Centre for Employment & Labour Relations Law

Annual Report 2010
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Report prepared and edited by Tessa Dermody, John Howe and Sean Cooney of the Centre for Employment and Labour Relations Law, and Judy Bennett of Judy Bennett Design.

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2010 was an excellent year for the Centre. The Centre and its members continued to be engaged with a multitude of labour and employment law developments. A particular focus was of course the Fair Work Act 2009 (Cth), which came into full effect at the beginning of the year. A highlight in the 2010 calendar was the ‘Bargaining Processes in the United States’ event co-hosted with Fair Work Australia on the 2nd of February. Speaking at the event were the heads of two leading United States labour relations institutions – Mr George Cohen, Director of the Federal Mediation and Conciliation Service; and Mr Ronald Meisburg, General Counsel of the National Labor Relations Board. The event was extremely well attended, the speakers were engaging and thoughtful and we received very positive feedback from those in attendance.

In 2010 we welcomed a new member; Associate Professor Helen Anderson joined the Law School from the Monash Department of Business Law & Taxation. Helen’s research and teaching interests lie predominantly in corporations law and she is conducting an Australian Research Council funded project on the protection of employee entitlements in the event of employee insolvency. Given the increased significance of the intersection between corporations law, corporate governance and employee relations, Helen’s expertise is important to the Centre’s research and teaching profile.

Thanks to the generous assistance of our sponsors, the Centre advertised for a CELRL Student Research Fellowship for the second year running. Any LLB or JD student with an interest in conducting labour and employment research is eligible to apply for the fellowship, and the successful applicant spends one day per week conducting research for Centre members over the course of the academic year. In 2010, LLB student Amy Lim was chosen for the Fellowship from a very strong field of applicants.

There was also a change in the composition of our Advisory Board at the 2010 Advisory Board meeting. After sixteen years as Chair of the Board, Justice Peter Gray stood down from this role, although he will continue to be a member of the Board. The founding Director of the Centre, Professor Richard Mitchell, gave a speech at the meeting honouring Justice Gray’s outstanding contribution to the Centre and its activities since his appointment to the Chair upon the establishment of the Centre in 1994. I also expressed my personal thanks to Justice Gray for his assistance and support since I took over as Director in 2008. At the meeting we welcomed the new Chair, Justice Tony North, who like Justice Gray has had a longstanding interest and commitment to labour law. I look forward to working with Justice North in the coming years.

The Centre’s standing in the Australian and international employment and labour law communities was reinforced with a number leading academics in the field accepting invitations to become Associate Members of the Centre. A full list of our Associate Members can be found on page 9 of this Report.

Research

The Centre’s reputation for research leadership and excellence in the field of employment and labour relations law continued to grow, with more success in the attraction of competitive research funding. In 2010, Anna Chapman and Beth Gaze were successful in their application for an Australian Research Council (ARC) Discovery Grant for their project ‘Reshaping Employment Discrimination Law: Towards Substantive Equality’
This project, to be conducted over three years between 2011 and 2014, will examine the effect of the new anti-discrimination provisions in the *Fair Work Act*. It will explore the interaction between these provisions and the overall system of employment discrimination laws in both providing legal redress for discriminatory harms at work in Australia and in contributing to systemic change towards equality in relations at work. Joo-Cheong Tham’s project ‘*Dollars and Democracy: The Dynamics of Australian Political Finance and its Regulation*’ (with Graeme Orr and Brian Costar) also received funding from the ARC and it too will run from 2011–2014.

These successes are in addition to a number of successful grant applications by Centre members in recent years. An update on progress of these existing ARC-funded projects is detailed in the Research section of this Annual Report.

**Learning and Teaching**

The Centre and its members have primary responsibility for developing and delivering the teaching programs in employment and labour relations law at Melbourne Law School. In 2010, Centre members taught employment law subjects in the LLB and for the first time, the JD degree.

In 2010, given the commencement of the remaining elements of the *Fair Work Act*, the Centre took the opportunity to review the Masters in Labour Relations Law. This was conducted by John Howe, Anna Chapman and a sub-committee of the Centre’s Advisory Board. I would like to thank the members of the sub-committee; Justice Peter Gray, Carol Andrades, Mary-Jane Ierodiaconou, Ross Jackson, and Peter Lupson for their assistance with the review.

