality and Strategy’ (1998) 9 *International Journal of Human Resource Management* 529 at 537.

³⁶ *Ibid*, p 545.

employer-dominant agreement because the alternative would be derecognition or no role for unions. Thus employers can offer ‘partnership’ agreements on a take it or leave it basis.³⁷

Thus we return to the contrasting positions on partnership outlined in our introduction. According to one account, partnership reflects a shift in power to management’s advantage. This imbalance of power between labour and capital means union involvement in partnership is most likely to reflect the co-option and compliance of a weakened and subordinate labour force. The alternative account sees a maturation of union policy in an era of intensified and global competition away from irrelevant and damaging traditions of struggle and militancy. According to this view, collective bargaining and union policy must become more closely aligned to the business goals of the firm and relations between the parties must become more co-operative and trusting if firms are to survive.³⁸

How useful are these contrasting perspectives for understanding British debates about the desirability of partnership at work? It is true that many contemporary proponents of partnership do in fact make no *a priori* commitment to a role for organised labour at all.³⁹ This is, as we noted earlier, consistent with the dominant theme in some HRM literature which focuses on the individualised relationship between employer and employee rather than the collective relationship with trade unions. The British Labour Government, elected in 1997, explicitly endorsed labour-management co-operation and ‘partnership’ as an effective approach for improving economic performance. However, while recognising that a partnership between employers and trade unions *sometimes* ‘complements the direct relationship between employer and employee’, it was open to organisations to ‘achieve effective working relationships in other ways’.⁴⁰ The government envisaged, instead, ‘a wide range of representational mechanisms’ to reflect individual ‘choice’.⁴¹ In positioning new Labour as distinct from its predecessor administrations of the 1970s, Tony Blair in his Foreword to *Fairness at Work*, spoke of the imperative that there would be ‘no going back’ to the ‘days of strikes without ballots, mass picketing, closed shops and secondary action’, suggesting that the idea of a formalised, regulated adversarial approach is to be dismissed as part of a discredited past.⁴² Labour and management are also seen as having sufficient

³⁷ John Kelly, ‘Social Partnership Agreements in Britain: Labor Cooperation and Compliance’ (2004) 43 *Industrial Relations* 267; Miguel Martínez Lucio and Mark Stuart, ‘Swimming Against the Tide: Social Partnership, Mutual Gains and the Revival of “Tired” HRM’ (2004) 15 *International Journal of Human Resource Management* 410; Phil Taylor and Harvie Ramsay, ‘Unions, Partnership and HRM: Sleeping with the Enemy?’ (1998) 6 *International Journal of Employment Studies* 115.

³⁸ Kelly refers to these perspectives as the political economy and the institutionalist respectively: see John Kelly, ‘Social Partnership Agreements in Britain’ in M Stuart and M Martínez Lucio (eds), *Partnership and Modernisation in Employment Relations*, Routledge, London, 2005, p 190.

³⁹ Prior to New Labour’s adoption of the term, Conservative ministers were also prone to contrast adversarial industrial relations to a ‘practical Tory philosophy of partnership’ which could provide the basis for a ‘caring capitalism’: Michael Heseltine, 1987, quoted in Ackers and Payne, above n 35. Wood also notes there ‘is nothing in the notion of partnership to link it exclusively with trade unions’: Stephen Wood, ‘From Voluntarism to Partnership: A Third Way Overview of the Public Policy Debate in British Industrial Relations,’ in Hugh Collins, Paul Davies and Roger Rideout (eds) *Legal Regulation of the Employment Relation*, Kluwer Law International, London, 2000.

⁴⁰ *Fairness at Work*, above n 3, para 2.5.

⁴¹ *Ibid.*, para 4.6.

⁴² Ackers and Payne, above n 35, p 544. The Labour government has refused to specify what role they believe trade unions should take in civil society, and in the government’s second term ministers used increasingly ‘belligerent’ language to describe those involved in disputes and openly questioned the legitimacy of strike action, while Blair himself labelled public sector unionists ‘wreckers’ and ‘Scargilites’ for voting to take industrial action: see John

interests in common such that trade unions, if involved, are expected to demonstrate their usefulness to employers in pursuing those common interests. There is some evidence that an appeal to a common organisational culture may go further and can be used as an excuse to exclude unions and collective bargaining altogether, and that practices associated with the high performance paradigm have been used in some cases as a means to avoid unions, although the relative importance of this objective to management varies.⁴³

In contrast the TUC vision, outlined earlier, can be characterised as collectivist, increasingly reliant on legal re-regulation of aspects of the employment relationship, and still recognising the possibility of divergent interests between employees and employers. This position recognises that there are important overlaps of interest between trade unions and employers, as 'trade unions have rarely welcomed the bankruptcy of their members' employers'.⁴⁴ However, whereas workers and employers share a common interest in 'value adding', they share divergent interests as to the distribution of profits, usually the subject of collective bargaining.⁴⁵

As we suggested in our introduction, many advocates of partnership would not deny a potential divergence of interests around pay and possibly the control of work. Rather, they would suggest that these conflictual issues should be bypassed in favour of a focus on shared interests which can provide the basis for less adversarial, more co-operative relations, in areas such as training, health and safety, and flexible working time. That is, both supporters and critics of partnerships will often agree with the proposition that industrial relations necessarily involve a combination of positive-sum and zero-sum aspects, but will disagree over what are the relative proportions of each.⁴⁶ Many critics of the partnership agenda would argue that typically the area of conflicting interests remains predominant.⁴⁷ In fact, 'any effective system of [trade union] representation is a contradictory combination of conflict and

Waddington, 'Heightening Tensions in Relations between Trade Unions and the Labour Government in 2002' (2003) 41 *British Journal of Industrial Relations* 335.

⁴³ On HPWS and the avoidance of unions in the US, see Kochan, Katz and McKersie, above n 13, pp 47–80. On union avoidance as both an objective and outcome of high performance programs, see John Goddard, 'Workplace Reforms, Managerial Objectives, and Managerial Outcomes' (1998) 9 *International Journal of Human Resource Management* 18. The presence of employee involvement schemes also appears to weaken workers' propensity to vote for a union in the US: see Richard Freeman, Morris Kleiner and Cheri Ostroff, *The Anatomy of Employee Involvement and its Effects on Firms and Workers*, Working Paper No. 8050, National Bureau of Economic Research, 2000. Most multivariate studies show no significant association either way between HPWS and union presence: on Britain, see Stephen Wood, 'High Commitment Management and Unionisation in the UK' (1996) 7 *International Journal of Human Resource Management* 41.

⁴⁴ Richard Hyman, 'Changing Union Identities in Europe' in P Leisink et al. (eds), *The Challenges to Trade Unions in Europe: Innovation or Adaptation*, Edward Elgar, Cheltenham, 1996. Or, as Marx put it, 'as long as the wage-worker is a wage-worker his lot depends on capital'.

⁴⁵ Maria Hudson, Suzanne Konzelmann and Frank Wilkinson, *Partnership In Practice*, Working Paper No. 239, ESRC Centre for Business Research, University of Cambridge, 2002.

⁴⁶ Richard Hyman, 'Whose (Social) Partnership?' in Stuart and Martinez Lucio (eds), above n 33. See also Richard Walton and Robert McKersie, *A Behavioural Theory of Labour Negotiations*, McGraw Hill, New York, 1965, p 5, who distinguish between 'distributive' (zero-sum) bargaining and 'integrative' (positive-sum) bargaining.