A number of changes were introduced to the graduate program as a result of this review; including a change of name to the Masters of Employment and Labour Relations Law and the addition of a new subject; Principles of Employment Law, that is designed to attract students from Human Resources backgrounds or lawyers new to the field of employment and labour relations law. Student numbers in the program in 2010 showed an increase on previous years, indicating that our graduate program is in a healthy state.

In relation to the JD degree, over the next few years the Faculty will be deciding what further optional subjects should be available for students in the JD and the Centre and its members aim to ensure that the JD curriculum contains a wide range of offerings in employment and labour law.

**Professional and Community Engagement**

In addition to the US Bargaining event mentioned at the beginning of this foreword, the Centre maintained a busy program of events and seminars in 2010. The Centre hosted two Sponsors’ Seminars and nine Labour Law Seminars over the course of the year on topics ranging from: ‘The transfer of business provisions in the *Fair Work Act*’, ‘Developments in the implied duty of mutual trust and confidence at common law’, ‘Workplace consequences of employer and employee use of electronic social media’ and the ‘Equal remuneration test case before Fair Work Australia’. In addition, there were a number of Workshops linked to the various research projects being conducted at the Centre: a Workshop on ‘Temporary Migrant Work and Social Justice’; ‘Regoverning the Workplace: From Self-Regulation to Co-Regulation’; a Policy and Research Roundtable on
the ‘Promotion of Cooperative and Productive Workplaces’ co-hosted with the Fair Work Ombudsman and the Workplace & Corporate Law Research Group at Monash University; and a half-day workshop on ‘Enforcement of Minimum Employment Standards’.

A number of these seminars and Workshops were given by interstate and international visitors to the Centre, once again highlighting the Centre’s standing in the broader employment and labour law community.

**Conclusion**

The publication of the Annual Report also provides an opportunity each year to make special acknowledgement of the important contributions made to the Centre and its work by the legal practices that are Centre Sponsors, as well as by its Academic Associates, Teaching Associates, and members of the Advisory Board. We are pleased to report that all 18 firms and one government organisation that sponsored Centre in 2009 did so again in 2010. In addition to these organisations’ financial contributions, members of the practices frequently participate in the Centre’s research and teaching programs, as well as attending (and in some cases presenting at) our Sponsors’ Seminar series. The many aspects of our relationships with our Sponsors are, we believe, mutually enriching.

The ongoing support and contributions of our Sponsors, as well as our Academic, Teaching and Research Associates, and the members of the Advisory Board, are all essential to the Centre’s continuing success and vitality. I also want to thank the LLB and JD students who are increasingly involved in the Centre as Student Editorial Assistants for the *Australian Journal of Labour Law (AJLL)*, or as research assistants for the various research projects in which Centre members are involved. Also important is the financial and administrative support provided by the Law School. Once again, we thank all those who continue to offer their support: without it the Centre could not do much of the work that it does.

Finally, on behalf of all Centre members, I would like to thank Tessa Dermody, the Centre’s Coordinator. Tessa’s excellent management and organisational skills keep the Centre ticking over smoothly throughout the year.

**John Howe**
The Centre was established in the Melbourne Law School in 1994. It is Australia’s first research centre devoted exclusively to developing an understanding of the role and function of labour law. Its goals are:

- To undertake and encourage independent research on all aspects of labour and employment regulation in Australia and internationally;
- To undertake and encourage critical research on the development of labour and employment law as a discipline, including the exploration of future developments;
- To undertake and promote the teaching of labour and employment law, including by developing and promoting innovative teaching methods and teaching materials, and by fostering postgraduate research;
- To disseminate the results of research in labour and employment law through publication in the form of working papers, journal articles, and books, and in the form of seminar programs and conferences, participation in public debate, information exchange, and consultancies; and
- To establish and foster links with similar bodies, internationally and nationally, and to facilitate engagement between scholars, students, policymakers, the legal profession, industrial relations practitioners and other individuals and organisations working in labour and employment law.
The Centre: People and Relationships

Centre Faculty Members

Associate Professor John Howe  
BA, LLB (Monash), LLM (Temple) (Summa Cum Laude), PhD (Melb)  
Director  
Room 0756, ph: (03) 8344 1094, j.howe@unimelb.edu.au  
John has been Director of the Centre since November 2008. His research interests include regulatory theory, labour law and corporate accountability, and he teaches labour law, corporations law and corporate social responsibility in both the undergraduate and postgraduate teaching programs offered by the Melbourne Law School. John is also a member of the Centre for Corporate Law and Securities Regulation in the Law School. Before starting his academic career, John worked in private legal practice and as a researcher for public policy and advocacy organisations in Washington DC. He was Secretary of the Australian Labour Law Association between 2005 and 2009, and is currently a member of ALLA’s National Committee. He is a member of the editorial committee of the Australian Journal of Labour Law.

Associate Professor Helen Anderson  
LLB (Hons) (Melb), Grad Dip Bus (Acc), LLM, PhD (Monash)  
Room 0753, ph: (03) 9035 5467, h.anderson@unimelb.edu.au  
Helen Anderson joined the Centre in January 2010 from Monash University. She practiced briefly and worked for the Legal Aid Commission before becoming an academic in 1989. The fair treatment of vulnerable parties has been her abiding research interest: her masters major thesis dealt with parties who rely on published audit opinions and her doctoral thesis was concerned with creditors in corporate insolvency. She continues this interest with her present work on improving the recovery rights of employees in corporate insolvency (an ARC funded project). She is also working on a book entitled Liability of Corporate Groups with Professor Christian Witting of Durham University, which examines the circumstances justifying lifting the corporate veil on parent companies.

Ms Anna Chapman  
BCom, LLB (Hons), LLM (Melb)  
Room 0702, ph: (03) 8344 5625, a.chapman@unimelb.edu.au  
Anna has been a faculty member at Melbourne Law School for more than ten years, having come to the University after legal practice with Mallesons Stephen Jaques. Anna’s research focuses on law, gender, race and sexuality in the paid labour market. Her current projects include an examination of the constitution of the worker and care responsibilities in Australian labour law. Anna has published in a range of Australian and international law journals and edited collections and from 2008 has been one of the editors of the Australian Journal of Labour Law.

Associate Professor Sean Cooney  
BA, LLB (Hons), LLM (Melb), LLM, JSD (Columbia)  
Room 0703, ph: (03) 8344 8109, s.cooney@unimelb.edu.au  
Sean’s research interests are in international and comparative labour law, with a particular focus on East Asia. Sean is a graduate of the University of Melbourne and, after several years in legal practice, obtained his doctoral degree at Columbia University. He has published in a range of international journals in English and in Chinese, and is at present examining issues of comparative labour law, and labour law enforcement, with a particular emphasis on East Asia. He is also undertaking an ARC-funded study of the Fair Work
Ombudsman, together with John Howe and Tess Hardy and a second ARC-funded study on the development of labour and corporate law in the Asia Pacific (with Richard Mitchell, Peter Gahan and Ian Ramsay). Sean is currently the Associate Dean (Research) of the Melbourne Law School.

**Associate Professor Colin Fenwick** BA, LLB, LLM (Melb), LLM (Virginia), (Currently on leave of absence at the ILO, Geneva)
c.fenwick@unimelb.edu.au
Colin has over fifteen years’ experience in the field of labour relations law. He was the Director of the Centre from August 2004 until October 2008. Colin has worked in both legal practice and in the academy; in Australia, the United States and Switzerland. Colin’s research interests are predominantly in comparative and international labour law, with a particular focus on Southern Africa. Between 2006 and 2008 he was one of the editors of the *Australian Journal of Labour Law*.

**Associate Professor Beth Gaze** BSc, LLB (Hons) (Monash), LLM (Cal) (Berkeley)
Room 0830, ph: (03) 8344 6173, egaze@unimelb.edu.au
Beth’s major interests are in anti-discrimination and equality law, feminist legal thought and administrative law including tribunals. She has undertaken research into Australian anti-discrimination law including; currently-funded research projects on the enforcement process under Australian federal anti-discrimination law and the need for substantive updating of Australian anti-discrimination laws. Her particular area of interest in discrimination law is equality for women at work, with a focus on work/family conflict. Beth joined the Melbourne Law School from Monash University in 2006.

**Mr Glenn Patmore** BA, LLB (Hons) (Monash), LLM (Queens)
Room 0709, ph: (03) 8344 6191, g.patmore@unimelb.edu.au
Glenn has taught law at Monash University and currently is a Senior Lecturer at the Melbourne Law School. He is presently researching in the fields of democratic theory and practice, constitutional law, employment law, human rights and republicanism. His employment law research has focused on disability discrimination, joint consultative committees as well as employee happiness and labour law. His book, *Choosing the Republic* (UNSW Press), was published in 2009 and he continues to write on the topic of Australian republicanism and constitutional change. He is an editor of four books of collected essays, has written two books and published in a range of Australian and international journals.