⁴⁷ Even where there may be general agreement as to the desirability of training, or workplace safety or flexibility, serious conflicts of interest would still appear to be at stake as to practical details implemented by individual employers. Indeed, it is clear that often employers will meet training obligations or ensure a low accident and injury rate and so on only where there is a strong and militant union present: see Kelly, 'Union Militancy and Social Partnership', above n 27, pp 97–98

accommodation'.⁴⁸ One question is whether these contradictory elements of conflict and accommodation are seen as continuing to co-exist under a partnership-at-work agenda, or whether the language and rhetoric of 'partnership' as currently understood in Britain leaves very little place for the notion or practice of conflict.⁴⁹

At two extremes, then, we can distinguish between partnership as part of a commitment to collective labour relations and partnership as part of a non-union agenda.⁵⁰ In practice, it is likely that there will be considerable diversity in approaches to partnership, and that particular partnership arrangements may not fit easily into either of these two polarised categories. For example, employers may realise that some union involvement is an inevitable consequence of company acquisitions or mergers or tendering processes, and partnership agreements are used to gain union assistance in implementing change while limiting wider union influence and increasing management discretion.⁵¹ That is, 'partnership' might deliver benefits to employers not solely by excluding trade unions but by co-opting them, especially in relation to organisational change, redundancy and redeployment.⁵² Such an outcome is not entirely consistent with an account of partnership that characterises it as the triumph of managerial power. Following Oxenbridge and Brown, we can recognise that in some aspects partnership will represent 'an essentially co-operative or positive-sum relationship' while also recognising that it will often take place on a contemporary terrain where labour's power is limited, but partnership is seized upon by the union movement as potentially preferable to further exclusion from influence.⁵³

2.3 Partnership in Practice

Given the vagueness or contestation that inheres in the concept of partnership, it is necessary to try and isolate how the concept plays out at the level of regulation of work relationships. At the level of principles, we have seen, partnership broadly entails an emphasis on *co-operative relations* between management and workers, primarily *around issues of production and strategic matters of organisational change*. If we take partnership as indicating a form of reciprocal or mutual co-operation, at the level of practice we would expect to see, by way of explicit agreement, a series of 'trade offs' between management and workers redefining their respective obligations: for example, employee concessions around flexibility (task, time, staffing levels, pay) in return for employee rights to information or consultation over strategic business decisions, or employer commitments to job security.⁵⁴ Obviously this leaves scope

⁴⁸ Richard Hyman, 'Is There a Case for Statutory Works Councils in Britain?' in A McColgan (ed), *The Future of Labour Law*, Cassell, London, 1996.

⁴⁹ Michael Terry, 'Can "Partnership" Reverse the Decline of British Trade Unions?' (2003) 17 *Work, Employment and Society* 460 at 463.

⁵⁰ Nicholas Bacon and John Storey, 'New Employee Relations Strategies in Britain: Towards Individualism or Partnership?' (2000) 38 *British Journal of Industrial Relations* 407 at 410.

⁵¹ Sarah Oxenbridge and William Brown, 'The Two Faces of Partnership? An Assessment of Partnership and Co-operative Employer/Trade Union Relationships' (2002) 24 *Employee Relations*.

⁵² Sarah Oxenbridge and William Brown, 'Developing Partnership Relationships' in Stuart and Martínez Lucio (eds), above n 33, p 89. In this regard Ackers and Payne make the point that the rise in partnership agreements in Britain may not represent a 'new realism' solely on the part of trade unions, but also pragmatism on the part of employers: Ackers and Payne, above n 35. But one implication of this line of reasoning is that partnership with trade unions will necessarily be of limited application or relevance to companies pursuing 'low road', non-HRM paths to competitive success: Terry, above n 49, p 469.

⁵³ Sarah Oxenbridge and William Brown, 'Achieving a New Equilibrium? The Stability of Co-operative Employer-Union Relationships' (2004) 35 *Industrial Relations Journal* 388 at 389.

⁵⁴ Although some would argue that job security is better seen as an underpinning of partnership rather than as a constituent practice: Paul Edwards and Martyn Wright, 'High Involvement

for considerable diversity in the nature, form and rationale of agreements in any given circumstance, and the centrality they give to any one of these practices or principles.⁵⁵

Terry provides a useful overview of how broad statements of partnership principles in British employer-union partnership agreements translate into actual regulation of the employment relationship.⁵⁶ Many such agreements take as a formal starting point a 'shared commitment to business success'. As noted earlier, there may be nothing particularly novel in this, as employees and union members would generally rather work for successful rather than unsuccessful employers. However, such a commitment from trade unions might be seen as a potential loss of autonomy in setting demands, in that the managerial expectation from such a commitment may be that wage claims will be made by reference to managerial analyses of financial viability rather than union demands.⁵⁷ This seems consistent with evidence of British industrial relations practices in the 1990s showing that even in workplaces where unions, by virtue of high membership and an active shop steward organisation, had retained employer recognition, pay rises had generally been fixed by employer imposition, for some with a cost-of-living formula. Similarly, employers often unilaterally rejected and reconfigured long-standing pay structures that had evolved through collective bargaining.⁵⁸

Another key theme in partnership agreements is the trade-off between flexibility and employment security. Most agreements offer a degree of employment, not job, security, and many set this aside in the event of serious economic difficulty.⁵⁹ Some agreements protect the job security of core union members by including clauses allowing the use of contingent labour as a way of managing economic adjustment.⁶⁰ For employers, the commitment to flexibility enables the potential elimination of union-based job controls and union influence over the performance of work. Finally, many agreements also contain some formulation that acknowledges differences of interest between employees and management. Yet is often difficult to see what flows from this in practice. As mentioned, many agreements avoid any conflict of interest over pay by presenting pay settlement as a commercially informed process. Pre-existing machinery of grievance resolution, disciplinary and dismissal procedures are rarely formally abolished, but quietly ignored in such agreements.⁶¹

On one reading, the twin commitments by unions to business success and flexibility suggest that during the 1990s trade unions have retained recognition in many workplaces but the scope of collective bargaining has narrowed, with the expansion of the employer's frontier of control.⁶² Against this, in many instances an employer's refusal to negotiate the annual pay round, for example, can be found alongside a willingness to have genuine negotiations around

Work Systems and Performance Outcomes: The Strength of Variable, Contingent and Context-Bound Relationships' (2001) 12 *International Journal of Human Resource Management* 568 at 570.

⁵⁵ There is also the question, outside the scope of this paper, of whether the *outcome* of partnership arrangements is, in fact, one of mutual gains. See, eg, David Guest and Riccardo Peccei in a study of 54 partnership companies concluded that the 'balance of advantage' often flowed toward management: 'Partnership at Work: Mutuality and the Balance of Advantage', (2001) 39 *British Journal of Industrial Relations* 207; John Kelly argues that partnership arrangements fall along a continuum between 'employer-dominant' partnerships and 'labour-parity' arrangements, with the latter delivering mutual gains: above n 38.

⁵⁶ Terry, above n 49, pp 464–467.

⁵⁷ *Ibid*, p 464.

⁵⁸ William Brown, 'Individualisation and Union Recognition in Britain in the 1990s' in Deery and Mitchell, above n 21.

⁵⁹ Terry, above n 49, p 465.

⁶⁰ Heery, above n 25, p 22.

⁶¹ Terry, above n 49, p 466.

⁶² William Brown et al., 'The Limits of Statutory Trade Union Recognition' (2001) 32 *Industrial Relations Journal* 180 at 188.

other issues such as sick pay, pension provision and family friendly policies, issues which might previously have been considered outside the scope of bargaining.⁶³ In practice, then, partnership at work may not easily or consistently fit into either of the two boxes we outlined at the beginning of our paper: worker capitulation or comprehensive reciprocal co-operation.

To sum up, we can observe a range of principles and practices espoused under the rubric of ‘partnership’. Some have characterised it as a ‘portmanteau term which can hold a rich diversity of ideological baggage’⁶⁴ — a fact embraced by Labour, who present it as ‘an umbrella concept under which a multitude of more specific policy initiatives sit’.⁶⁵ Different social actors will in fact tend to approach ‘partnership’ with different readings of the concept.⁶⁶ Employers will tend to focus on economic and organisational factors inherent in the concept: notions of competitive advantage and ‘excellence’, the links with ‘best practice’ HRM, or the extent to which co-operation with trade unions may confer legitimacy on and facilitate management decisions around organisational change, redundancy and redeployment. Trade union engagement with the concept will reflect traditional concerns around securing workers’ conditions, especially as regards job security, training and employee voice, as well as strategic concerns such as boosting union membership and gaining ‘institutional centrality’ in the policy-making process. Governments will be drawn to ‘partnership’ because it reflects an ideology of consensus and community rather than conflict, and a belief that maintaining a strong, dynamic and ‘modernised’ economy can be reconciled with the goals of social justice.⁶⁷ The result is, as Ackers and Payne point out, that ‘partnership’, for the time being at least, remains a work in progress, a ‘moveable feast’, an open agenda providing opportunities for redefinition by the main actors.⁶⁸ It also, on the other hand, makes it difficult to pin down a specific set of principles and practices that can be unmistakably labelled as ‘partnership’ relations.

3. Partnership at Work and British Statutory Labour Law

To sum up our discussion so far, we have identified a move in labour law policy away from adversarialism toward co-operative work relations. In policy terms, this move seems particularly developed in Britain, where the concept of ‘partnership at work’ has risen to prominence. Yet whether promoters of ‘partnership’ or ‘co-operation’ envisage workers’ acquiescence to managerial prerogative or a series of mutual and reciprocal commitments on the part of both workers and management is less clear. Similarly, it is debatable whether partnership at work represents a revived institutional centrality for trade unions or an individualisation of employment relations. In practice, partnership at work in Britain has appeared to have manifested itself in single-enterprise union agreements based around a reconfigured bargaining agenda, involving a series of ‘trade offs’ between management and workers such as concessions around flexibility in return for trade union recognition or employer commitments to job security.

⁶³ Ibid.

⁶⁴ Noel Thompson, ‘Supply-side Socialism: The Political Economy of New Labour’ (1996) *New Left Review*, no 216.

⁶⁵ Tony Blair, quoted *ibid.*

⁶⁶ Mark Stuart and Miguel Martínez Lucio, ‘Introduction’ in Stuart and Martínez Lucio (eds), above n 33.

⁶⁷ Finlayson, *Making Sense of New Labour*, quoted *ibid.*

⁶⁸ Ackers and Payne, above n 35, draw attention to the openness of the partnership agenda in order to stress the opportunity for unions to steer it in more radical directions, ‘playing back’ management rhetoric around employee involvement to forge an expansive agenda around justice and fairness for workers which has the potential to ‘break the boundaries of business convenience’ while also advancing unions’ own institutional centrality. For a more sceptical appraisal which takes issue with Ackers and Payne’s optimistic analysis, see Martínez Lucio and Stuart, above n 37.

In this section we will consider what role statutory labour law might be playing in promoting workplace partnerships. We have already noted that the Blair government has put forward an essentially voluntarist notion of partnership at work, invoking the central role of ‘cultural’ change rather than legal change in fostering partnership. This appears to embody an idea of governance based on coaxing social actors into new forms of behaviour without directly intervening into the substance of employment relations, with a reliance on key non-state institutions who provide knowledge resources for the development of partnership.⁶⁹ Yet a role for more direct regulation in fostering partnership-style employment relations cannot be dismissed. For example, we would expect that a vision of partnership that entails unilateral co-operation by employees with management strategies for business success to be associated with an enhancement of managerial prerogative — through, say, the fettering of trade union power and the stripping back of minimum standards — and little more: what might be termed an essentially negative regulatory response, which makes structured adversarialism in industrial relations either illegitimate or difficult to sustain. Collaborative partnership, based on mutual and reciprocal co-operation, however, might be characterised, on the one hand, by the dismantling of the institutions and procedures associated with adversarialism and, on the other, by various regulatory initiatives which either strengthen employees’ collective representation and collective voice within workplaces, provide the mechanisms that increase individual employees’ stake in the firm and its organisational success, or institute minimum standards or a floor or rights that underpins credible commitments by management to workers in the areas of job security, wages, family-friendly work arrangements and so on. We might still expect to see elements of collective bargaining, evidenced by an independent trade union, promoted by laws regarding union recognition and the enforcement of an obligation on the employer to bargain in good faith. A more expansive approach would be akin to forms of ‘industrial democracy’, regarding partnership as an institutional arrangement granting workers collective voice in company decision-making other than, or in addition to, collective bargaining. Again, this can take a variety of forms: consultation mechanisms, co-determination, employee involvement in areas traditionally considered ‘managerial prerogative’ (business planning and strategy, product development, finance, supplier selection). An alternative approach might favour financial incentives, share-ownership, profit-sharing and so on: that is, arrangements with individual employees as a way of integrating and aligning employer and employee interests in the enterprise.

Since its election to office in 1997, the British Labour government has not been abstentionist in the area of employment regulation, but has undertaken legislative initiatives around both trade union recognition and rights to information and consultation, as well as a variety of individual employment rights to move forward an agenda of ‘Fairness at Work’. In this section, we will briefly examine these initiatives. A key question is to what extent and in what ways this legislative agenda has promoted or fostered partnership work relations.

3.1 *Trade Union Recognition*

Under reforms enacted by Labour in 1999, a trade union may apply for recognition to represent a particular group of workers, or bargaining unit, for collective bargaining purposes.⁷⁰ The union makes its request to an employer, and if the employer rejects the request the union may apply to the Central Arbitration Committee (CAC) to both fix the appropriate bargaining unit and to determine whether the union has the support of the majority of the workers constituting the bargaining unit. Once recognition is agreed (either by employer agreement or by formal declaration of CAC) both parties must reach a procedure

⁶⁹ Stuart and Martínez Lucio, above n 66, pp 9–10.

⁷⁰ See *Employment Relations Act 1999* (UK).

agreement on the method of collective bargaining (that is, a procedure for negotiation, frequency, negotiation bodies, dispute resolution etc).

There are several points to note about this recognition procedure and its potential contribution to partnership at work. First, rather than a 'statutory right' to recognition, it represents essentially a default procedure for recognition, whereby the 'threat' of an imposed process by the CAC is held in reserve for situations where the parties fail to make provision for voluntary recognition. This appears consistent with a governance approach based on indirect encouragement of self-regulation rather than more direct prescription,⁷¹ and reflects the point of view put in the *Fairness at Work* white paper (para 4.15) that 'voluntary agreements are the best way to build partnerships between workers and employers'. Secondly, the 'mere fact that an employer has granted unions recognition tells one little about the practical value of that to the trade unions in terms of effective collective bargaining'.⁷² Thus while recognition is viewed as the prelude to negotiation, the legislation imposes nothing more than a duty on an employer to meet with the union in accordance with the specified procedure, rather than any obligation to agree or even negotiate over the issues raised by the union. There is no duty to bargain in good faith (as in US law) nor to discuss issues 'with a view to reaching agreement' (as in several EU directives). Thirdly, it is open to the parties to negotiate a recognition agreement which confines the scope of bargaining to matters other than pay. But should the parties fail to reach an agreement about the procedures and scope of bargaining, the standard model imposed by the CAC limits the scope of collective bargaining to pay, hours and holidays. This would appear to go against the grain of the practice which emerged in the 1990s, consistent with many prevailing ideas of 'partnership', whereby pay was taken out of bargaining in favour of negotiation over a range of other issues (see the discussion in Part 2.3, above). The new legislation, particularly when compared to the legal position under successive Conservative governments, is not unsupportive of trade unions, but at most has 'a powerful demonstration effect in marking a clear shift in official attitudes towards trade unionism'.⁷³

3.2 *Information and Consultation*

The Labour government has also reformulated law deriving from European directives on representation in collective redundancies and transfer of undertakings. In the case of multinational corporations, the government also implemented the European Works Councils Directive. This established legally-based, standing, general consultative arrangements in Britain, for a particular group of employees: those in transnational firms. Finally, in 2001, the government accepted the EU Directive on Information and Consultation rights in national level undertakings.

This last development is perhaps the most notable as it moves away from disclosure and consultation for specific purposes to a more generalized obligation on the employer to inform and consult employees. From April 2005, undertakings employing 150 or more employees are required to inform and consult representatives on a wide range of matters (the threshold will reduce to 100 employees in 2007, and to 50 a year later). The basic framework was agreed between the government, the TUC and the CBI. An employer is required to initiate negotiations toward reaching an agreement on information and consultation if it receives a request from at least 15 per cent of employees. There is considerable flexibility in the form

⁷¹ Also called 'reflexive law': see William Brown et al., 'The Limits of Statutory Trade Union Recognition' (2001) 32 *Industrial Relations Journal* 180.

⁷² Ibid, p 182.

⁷³ Ibid, p 192. cf Blair in *Fairness at Work*: 'It is often said that a change in law cannot be brought about by a change in the framework of law. But a change in law can reflect a new culture, can enhance its understanding and support its development': above n 3.

and content of any negotiated agreement: it must cover all employees of the undertaking; set out the circumstances in which the employer must inform and consult employees and provide either for the appointment or election of employee representatives or that the employer provide information directly to employees and consult them directly. Thus the parties may agree on method, frequency, timing and subject matter of information and consultation best suited to their circumstances. Again, it was the government's explicit concern to 'create room for a wide diversity of practices that have built over the years...Individual organisations should be able to develop their own arrangements tailored to the particular circumstances, through voluntary arrangements'.⁷⁴ However, where an employer fails to negotiate where required to do so, or where negotiations fail, the regulations provide for a set of standard provisions: elected representatives (1 per 50 employees) and, as to subject matter, outlines three substantive areas with corresponding obligations: (a) an obligation to provide information on the general business situation of the undertaking (would include takeovers and mergers, changes in senior management, significant changes to products and services); (b) an obligation to inform and consult on the likely development of employment and on 'anticipatory measures' which might threaten employment; and (c) an enhanced obligation to inform and consult on decisions likely to lead to substantial changes in work organization or in contractual relations (including redundancies and relocations, working time, pensions, grievance and disciplinary procedures).