**Associate Professor Joo-Cheong Tham** LLB (Hons) (Melb), LLM (Melb), PhD (Melb)
Room 0710, ph: (03) 8344 7030, j.tham@unimelb.edu.au
Joo-Cheong Tham is an Associate Professor at the Law Faculty and has taught at the law schools of Victoria University and La Trobe University. His key research areas are the regulation of non-standard work and political finance law. He has published over 25 book chapters and refereed articles. His research has also been published in print and online media with Joo-Cheong having written more than 30 opinion pieces. In the area of political finance, Joo-Cheong’s book, *Money and Politics: The Democracy We Can’t Afford* was published by UNSW Press in 2010.
Principal Research Staff

Ms Catherine Dow BA, LLB (Hons) (Melb)
Catherine graduated from the University of Melbourne in June 2009 with a LLB (Hons), BA (Media & Communications), U21 Certificate in Global Issues (Understanding Globalisation) and a Diploma in Music (Practical). Catherine worked as a research assistant for many Centre members and in the second half of the year commenced work as a research fellow for Helen Anderson’s ARC project. Catherine was also the Associate Editor of the Australian Journal of Labour Law and Administrator of the Australian Labour Law Association. Catherine is passionate about all aspects of labour law and is particularly interested in anti-discrimination law, collective bargaining, freedom of association, international labour law and the rights of precarious and informal workers.

Ms Tess Hardy BA, LLB (Hons), LLM (Melb)
Tess graduated from Arts and Law (Hons) from the University of Melbourne. She completed her LLM in 2009 and is currently a PhD candidate and research fellow with the Centre. Her research interests include: recent changes to the Australian workplace relations legislation and enforcement of labour law. She is presently working with John Howe and Sean Cooney on an ARC research project regarding the role of the Fair Work Ombudsman. Prior to joining the Centre, Tess practiced in employment and labour relations law in Melbourne, Tokyo and Hong Kong.

Student Fellow
Ms Amy Lim was the Centre Student Fellow for 2010. She was an LLB student at Melbourne Law School. She assisted Centre members Anna Chapman and Beth Gaze with their successful Australian Research Council grant application.

Research Assistants
Members of the Centre were assisted by the following research staff: Kirsty Corby, Colette Downie, Clara Jordan-Baird, Michael Keks, Ingrid Landau, Emily Long, Jesse Winton and Nicole Yazbek.

Coordinator
Ms Tessa Dermody BEd (Otago), Dip Tching (Dunedin)
Tessa joined the Centre as the Coordinator in January 2009. She comes from an Education background and has several years experience working in various administration roles in New Zealand, United Kingdom and Australia. Tessa is also the Coordinator for the Tax Group.
**Centre Associates**

**Academic Associates**
Professor Chris Arup  
Associate Professor Michelle Brown  
Mr Alan Clayton  
Associate Professor Christina Cregan  
Professor Cindy Estlund  
Professor Keith Ewing  
Associate Professor Colin Fenwick  
Professor William Ford  
Associate Professor Anthony Forsyth  
Dr Andrew Frazer  
Professor Mark Freedland  
Professor Judy Fudge  
Associate Professor Peter Gahan  
Professor Richard Johnstone  
Professor Tim Lindsey  
Professor Ronald McCallum AO  
Ms Shelley Marshall  
Associate Professor Gail Mason  
Professor Richard Mitchell  
Associate Professor Jill Murray  
Mr Richard Naughton  
Associate Professor Graeme Orr  
Professor Rosemary Owens  
Mr Anthony O’Donnell  
Professor Marilyn Pittard  
Professor Ian Ramsay  
Professor Joellen Riley  
Professor Andrew Stewart  
Professor Katherine Stone  
Professor Leah Vosko  

**Current affiliation**
Monash University  
University of Melbourne  
Independent consultant in workplace regulation  
University of Melbourne  
New York University  
Kings College, University of London  
University of Melbourne  
University of Western Australia  
Monash University  
University of Wollongong  
University of Oxford  
University of Victoria, Canada  
Monash University  
Griffith University  
University of Melbourne  
University of Sydney  
Monash University  
University of Sydney  
Monash University  
La Trobe University  
Monash University  
University of Queensland  
University of Adelaide  
La Trobe University  
Monash University  
University of Melbourne  
University of Sydney  
University of Adelaide  
UCLA School of Law  
York University, Canada  