Whereas the union recognition procedure might only be loosely linked to the promotion of a partnership agenda, the staggered implementation of these various EU Directives means Britain now has a fragmented system of information, consultation, and representation that appears to address the partnership agenda more directly. The government has certainly explicitly related the information and consultation regulations to the promotion of high performance work systems.⁷⁵ However, whereas many issue-specific statutory consultation procedures give priority to the recognised trade union where one exists, the wider information and consultation regulation introduced in 2005 disconnects union-based structures from the representative structures of information and consultation, opening a second channel of communication from which trade unions are excluded. The TUC's acceptance of this, observe Davies and Kilpatrick, is 'a measure of just how weak the negotiating position of unions is in the UK today'.⁷⁶ Nevertheless, the overall effect of the regulations may be to consolidate a trade union presence at the workplace and expand the scope of collective bargaining. This is because the regulations require workers to initiate negotiations toward an information and consultation agreement, which is more likely to happen amongst a unionised workforce, and because employers can avoid the statutory enforcement of the regulations if they enter into a 'pre-existing agreement' with a union for the purposes of information and consultation.⁷⁷

⁷⁴ *High Performance Workplaces — Informing and Consulting Employees: Consultation Document*, DTI, London, 2003, p 5.

⁷⁵ See, eg, *High Performance Workplaces — The Role of Employee Involvement in a Modern Economy*, DTI, London, 2002; *High Performance Workplaces — Informing and Consulting Employees: Consultation Document*, DTI, London, 2003. In contrast, Gospel and Willman argue there is no unequivocal link between levels of information and consultation with employees and performance at the firm or establishment level. They suggest the government confuses managerially-initiated techniques of employee involvement intended to boost performance and the representative structures for employees required by EU directives: Howard Gospel and Paul Willman, *Evidence on the EU Directive Establishing a General Framework for Informing and Consulting Employees*, Discussion Paper No 562, Centre for Economic Performance, London School of Economics and Political Science, 2003.

⁷⁶ Paul Davies and Claire Kilpatrick, 'UK Worker Representation After Single Channel' (2004) 33 *Industrial Law Journal* 121.

⁷⁷ KD Ewing and GM Truter, 'The Information and Consultation of Employees Regulations: Voluntarism's Bitter Legacy' (2005) 68 *Modern Law Review* 626.

3.4 *Minimum Standards and Individual Rights*

In the late 1990s the UK also adopted for the first time comprehensive minimum wage and working time regulation, as well as expanded protections against unfair dismissal and expanded rights for working women and parents. This new regulation is noteworthy in the context of the tradition of British labour law in that it has taken the form of individual legal rights enforceable through employment tribunals, rather than relying on regulation of workplace relations through collective bargaining.

These laws have primarily been promoted as ensuring ‘fairness at work’, but they may also serve to promote workplace partnerships. Such laws limit managerial prerogative and serve to reassure employees that the employer will not engage in opportunism,⁷⁸ and so arguably can be part of a package that promotes reciprocal co-operation between workers and management. On the other hand, much of the emphasis in the HPWS and strategic HRM literature is on greater flexibility in the design of work. This may involve strengthening the employer’s discretionary powers and would seem to rule out many of the traditional safeguards for fairness in the workplace such as minimum standards.⁷⁹ Thus one preferred model for new legislated standards is that, like the procedures for trade union recognition, they operate as default rules that will apply in the absence of contrary agreement. For example, with regard to the Working Time Regulations 1998 the maximum hours standard of 48 hours per week is alienable by individuals; the rights in relation to night work, daily rest and short rest breaks are alienable by collective agreements;⁸⁰ and the right to paid annual leave is inalienable. However, the extent of the individual opt-out is such that in practice the 48 hour limit is so easily avoided by employers seeking flexibility and workers wanting higher earnings or status that some commentators would suggest it hardly amounts to a minimum standard at all.⁸¹

4. **Partnership in Australia**

So far in our discussion we have indicated that a partnership agenda has risen to prominence in Britain, and that arguably such an agenda partly accounts for the recent trajectory of British statutory labour law. Can the trajectory of Australian statutory labour law be explained by reference to a similar agenda? And if Australian labour law does seem to be following a path away from adversarialism toward co-operative work relations or partnership, what understanding of partnership might this move entail?

We stated at the outset that the phrase ‘partnership at work’ has not achieved substantial rhetorical significance in Australia. There clearly does not exist in Australia the same ‘market’ for partnerships as we’ve identified in Britain. However, ‘partnership at work’ may encapsulate ideas about work organisation and industrial relations that are finding expression in other ways in Australia. In order to determine if this is the case, it is necessary to draw from the particularities of the British situation the specific elements that can be thought of as

⁷⁸ Although some minimum standards, such as wages, are set too low to provide the substantial safeguards required for promoting trust: Hugh Collins, ‘Regulating for Competitiveness’ (2001) 30 *Industrial Law Journal* 17 at 36.

⁷⁹ Ibid

⁸⁰ In this way, such default standards also potentially serve a partnership agenda because as the give employers a strong incentive to engage in joint regulation with employee representatives in certain circumstances, although so far there has been little evidence that sectoral or enterprise-level agreements have been used to vary working hours: Simon Deakin and Frank Wilkinson, *The Law of the Labour Market*, Oxford University Press, Oxford, 2005, pp 340-341.

⁸¹ Catherine Barnard, Simon Deakin and Richard Hobbes, ‘Opting Out of the 48-hour week’ (2003) 32 *Industrial Law Journal* 223.

comprising a partnership agenda. In our discussion of the partnership agenda in Britain we focussed on the emphasis on co-operative relations between management and workers in pursuit of mutual gains and on the practice of ‘trade offs’ between management and workers such as concessions around flexibility in return for employee rights to information or consultation over strategic business decisions, or employer commitments to job security.

4.1 ‘Co-operation’ and the Trajectory of Australian Labour Law Policy

Historically the federal Australian labour law system has been characterised as one marked by a strong adversarialism between the parties.⁸² That is, the origins of the system lay in an attempt to both legitimate and resolve what was seen as an inevitable conflict between capital and labour.⁸³ Certainly the formal requirement (due to the constitutional limits within which the system operated) that the parties generate an ‘industrial dispute’ to attract jurisdiction of the federal arbitration tribunal appears to make antagonism and adversarialism central to the operation of the system,⁸⁴ with the systems of conciliation and arbitration specifically constructed as quasi-legal (adversarial) proceedings for litigating industrial disputes. Employers and employees were always free to pursue strategies based on consultation, participation and high trust. Examples of such strategies can be found throughout the twentieth century, usually manifesting themselves as employer ‘welfarism’ or paternalism, their incidence peaking in the immediate postwar period.⁸⁵ However, such approaches remained the exception rather than the rule. Historically, it is likely that the arbitration system ‘centralised’ industrial relations and discouraged deeper co-operation at the workplace level. By the 1960s and 1970s there was little evidence of what could be described as enterprise-level ‘partnership’ or co-operation. Full employment and a tight labour market gave rise to a union militancy which was met with either confrontational ‘hard bargaining’ or, in smaller firms, a strong reliance by employers on the award framework and arbitration tribunals setting the ambit of management-trade union interaction. The dominant personnel management approach in the postwar period was a legalistic and minimalist style which sought to defend managerial prerogative while union shop floor organisation remained limited.⁸⁶

During the 1980s and 1990s, however, public policy debate focussed increasingly on the issue of productivity, competitiveness and business performance. One consequent management strategy was to win union support for productivity improvement through an emphasis on greater consultation and co-operation. This strategy was aided by the broader national context which saw an Accord between the ALP and ACTU. The Accord regularized wage outcomes and increased workplace stability, allowing enterprise-level management to concentrate on

⁸² See, eg, Orwell Foenander, *Towards Industrial Peace in Australia*, Melbourne University Press, Melbourne, 1937, pp 32-3, 250; Bill Ford and Lorna Tilley, ‘Introduction: The Forces of Change Confront the Forces of Tradition’ in Ford and Tilley (eds), *Diversity, Change and Tradition: The Environment for Industrial Democracy in Australia*, AGPS, Canberra, 1986.

⁸³ See, eg, Henry Bournes Higgins, ‘A New Province for Law and Order’ (1915-16) 29 *Harvard Law Review* 13.

⁸⁴ Note, however, that the State systems of arbitration were also predominantly based on the ‘dispute’ model, even absent such a constitutional limit on their powers.

⁸⁵ See Nikola Balnave, *Industrial Welfarism in Australia 1890–1965*, Doctoral Thesis, University of Sydney, 2002. However, in many cases while some company welfare schemes involved worker and union participation and consultation, this was rarely extended to the issues of wage fixing and working conditions. Indeed, far from involving co-operation with unions, companies often had a strong anti-union agenda in introducing the strategy. Further, welfarism was often introduced simultaneously with a ‘low trust’ approach, with worker autonomy and responsibility minimised and the role of supervisors increased. Thus, welfarism was sometimes an attempt to soften the impact of direct control.

⁸⁶ See Christopher Wright, *The Management of Labour*, Oxford University Press, Melbourne, 1995.

issues of efficiency and productivity. An alliance between the AMWU and the ACTU led to the advocacy of a strategy of active intervention to influence change by participating in reforms to enhance productivity and efficiency, develop more democratic workplaces, access to skills training, and more enriching work and career paths. In short, Australian unions mobilised at this juncture behind the perceived 'high-road' to international competitiveness, while the ALP government also endorsed the superiority of co-operative workplace relations, including participative practices in the workplace, over adversarial industrial relations.⁸⁷

The period since the late 1980s has also seen the gradual replacement of the centralised fixation of wages and conditions with enterprise-based employment systems which, it was felt, would be inherently more flexible, more productive, and hence offer greater opportunity for profitability, economic growth and employment creation.⁸⁸ This shift to enterprise bargaining also coincided with the rise of HRM in Australia. In fact, HRM had emerged by the mid-1980s, when centralized industrial relations institutions were still dominant. However, arguably the spread of enterprise bargaining has allowed HRM to flourish.⁸⁹ In particular, the introduction of enterprise bargaining and the rise of HRM shared a similar rationale, based on the organizational pressure to develop employee productivity to meet the demands of an increasingly competitive marketplace. Similarly, the way enterprise bargaining has developed in Australia has allowed an increasing individualization of employment relations

The repudiation of 'adversarialism' as a legitimate organising principle for the conduct of employment relations emerged strongly in the late 1980s and early 1990s in the language of the Business Council of Australia's Industrial Relations Study Commission (1989-1992). For example, page 1 of the Commission's first Report, *Enterprise-Based Bargaining Units: A Better Way of Working* (1989) began with the following:

A new language is beginning to take hold in Australia. 'Competitive', 'global', 'innovative', 'co-operation', 'value-adding' and 'enterprise' are displacing such words as 'protected', 'local', 'conventional', 'conflict' 'value-distributing' and 'industry'.

Elsewhere the Report referred to the 'outmoded' assumption of conflict, disputed the starting premise of 'adversarialism' and asserted that employee relations are characterised, or need to be characterised, by common purpose rather than conflict. The Study Commission's second Report, *Avoiding Industrial Action: A Better Way of Working* (1991) was focussed on ways of eliminating industrial action at the workplace, including the strengthening of laws against such action. The endorsement of an individualisation strategy (i.e. one in which individual agreements would be recognised, and awards and compulsory arbitration phased out) was eventually formally endorsed by the Study Commission in its final report *Working Relations: A Fresh Start for Australian Enterprises*.

More recently the rhetoric of 'partnership' has achieved some status amongst the Australian labour movement. A Fabian Society compilation published in 2003 was entitled *Partnership at Work: The Challenge of Employee Democracy*, but the essays mainly traversed the traditional landscape of industrial democracy with little attempt to recast it in terms of either

⁸⁷ See, eg, *Australia Reconstructed*; and Commonwealth of Australia, *Labour Market Reform: The Industrial Relations Agenda*, 1988-89 Budget Related Paper No 9, AGPS, Canberra, 1988.

⁸⁸ See Duncan Macdonald, Iain Campbell and John Burgess, 'Ten Years of Enterprise Bargaining in Australia: An Introduction' (2001) 12 *Labour and Industry* 1; Braham Dabscheck, 'The Slow and Agonising Death of the Australian Experiment with Conciliation and Arbitration' (2001) 43 *Journal of Industrial Relations* 277.

⁸⁹ Susan McGrath-Champ and Marion Baird, 'The Mercurial Nature of Australian HRM under Enterprise Bargaining' (2005) 43 *Asia Pacific Journal of Human Resources* 155

high performance work systems, HRM, competitiveness, or the UK experience and debates. In 2003 Federal Labor linked its IR policy to the idea of workplace ‘partnerships’ designed to create a ‘joint commitment to the enterprise and the success of the enterprise’. Perhaps most significantly the Victorian government in recent years has conducted a ‘Partnership in Action’ program that closely resembled UK initiatives and debates, in particular claiming the partnership approach to be ‘a significant key to better business performance, which in turn encourages a healthy Victorian economy. The approach champions organisational improvement that benefits all stakeholders within an enterprise. It involves employers and employees working together to tackle business challenges, foster creativity and boost productivity’. The initiative has included a competitive grants program which specifically encourages practices that increase employee participation and improve workplace relationships. Priority areas include business literacy for employees and front-line management to support dynamic workplace change and continuous improvement; innovative forms of employee involvement and participation in workplace change and outcomes (including financial participation); building sustainable stakeholder relations between management and unions, including improved bargaining relationships and establishing good faith bargaining protocols; innovative approaches to creating workplace flexibility that balances employer and employee needs; innovative approaches to promoting diversity at work, including responses to encourage the recruitment/retention of older employees; and workplace change that supports improved supply chain relationships. The program also included a Work/Family balance sub-program, Annual Workplace Excellence Awards, and the dissemination of ‘Partnership in Action’ case studies.⁹⁰

In Australian labour law the most obvious direct manifestation of this ideological restatement of purpose is found in the principal object of the *Workplace Relations Act 1996*(Cth). The *Act* is stated to provide a framework for ‘cooperative workplace relations’ generally (s 3), and supporting ‘harmonious...workplace relations’ through the provision of flexible mechanisms of voluntary dispute settlement (s 3(h)). The *Act* appears not to say anything else directly about ‘co-operation’ as such, even in relation to the functions that it sets out for the Employment Advocate in relation to the making of agreements.⁹¹

There are, however, other ways in which the traditional ‘adversarial’ labour law edifice has been progressively systemically dissolved. First, the promotion of enterprise bargaining and the virtual removal of automatic access to external dispute settling agencies means that there is no scope for the organised adversarialism which was supported by the log of claims, tribunal hearing, award decision process. Organised adversarialism can thus only take place around union campaigns for new agreements, or industrial action over spot disputes. In respect of these matters, union power has been so weakened by the removal of the legislative supports traditionally given to them as institutions of adversarialism, both in terms of recognition and the right to take industrial action, that the capacity to operate as oppositional organisations is substantially diminished. Much of this transition was initiated by the *Workplace Relations Act 1996*, as we explore below, but it has since been consolidated in the extreme by the *WorkChoices* legislation of 2006. At the same time areas where unions have been able to retain extraordinary workplace strength (for example the building industry which is not subject to global competition as some other areas) have been weakened industrially by specific legislation. Secondly, the power of the individual worker has also been substantially reduced through the agreements process (lack of proper scrutiny, failing to protect against duress) and by the removal of unfair dismissal laws. This also substantially impacts upon the degree of ‘adversarialism’ in employment relations because workers are unable legally to act upon opposition to managerial policy other than by opting to quit the enterprise.

⁹⁰ See http://www.business.vic.gov.au/BUSVIC.1638728/STANDARD//PC_60915.html

⁹¹ See Richard Mitchell and Joel Fetter, ‘Human Resource Management and Individualisation in Australian Labour Law’ (2003) 45 *Journal of Industrial Relations* 292.