**Teaching Associates**
Ms Carol Andrades  
Mr Paul O’Grady  
Mr Peter Rozen  
Professor Andrew Stewart  

**Current affiliation**
Ryan Carlisle Thomas  
Victorian Bar  
Victorian Bar  
University of Adelaide
The Advisory Board

The Centre’s work takes place under the guidance and assistance of an Advisory Board. Members of the Board are distinguished representatives of major institutions, bodies and law firms with an involvement in the labour law field. The members in 2010 were:

Justice Peter Gray (Chair until August)
Justice Anthony North (Chair from August)
Senior Deputy President Jennifer Acton
Mr Steven Amendola
Ms Carol Andrades
Mr Josh Bornstein
Justice Alan Boulton
Ms Cath Bowtell (until June)
Mr Ben Burke
Professor Michael Crommelin AO
Mr Mark Diserio
Ms Rachel Doyle SC
Mr Philip Gardner
Mr Val Gostencnik
Mr Joel Fetter (from June)
Ms Mary-Jane Ierodiaconou
Mr Ross Jackson
Mr Murray Kellock
Mr Ross Levin
Mr Adam Lunn
Mr Peter Lupson
Professor Richard Mitchell
Mr Stuart Pill
Mr Charles Power
Mr Julian Rieker
Mr Nick Ruskin
Mr Henry Skene
Mr Graeme Smith
Mr Michael Tehan
Mr Nicholas Wilson

Federal Court of Australia
Federal Court of Australia
Fair Work Australia
Blake Dawson
Ryan Carlisle Thomas
Maurice Blackburn
Fair Work Australia
Australian Council of Trade Unions
Baker & McKenzie
University of Melbourne
Lander & Rogers
Australian Council of Trade Unions
Justitia
Maddocks
Mallesons Stephen Jaques
Rigby Cooke Lawyers
Allens Arthur Robinson
Middletons
Monash University
Trindale Farr & Pill
Holding Redlich
Lander & Rogers
DLA Piper
Arnold Bloch Leibler
Freehills
Minter Ellison
Fair Work Ombudsman
**CENTRE SPONSORS**

The support of sponsors is essential to the continued operation of the Centre, both in terms of the financial contributions that sponsors make to the resources of the Centre, and in terms of the involvement of sponsoring firms in providing advice and counsel for the Centre. One representative from each of the Centre’s sponsors sits on the Centre’s Advisory Board. The Centre’s sponsors in 2010 were:
The Centre is Australia’s first research centre devoted exclusively to developing an understanding of the role and function of legal regulation of the labour market. Centre Members are engaged in research in diverse aspects of the broad field of employment and labour law and labour market regulation. Areas of particular interest and expertise include the regulation of individual work relationships, discrimination and inequality in employment and the labour market, the regulation of occupational health and safety, collective labour relations and bargaining, the functions of trade unions and alternative forms of worker representation, corporate governance and labour, enforcement of minimum employment standards, international labour rights and standards, and unemployment law and labour market policy. Centre members also have a strong interest in comparative labour and employment law and labour market regulation, including research into labour and employment regulation in the Asia-Pacific region, Southern Africa, North America and Europe.

During 2010 Centre members pursued a number of specific research projects. Short descriptions of the Australian Research Council (ARC) funded projects follow. Further information on all of the research projects can be found on our website www.celrl.law.unimelb.edu.au/go/research/.

**Australian Research Council (ARC) Funded Research Projects**

**Employee Share Ownership Plans: Current Practice and Regulatory Reform**

*Centre Associates:* R. Mitchell and I. Ramsay

This project developed from the ‘Corporate Governance and Workplace Partnerships’ project. It was seeking to produce the first comprehensive analysis of how current legal regulation structures and constrains the use of employee share ownership in Australian enterprises. Employee Share Ownership Plans (ESOPs) are important to the development of an economic culture of enterprise and innovation and the building of national wealth and savings in response to long-term demands of intergenerational equity. ESOPs require development through appropriate regulatory frameworks. This project subjected the existing regime of tax, corporate and labour law to technical and empirical scrutiny. The project was funded by a Discovery Grant from the ARC, for three years from 2006. The Chief Investigators were Professor Richard Mitchell, with Professor Ian Ramsay and Associate Professor Ann O'Connell of the Melbourne Law School’s Centre for Corporate Law and Securities Regulation. In 2010, the project focused on why employees participate in plans and on use of such plans in other jurisdictions.