In July 2005, the Prime Minister John Howard summed up the aims of the Coalition's labour law reform program as changing 'the culture from the remote, adversarial and legalistic way employment relations were handled in the past'. He suggested that by giving 'employers and employees a tangible stake in what happens at the workplace you give them a shared incentive to improve its performance'. Howard invoked the idea of the 'enterprise worker' who recognised 'the economic logic and fairness of workplaces where initiative, performance and reward are linked together.' Such workers have a long term focus and 'grasp that high wages and good conditions in today's economy are bound up with the productivity and success of their workplace'. Ongoing productivity growth in turn 'is a continuous process of cooperation and commitment to implementing change'.⁹²

The substitution of 'co-operative' employment relations for 'adversarial' employment relations is one of the major aspects of the reformulation of labour law in Australia, but has gone largely un-noted. If we recall the contrasting interpretations of partnership in Britain, it is useful to ask whether the eclipse of structured adversarialism in Australian labour law policy represents either an attempt to come to build collaborations between workers and management so as to take advantage of the promise held out by HPWS, or a weakened union movement's acquiescence to a renewal of management prerogative. In contrast to the promotion of co-operative relations in the late 1980s by the ACTU and the ALP government,⁹³ which emphasised the institutional centrality of trade unions and the importance of participative structures, the current government has done very little to publicise the 'co-operation' rhetoric, or to support the rhetoric, apart from dismantling or subduing almost all of the legal institutions and legal rights which supported the adversarial model historically. The Australian evidence seems to indicate overwhelmingly that the language of 'co-operation' between the parties has important rhetorical value in business enterprises (particularly in enterprise agreements), but that it is not effective in the construction of strong workplace partnerships which deliver mutual gains.⁹⁴ This seems to bear comparison with Deakin and Wilkinson's take on Steve Wood's formulation of 'partnership' in Britain: 'the strong emphasis is on the need for workers to make far-reaching commitments to their employer's business interests and objectives, and to mould themselves to its needs'.⁹⁵

We now turn to examine the specific reforms to the formal apparatus of Australian statutory labour law since 1996, with particular regard to trade union recognition, information and consultation requirements and minimum standards.

4.2 *Partnership at Work and Australian Statutory Labour Law*

4.2.1 Trade Union Rights and the Regulation of Bargaining

In Britain, partnership has generally manifested itself through the emergence of single-union enterprise-level agreements that involve union acceptance of workplace flexibilities or strategic HRM practices in return for union recognition and tepid consultative arrangements

⁹² See <http://www.pm.gov.au/news/speeches/speech1455.html>

⁹³ See above, n 87.

⁹⁴ Mitchell and Fetter above n 91; Richard Mitchell et al, 'What's Going on with the 'No Disadvantage Test'? An Analysis of Outcomes and Processes Under the Workplace Relations Act 1996 (Cth)' (2005) 47 *Journal of Industrial Relations* 393; Shelley Marshall and Richard Mitchell, 'Enterprise Bargaining, Managerial Prerogative and the Protection of Workers Rights: An Argument on the Role of Law and Regulatory Strategy in Australia under the Workplace Relations Act 1996 (Cth)' (2006) 22 *International Journal of Comparative Labour Law and Industrial Relations* 299.

⁹⁵ Deakin and Wilkinson, above n 80, p 327

around workplace change. As we have seen, union recognition and consultation has been supported by new statutory regulation. Given more than a decade of union *de*-recognition in Britain, this phenomenon is of some significance, and the emergence of union enterprise agreements has been taken by some British commentators as, in itself, indicative of partnership. It is unclear, however, whether a focus on union recognition and union bargaining at the enterprise level provides any analytical purchase in the Australian case.

One of the objects of the Australian federal system of conciliation and arbitration put in place in 1904 was 'to facilitate and encourage the organisation of representative bodies of employers and employees'. Trade unions were able to register under the provisions of the federal statute and registration delivered corporate status and exclusive jurisdiction over a segment of the workforce. Registered unions were legally defined as 'parties principal' to disputes, and were given the right to initiate disputes on behalf of not only their members but entire categories of employees within their recognised areas of coverage.⁹⁶ Employers did not have to recognise unions at the enterprise level but the fact that unions could bind employers to multi-employer instruments or awards which applied to union and non-union employees alike meant there was little incentive and opportunity for union evasion. The combined effect of the operation of the system amounted to a *de facto* system of trade union recognition.

When the established arbitral system came under increasing attack from the 1980s onwards, the core registration and recognition provisions remained largely unchallenged. Rather, the bulk of subsequent legislative reform was directed at the bargaining process. In the early 1990s, the federal Labor government introduced statutorily-endorsed enterprise-level bargaining and extended this to include non-union based collective agreements. In 1996 the Coalition's *Workplace Relations Act (WRA)* introduced Australian Workplace Agreements as a form of individualised bargaining between employers and employees. Yet this shift to enterprise bargaining and restrictions on the powers of the AIRC fundamentally altered trade unions' status as 'parties principal': since the introduction of the statutory enterprise bargaining principle, there appears no way that an employer intent on concluding a non-union or individual agreement can be legally compelled to engage in bargaining for a union agreement, even where a union has majority support amongst the employees.⁹⁷

By adopting a principle of neutrality between different types of workplace agreements, the *WRA* formally promotes choice, yet it is clear that the stronger industrial party can pursue its preferred avenue of bargaining (union, non-union or individualized, or simple reliance on common law contract), despite the continued formal recognition given to unions as bargaining parties. The process of registration of trade unions under the federal system remains much as it always has, and is a considerably simpler procedure than the British arrangements for recognition outlined earlier. However, the new bargaining system means recognition is much less valuable than previously was the case, granting some important jurisdictional rights but giving unions significantly less influence in the bargaining relationship.⁹⁸ It would appear that productive relationships with management have increasingly become a matter of employer choice, as some employers seek to deunionise, some to minimize union influence and some to

⁹⁶ *Metal Trades Employers Association v Amalgamated Engineering Union* (1935) 54 CLR 387, where the High Court held that unions were 'parties principal' to industrial disputes (see too *Burwood Cinema Ltd v Australian Theatrical and Amusement Employees' Association* 35 CLR 528), and that unions legitimately represented the interests of not only current members but also future members of the union.

⁹⁷ *Asahi v Automotive, Food, Metals and Engineering Union* (1995) 59 IR 385; *Sensis v CPSU* (2003) 128 IR 92; *AWU v BHP Iron Ore* (2001) 106 FCR 482. See the discussion in Ron McCallum, 'Trade Union Recognition and Australia's Neo-Liberal Voluntary Bargaining Laws' (2002) 57 *Relations Industrielles* 225.

⁹⁸ Gerard Griffin, 'Recognition, Bargaining and Unions in Australia' in Gregor Gall (ed), *Union Recognition: Organising and Bargaining Outcomes*, Routledge, London, 2006, p 219.

maintain consultation and collaboration.⁹⁹ In a decentralised industrial relations system, the kind of relationship that is established with employees and their representatives is increasingly the choice of management alone.¹⁰⁰

Yet in this context it is also important to note that the *WorkChoices* legislation is in several respects highly prescriptive as to the content of collective agreements. Employers are now forbidden from lodging agreements which contain 'prohibited content'. Most forms of prohibited content relate to support for the operation of trade unions, such as the deduction of union dues, right of entry for union officials, trade union training leave, paid union meetings, the encouragement or discouragement of union membership or requiring union involvement in dispute resolution.¹⁰¹ Thus even if an employer should wish to pursue a policy of 'partnership' with a trade union, its capacity to make credible commitment supporting the role of the union in workplace governance (through the terms of a registered collective agreement formally sanctioned within the labour law system) is limited.

4.2.2 Information and Consultation Rights

Notwithstanding the apparently historically privileged position of unions in Australian workplace regulation through the award system, the formal exclusion from regulation of core managerial prerogatives effectively ruled out the development of practices approximating 'high involvement' workplaces. Whatever the extent of union power in practice at particular worksites, the formal doctrine of the arbitration authorities largely institutionalised unilateral managerial control over work methods, technology, recruitment, selection, placement and transfer.¹⁰² Even boards of reference, established under awards to deal with disputes at a more localised level, were themselves limited by the managerial prerogatives doctrine.¹⁰³

In the late 1980s the Australian Industrial Relations Commission (AIRC) used its national wage decisions to induce employers and unions to review awards and work practices with a view to bringing about greater functional and numerical flexibility, consultation, training and career-path progression within enterprises.¹⁰⁴ Employers wishing to take advantage of the award restructuring process were likewise obliged to reach agreement with unions on the progress of restructuring and establish enterprise consultative committees to negotiate an enterprise restructuring and efficiency agreement that would cover such matters as training, the broadbanding of jobs and the conduct of skill audits. Employers benefited greatly from this process, with the new classification structures facilitating the more flexible use of labour,¹⁰⁵ but once restructuring was complete employer interest in the use of consultative

⁹⁹ Meredith Jones, Shelley Marshall and Richard Mitchell, 'Corporate Social Responsibility and the Management of Labour in Two Australian Mining Industry Companies' (2007) 15 *Corporate Governance: An International Review* 57.

¹⁰⁰ Richard Cooney, 'The Contingencies of Partnership: Experiences from the Training Reform Agenda in Australian Manufacturing' (2002) 24 *Employee Relations* 321.

¹⁰¹ WR Regs, regs 8.4-8.7. Other areas of prohibited content include restrictions on use of non-standard labour and remedies for unfair dismissal.

¹⁰² Anthony Forsyth, *Transplanting Social Partnership*, Doctoral Thesis, University of Melbourne, 2005, p 22; Meredith Jones and Richard Mitchell, 'Legal Origin, Legal Families and the Regulation of Labour in Australia' Paper presented at Corporate Governance and the Management of Labour Workshop, The University of Melbourne, Dec. 7-8, 2006.

¹⁰³ Ibid.

¹⁰⁴ *National Wage Case, March 1987* (1987) 17 IR 65; *National Wage Case, February 1989 Review* (1989) 27 IR 196.

¹⁰⁵ In the metals manufacturing industry, for example, more than 300 different job classifications in the old award, were compressed into less than 15 skill levels under the award restructuring process: for discussion of the problems of over-regulation in awards see Richard Mitchell and

mechanisms declined. Consultation in the workplace was therefore not institutionalised through the reform process but rather was contingent on management policy, and the putative 'partnerships' that were formed were of limited duration.¹⁰⁶

There was also scope for the new decentralised bargaining system to advance local non-union consultative mechanisms. From 1993 there was a legislative requirement to consult during the bargaining period and to provide for ongoing consultation. This led to some increase in the incidence of workplace consultation. From 1990 to 1995 the proportion of workplaces with 20 or more employees that had standing Joint Consultative Committees (JCCs) more than doubled, from 14 to 33 per cent. They are much more common in public sector, large and unionised workplaces.¹⁰⁷ The percentage of agreements containing provision for JCCs then more than doubled between 1995 and 1999 before reducing to 2003.¹⁰⁸ JCCs commonly include up to 50 per cent managers, as well as employee representatives. The latter are sometimes appointed by management, sometimes by unions or a combination of the two, and seem to be less commonly elected directly by employees. JCCs usually have an advisory role to management, are often restricted in their jurisdiction to a narrow range of issues, and often have specific briefs for a limited period of time (task forces). Overall, however, the impact of enterprise bargaining on workplace consultation was muted in that the legislative provisions failed to adequately specify the structures through which consultation would take place and the AIRC did not appear to subject clauses regarding ongoing consultation to sufficient scrutiny.¹⁰⁹

An examination of clauses specifying the subject matter that committees are allowed or empowered to address revealed that most JCCs are designed to discuss matters of strategic importance to the enterprise.¹¹⁰ The available evidence from case studies as well as surveys suggest that Australian JCCs are almost exclusively advisory, rather than enjoying substantial co-decision-making powers.¹¹¹ To sum up: whilst the data suggests that JCCs are a significant institution of employee 'voice' in Australia, it does not appear that they are also a significant mechanism for the extension of union or employee *power*. They may act as a consultative mechanism for increasing productivity by securing employee cooperation through information sharing. However, it is unlikely that they are systemically encouraging the kind of employee involvement in decision-making which is indicative of the more advanced models suggested in some of the human resource management literature.

Malcolm Rimmer, 'Labour Law, Deregulation and Flexibility in Australian Industrial Relations' (1990) 12 *Comparative Labor Law Journal* 1.

¹⁰⁶ See Cooney, above n 100.

¹⁰⁷ AWIRS 95

¹⁰⁸ Anthony Forsyth, Samantha Korman and Shelley Marshall, *Joint Consultative Committees in Australia; An Empirical Update*, Paper presented to the 3rd Australian Labour Law Association National Conference, Brisbane, 22-23 September 2006. The marked increase may have been related to the void left by the removal of award provisions for consultation prior to termination, change and redundancy that the AIRC had developed and inserted into most Federal awards prior the introduction of the WRA. With the introduction of the WRA, consultation was no longer an 'allowable matter' and consequently such provisions were required to be removed from awards.

¹⁰⁹ Richard Mitchell, Richard Naughton and Rolf Sorensen, 'The Law and Employee Participation: Evidence from the Federal Enterprise Agreements Process' (1997) 39 *Journal of Industrial Relations* 196.

¹¹⁰ Forsyth, Korman and Marshall, above n 108.

¹¹¹ Eg, Santina Bertone et al. 1998, *Developing Effective Consultative Practices: Case Studies of Consultation at Work*, South Pacific Publishing, Melbourne, 1998; Ian Palmer and Peter McGraw, 'A New Era for Joint Consultation? Human Resource Managers' Perceptions of JCCs and Enterprise Bargaining' in Dennis Mortimer, Priscilla Leece and Richard Morris (eds), *Workplace Reform and Enterprise Bargaining*, Harcourt Brace, Melbourne, 1996.

From 1984, awards contained national standards as to redundancy and unfair dismissal, including provisions that required an employer, having made a definite decision to introduce major changes in production, program, organisation, structure or technology that were likely to have a significant effect on employees (such as dismissals, transfers or restructuring of jobs) to notify the related employees and their union(s) and to consult with them over the implementation of the proposed changes.¹¹² Awards are still expressly permitted to regulate notice of termination and redundancy pay, but most of the consultation requirements introduced into awards in the 1980s cannot be regarded as ‘allowable matters’ under the *Workplace Relations Act 1996* (Cth), representing in one view, ‘a definite attempt to achieve a return to former managerial prerogatives and to limit the area for union involvement and input’.¹¹³ Again, it would appear that the removal of award provisions for information disclosure to employees over restructuring has only partly been compensated for with agreement-making at the enterprise level, with less than one-third of enterprise agreements making provision for discussion between management and employees/unions about redundancies or other forms of workplace change.¹¹⁴ Obligations for employers to consult with employees are not only rare in such agreements, but often appear only as an obligation to ‘advise’ rather than engage in deliberative discussions.¹¹⁵

To sum up, Australian labour law exhibits few of the offsetting mechanisms identified in some other (mostly European) jurisdictions which give employees an effective voice in business restructuring. Mandatory consultation over redundancies survives,¹¹⁶ and the sharing of ‘information’ under such provisions may include information about the selection criteria for redundancy and redeployment plans, but labour law does not require the production of information going to the necessity of the employer’s decision to implement redundancies. In essence, management’s commercial decision-making rights about business strategy remain intact.

4.3.3 Minimum Standards

In our discussion of British labour law, at 3.3, above, we drew attention to the potential role played by minimum employment standards in a partnership agenda. Until the 1990s the specification of terms and conditions through awards established many of the minimum standards below which it was unlawful for an Australian employer to engage labour at a given classification. Those standards covered many aspects of the employment relationship, pre-eminently matters relating to rewards for labour (wage rates, loadings for overtime and

¹¹² *Termination, Change and Redundancy Case* (1984) 8 IR 34; 9 IR 115.

¹¹³ Marilyn Pittard, ‘Collective Employment Relationships: Reforms to Arbitrated Awards and Certified Agreements’ (1997) 10 *Australian Journal of Labour Law* 62.

¹¹⁴ The exclusion of consultation provisions from awards was partly redressed by the AIRC in a March 2004 decision, which held that employer obligations to inform and consult about redundancies were an allowable award matter relating to ‘dispute settlement procedures’. The outcome might be an improvement on old award standards in that consultation must commence once redundancies are ‘contemplated’, but narrower in that consultation is limited to redundancies rather than broader workplace change: *Redundancy Test Case Decision* (AIRC Full Bench, PR032004, 26 March 2004).

¹¹⁵ See Mitchell and Fetter, above n 91; Mitchell et al., above n 94.

¹¹⁶ Now imposed where an employer has decided to terminate the employment of 15 or more workers for economic or structural reasons: *Workplace Relations Act 1996* (Cth), Part VIA, Division 3, Subdivisions D and E. Such consultations must cover possible measures to avert or minimise dismissals and to mitigate the adverse affects if they cannot be avoided, and should commence at an early stage in the management decision-making process, well before specific employees are identified for redundancy: see Anthony Forsyth, ‘Giving Teeth to the Statutory Obligation to Consult Over Redundancies’ (2002) 15 *Australian Journal of Labour Law* 177.

shiftwork, allowances or special rates, and so on) and the quantity or quality of work performed (hours of labour, leave, work organisation, discipline and termination of employment). The federal tribunal was able to extend or refine award conditions in relation to working hours, family leave, redundancy entitlements, casual conversion, classification structures and so on, both through test cases and through the conciliation and arbitration of disputes. There was some evidence that this process was leading to the development of increasingly innovative standards that reflected the need to reconcile fairness at work with managerial flexibility.¹¹⁷ Employment contracts which offered less than award standards were unenforceable.