**Labour Regulation in East Asia: China**

*Centre Member:* S. Cooney

*Centre Associates:* Y. Zhu, S Biddulph

This project is a development of earlier ARC-funded research conducted by Associate Professor Sean Cooney, and Centre Associates Associate Professor Jill Murray and Professor Richard Mitchell on ‘Rethinking International Labour Standards in the Asia-Pacific’. A major issue that emerged from the work was the enforcement of domestic and international labour law in developing countries such as China. Many developing
countries have labour laws that, on paper, are comprehensive and reflect international standards (with exceptions in the area of freedom of association). However, it is notorious that these laws are widely ignored. This project investigates systematically the reasons for implementation failures. It examines the scope for greater coordination and systematisation of domestic enforcement measures. In 2006 Associate Professor Sean Cooney was awarded a Discovery Grant from the ARC for further work in this area, together with Associate Professor and Reader Sarah Biddulph of the Asian Law Centre (Melbourne Law School) and Centre Associate Dr Ying Zhu. Field work on the project was carried out between 2007 and 2010 with visits to officials, firms and academics in Beijing, Hefei, Nanjing, Shenzhen and Shantou. A major international workshop was held on the issue in Melbourne February 2009 with a follow up in Beijing in August 2010.

**LEGAL ORIGINS: COMPARING THE IMPACT OF DIFFERENT LEGAL SYSTEMS ON THE REGULATION OF THE BUSINESS ENTERPRISE IN THE ASIA-PACIFIC REGION.**

**Centre Member:** S. Cooney  
**Research Staff:** P Maher  
**Associates:** R. Mitchell, P. Gahan, I. Ramsay

The legal origin hypothesis proposes that common law institutions deliver superior economic outcomes to other legal systems. International agencies have acted on this view in advocating legal reforms in a number of countries. This ignores alternative arguments/evidence that emphasise that legal systems can be responsive to local histories and conditions without adverse economic consequences. We aim to assess whether the legal origins hypothesis is (1) an accurate description and (2) an apt guide for legal analysis and reform in Australia and the region. The project will bring Australia and Asia to the forefront of research on legal origins through a systematic analysis of our region comparable to those produced in other parts of the world.

**NEW INITIATIVES IN ENFORCING EMPLOYMENT STANDARDS: ASSESSING THE EFFECTIVENESS OF FEDERAL GOVERNMENT COMPLIANCE STRATEGIES**

**Centre Members:** S. Cooney and J. Howe  
**Research Staff:** C. Dow, C. Downie, T. Hardy

The well-being of more than eight million Australian employees is underpinned by statutory workplace entitlements. For the large majority of those employees, these are set by federal legislation. The statutory entitlements are meaningful only in so far as they are complied with, and improving the effectiveness of the federal enforcement agency, the Fair Work Ombudsman, is therefore of crucial public importance. This project provides the first comprehensive scholarly empirical evaluation of the Fair Work Ombudsman. Its findings will identify multiple ways in which enforcement practices can be improved, not only for the Fair Work Ombudsman, but also for comparable compliance agencies domestically and overseas. The project is supported by a three year ARC Linkage Grant, awarded in 2009. In 2010, the project team conducted comparative research on labour enforcement in other jurisdictions, and commenced interviews with staff at the Fair Work Ombudsman. A paper outlining preliminary findings from this research was presented at the Australian Labour Law Association conference. The project team also held a half-day Workshop with guest speaker Professor David Weil, of Boston University in the US.
‘Nothing Can Be Created Out of Nothing’: Workers, Their Know-How and the Employment Relationships that Support Them

Centre Members: C. Fenwick, J. Howe
Research Staff: B. Strong
Associates: C. Arup, C. Dent, W van Caenegem

Innovation is central to the Australian and global economy. Innovation policy, to date, has focused on high-technology industries and the commercialisation of new products – areas encouraged by current intellectual property laws. This neglects the key contribution of “know-how” to innovation, leaving it to regulation by contractual clauses and industry practice, which may not set appropriate incentives. This empirical project, through the collection of qualitative data, will establish how Australian employers and workers bargain over the fruits of know-how and whether this promotes innovation. It will suggest, if necessary, reforms to the intellectual property and labour law systems to enhance legal incentives for this form of innovation. The project commenced in 2009 and is supported by an ARC Discovery Grant. In 2010, the project team interviewed legal practitioners about their experience with the use and enforcement of restraint of trade and confidential information clauses in employment contracts. Preliminary findings from this research were presented at the Australian Labour Law Association conference in November 2010.

Reform of the Personal Liability of Directors for Unpaid Employee Entitlements

Centre Member: H. Anderson
Research Staff: C. Dow

Laws imposing liability on corporate directors must balance responsible governance by directors and the need for appropriate compensation for affected parties with the risk of inhibiting directors’ legitimate commercial decision-making. A pressing issue is the extent to which directors should be liable for unpaid employee entitlements, given the ineffectiveness of the relevant Corporations Act provisions and the burden this places on taxpayers. This project will examine other models of liability, which provide greater deterrence and possible compensation, including incentives to place companies into voluntary administration. The objective is to recommend reform and the employee entitlement provisions. 2010 saw the commencement of the project. An extensive literature search was carried out, and contact was made with the major regulators to obtain statistical data. Preliminary findings were written up and will be published in 2011.
OTHER EMPLOYMENT AND LABOUR LAW RESEARCH PROJECTS

- Employment Rights of International Students: *Enhancing protection through a community-university collaboration*
- Employee Happiness and Labour Law
- Law and Labour Market Regulation
- Reform of Australian Employment and Labour Law
- Security of Employment and Unfair Dismissal Law
- The Challenges of Regulating Temporary migrant labour in Australia
- Work, Care and Family: *Revealing and Reconstituting Legal Norms*

In addition, during 2010 a number of research projects were pursued in areas beyond labour and employment law. These were:

- Coherent, Independent and User-Friendly? *Participant Perceptions of Social Security Administrative Review Processes in Australia and Britain*
- Dollars and Democracy: *The Dynamics of Australian Political Finance and its Regulation*
- Electoral Regulation and its Prospects for Australian Democracy
- International Perspectives on the Regulation of Party Funding
- Non-discrimination and Freedom of religion
- Political Finance in Australia
Research Students under the Supervision of Centre Members

Student Research Projects


Marco Bini – ‘Public Sector Directors’ Duties’ (PhD). Co-Supervisors: Associate Professor Beth Gaze and Professor Ian Ramsay.

Katie Elkin – ‘The Regulation of International Medical Graduates in Australia and New Zealand’ (PhD). Co-Supervisors: Professor David Studdert (principal), Professor Lesleyanne Hawthorne and Associate Professor John Howe.

Tess Hardy – ‘New Initiatives in Enforcing Employment Standards’ (PhD). Co-Supervisors: Associate Professor Sean Cooney and Associate Professor John Howe.

Mark Irving – ‘Equitable Remedies for Unfair Termination’ (LLM, Minor Thesis). Co-Supervisors: Associate Professor Sean Cooney and Associate Professor Matthew Harding.

Jimmy Mao – ‘China’s Pension System’ (PhD). Co-Supervisors: Associate Professor Sean Cooney and Professor Richard Mitchell

Nimmith Men – ‘Alternative Dispute Resolution in Cambodia’ (PhD). Co-Supervisors: Associate Professor Sean Cooney and Professor Camille Cameron.

Tony Mihalopoulos – ‘Recognition Space for Indigenous and Ethno-Cultural Groups in Australia’ (PhD). Co-Supervisors: Associate Professor Beth Gaze and Dr Lisa Sarmas.

David Ruschena – ‘Litigation and Liability as Regulation to Reduce Tobacco-Related Harm’ (PhD). Co-Supervisors: Associate Professor John Howe, Professor Christine Parker and Professor Camille Cameron.

Qingfan You – ‘New Forms of Worker Organisation in China’ (PhD). Co-Supervisors: Associate Professor Sean Cooney and Associate Professor Peter Gahan
Members of the Centre teach a number of undergraduate subjects and postgraduate programs in labour and employment law in the Law School. In addition, the Centre has a sizeable cohort of research students under the supervision of Centre members. Information regarding the projects of these research students is contained in the earlier part of this annual report (under the heading 'Research'). All labour law students are encouraged to take part in various activities within the Centre, including the Labour Law Seminar Series.