More recently federal legislation has established minimum standards in relation to a range of matters such as parental leave, superannuation, termination and redundancy. However, the most notable shift has been that away from the comprehensive set of minimum standards established by awards. Since the early 1990s, the minimum standards set out in awards have been set at a low 'safety net' level as part of a policy to encourage parties to bargain at the enterprise level. Accordingly, enterprise-specific collective agreements and individual agreements could not be legislatively formalised if they disadvantaged employees when compared with the relevant award standards (commonly called the 'no disadvantage test'). Under the *WRA* the 'no disadvantage test' was retained, but made a 'global' test, in place of the previous 'line by line' comparison with the relevant award. The test has arguably been the most important aspect of the legal regulatory framework applying to the enterprise bargaining process under the *WRA*.¹¹⁸

In its final form, the operation of the award safety net and the no disadvantage test did not seem to operate in any meaningful way as a brake on employer opportunism and thus as an underpinning of 'high trust' or partnership-style work relations although, undoubtedly, these protective devices to some extent did manage to prevent really exaggerated degrees of exploitation. Evidence on the utilization of AWAs and non-union collective agreements indicated that they were used to pursue cost cutting rather than high productivity strategies, especially as regards the removal of penalty rates and loadings and shifts to annualized salaries. Many employees experienced loss of conditions which previously regulated the quality of working life, such as limitation on working hours, and restrictions on overtime.¹¹⁹ Further, there is very little evidence that enterprise bargaining led to the development of 'innovative' strategies to reconcile work and family commitments.

At the beginning of 2006 the no disadvantage test was replaced by a new comparative standard, the Fair Pay and Conditions Standard, whereby all workplace agreements will be assessed by the OEA against just 5 minimum terms and conditions: annual leave, personal leave, unpaid parental leave, working hours and a minimum rate of pay.¹²⁰ It is now relatively straightforward for enterprises with no union presence, or where employees have relatively low collective bargaining power, to propose collective enterprise agreements or AWAs excluding award terms and conditions of employment which exceed the Fair Pay and

¹¹⁷ For example, the AIRC's recent decision in the Work and Family Test Case devised an award standard regarding parents' right to request variations to hours of work that substantially mirrored that put in place in Britain by the *Employment Act 2002* (UK) s 47: see AIRC, *Family Provisions Test Case Decision*, 8 August 2005, Print PR082005.

¹¹⁸ Mitchell et al, above n 94; Omar Merlo, 'Flexibility and Stretching Rights: The No Disadvantage Test in Enterprise Bargaining' (2000) 13 *Australian Journal of Labour Law* 207.

¹¹⁹ Mitchell et al, above n 94; Fetter and Mitchell, above n 91.

¹²⁰ For those workers already on awards, there are various transition arrangements involving 'preserved' and 'protected' award conditions: for a full discussion, see Colin Fenwick, 'How Low Can You Go? Minimum Working Conditions Under Australia's New Labour Laws' (2006) 16 *Economic and Labour Relations Review* 85.

Conditions Standard. On recent experience, the excluded terms will most likely be those regulating job quality, such as control over rostering, control over hours, entitlements to penalty rates and so on.

5. Conclusion

We began our paper by noting a shift in labour law policy away from structured adversarialism toward ‘co-operative’ or work relations or ‘partnership at work’. We pointed out that such a shift could entail a move either toward enhanced managerial prerogative or toward workplace arrangements based on mutual concessions and collaboration between labour and capital. The attendant trajectory of labour law may give some clue as to which understanding of partnership prevails in a given jurisdiction.

Our discussion of labour law in Britain gives limited support for the idea that an understanding of partnership as collaboration or mutuality has some purchase. Although statutory developments around trade union recognition, information and consultation and minimum standards give only partial and imperfect support for collaborative partnership arrangements, the noteworthy aspect of such developments is that they represent significant legislative enhancements in a jurisdiction that, immediately prior to Labour coming to power, offered little, if any, legal fetter on managerial prerogative at the workplace. That is, in terms of the *trajectory* of labour law in Britain we can discern an attempt, however partial, to offer legislative support for partnership at work that goes beyond merely dismantling the institutions and procedures of adversarialism.

Despite a somewhat similar emphasis in Australian labour law policy on fostering ‘co-operative’ workplace relations, the trajectory of Australian statutory labour law appears to be toward a buttressing of managerial prerogative.¹²¹ While trade union recognition procedures, based on registration, remain largely unchanged, the practical significance of recognition is radically reduced given changes to the regulation of bargaining; what limited legal rights to information and consultation that had emerged by the mid 1990s have been stripped back; and although Australia has, like Britain, for the first time instituted minimum standards around working time and leave within the federal workplace relations statute, such legislated standards represent a significant reduction in the array of quasi-legislative minimum standards that were embodied in the award system. Indicatively, Australian labour law seems to be heading in the opposite direction even to the very mild initiatives of the British Labour government’s statutory union recognition policy, extension of information and consultation rights and adoption of minimum standards,

Given this position of greatly heightened managerial prerogative there is no a priori reason why strong management would not choose to move to the adoption of work relations in line with ‘partnership at work’ approaches. There is clearly scope for the development of progressive systems where management deems it valuable to pursue such policies. The evidence on this however is uncertain, and what evidence there is cannot be regarded as very encouraging. There is little case study evidence on the extent to which businesses have adopted ‘high performance’ or ‘high involvement’ work practices. Survey evidence on these matters, particularly concerning the extent to which workers feel more ‘involved’ in their workplace under certain types of agreements, is contested. One study, for example, found that by and large the emergence of employment systems in AWAs based on ‘flexible’ production were very largely still based on hierarchical models, and upon managerial authority and discretion. There was ‘much less evidence of worker empowerment, information sharing, and consultative mechanisms’ in AWAs, beyond rhetorical preambles committing the enterprise

¹²¹ See Mark Bray and Peter Waring, ‘The Rise of Managerial Prerogative Under the Howard Government’ (2006) 32 *Australian Bulletin of Labour* 45.

to 'cooperation and trust', 'industrial democracy' and 'open book management'. There were few AWAs providing formal mechanisms of employee consultation through workplace committees and other structures, few references to group work, teams and quality circles, and so on. The general conclusion of the authors was that enterprise bargaining through AWA negotiation was not 'providing, in any systematic way, employment systems' which corresponded to the 'high trust', 'high involvement' or HPW system.¹²² Other studies indicate, again largely based on the material in public documents such as company policies and employment agreements, that even where major businesses feel compelled to withdraw from longstanding collective arrangements with unions, these are not necessarily replaced with HRM approaches designed to induce HPWS or other partnership approaches with employees.¹²³

Some would argue that you would not expect the terms of agreements necessarily to reveal working practices. This may be a valid criticism, but there are at least some reasons why we should not entirely discount the content of agreements as indicators of workplace culture. First most agreements of the recent era do set down preambles and sets of objectives which purport to espouse enterprise culture. Secondly many agreements do contain terms relevant to this discussion. Thirdly, agreements also give a picture of the extent to which managerial prerogative is utilised in respect of the wage/work bargain, and it is not unreasonable logically to suppose that the approach on these issues might characterise the workplace culture generally.

Finally, despite its rhetoric around co-operation, the federal government itself, through the Office of the Employment Advocate, has restricted its promotion of industry and sectoral templates to issues of conditions and workplace practices, temporal and pay flexibility and family friendly policies. Much of this activity can be cost-cutting in orientation and not necessarily associated with the development with the 'high trust' agenda, 'partnerships at work' or 'high performance work systems'. Far less prominent are initiatives such as obligations on the employer to move to a system which enhances the quality of the job through multi-skilling and training, and which empowers the employee in workplace decision-making through work teams, autonomous work groups and formal mechanisms for information sharing and communication.

To sum up, the recent trajectory of Australian labour law has been characterised by the restoration of managerial prerogative and the de-legitimisation of labour opposition to the objectives of the business enterprise. The latter is increasingly spruiked under the rhetoric of 'co-operation', but such co-operation seems to largely consist of employee acquiescence to management power rather than any true notion of 'partnership' based on consultation, integrative bargaining and the delivery of mutual gains. In Australia co-operation is secured, if not voluntarily, by default. There is no scope for opposition to management policies in the absence of oppositional institutions or individual power.

¹²² Mitchell and Fetter, above n 91; see also Mark Cole, Ron Callus and Kristen Van Barnavelde , *What's in an Agreement: An Approach to Understanding AWAs*, Paper to Joint ACIRRT/OEA seminar, University of Sydney, 2001.

¹²³ See Jones, Marshall and Mitchell, above n 99.