Subjects in the LLB Program

- Employment Law (J. Tham)
- Discrimination, Law and Equality (B. Gaze)

During 2010 Centre members also taught in a number of other subjects in the LLB degree, including Administrative Law; Advance Legal Research; Constitutional Law; Contracts; Corporations Law; Discrimination, Law and Equality; Legal Ethics; Obligations; Principles of Public Law, Rethinking Democracy and the Law and Torts.

Subjects in the JD Program

- Employment Law (J. Tham)

During 2010 Centre members also taught in several other subjects in the JD degree, including Constitutional Law and Corporations Law.
The Melbourne Law Masters Program

The Melbourne Law School offers a range of different teaching programs as part of the Melbourne Law Masters Program. Ms Anna Chapman and Associate Professor John Howe were the Directors of Studies for the Labour Relations Law Graduate Program in 2010.

Coursework Programs:
- Graduate Diploma in Labour Relations Law
- Master of Labour Relations Law
- LLM by coursework

Research Programs:
- LLM by major thesis
- Doctorate of Juridical Science (SJD)
- PhD

The subjects offered in 2010 were:

Compulsory Subjects:
- Bargaining at Work and Industrial Action (A. Stewart)
- Employment Law (S. Cooney)
- Labour Standards under the Fair Work Act (J. Howe and P. O’Grady)

Optional Subjects:
- Equality and Discrimination at Work (A. Chapman, B. Gaze and C. Andrades)
- International Employment Law (K. Kolben)
- Workplace Health and Safety (P. Rozen)

The structure of the program was revised in 2010 after consultation with a working group of the Centre Advisory Board. A number of developments eventuated, including the introduction of a new subject providing an overview of the field. This subject called ‘Principles of Employment Law’, has been developed in particular for students without a background in employment law.

Further information regarding the program can be obtained from the Melbourne Law Masters website at: http://www.masters.law.unimelb.edu.au/.
During 2010 the Centre was engaged in a range of knowledge transfer activities, between the University and other higher education institutions, legal practitioners, industry groups, trade unions, community groups, international institutions such as the International Labour Organisation, Australian government bodies and parliament, and the public. These exchanges took place through a variety of mechanisms including its two Seminar Series, its Working Paper Series and the involvement of Centre members in editorial roles with the Australian Journal of Labour Law, to name a few. Centre members also played active roles in various associations, were regular contributors to print and electronic media and made submissions and gave evidence to parliamentary inquiries in 2010.

**Sponsors’ Seminar Series**
The Centre conducts a series of seminars for members of the Centre’s sponsoring firms and organisations. Two seminars were held in 2010:
- **Professor Breen Creighton**, RMIT University on ‘The Transfer of Business Provisions of the Fair Work Act in National and International Context’ (23 March).
- **Mr Paul O’Grady**, Victorian Bar on ‘Recent Developments in the Duty of Trust and Confidence’ (25 May).

**Labour Law Seminar Series**
These free public seminars are intended to be of interest to a wide audience including academics, members of the legal profession, and those engaged in the day to day business of industrial relations and/or human resource management. Among other things, the Labour Law Seminar Series provides an opportunity for Centre members, visitors and associates, together with invited speakers, to present preliminary results of their research into the operations of labour and employment law. Associate Professor John Howe and Mr Glenn Patmore co-ordinated the Labour Law Seminar Series during 2010.

Nine seminars were held during the course of the year:
- **Professor Cindy Estlund**, New York University School of Law on ‘Just the facts – The Case for Workplace Transparency’ (15 April).
- **Professor Kevin Kolben**, Rutgers Business School, USA on ‘Transnational Labour Regulation and the Limits of Governance’ (12 May).
- **Mr William Herbert**, Deputy Chair and Counsel for New York State Public Employment Relations Board, USA on ‘Workplace Consequences of Electronic Exhibitionism and Voyeurism’ (22 June).
- **Dr Paul Gollan**, Macquarie University on ‘Non-Union Collective Voice Mechanisms: Employer Strategies and Union Responses’ (21 July).
- **Dr Meg Smith**, University of Western Sydney on ‘Gender Pay Equity Regulation in Australia and the Equal Remuneration Test Case’ (21 October).
- **Mr Giuseppe Carabetta**, University of Sydney on ‘The Future of Police Industrial Regulation in Australia: Lessons from Victoria’ (25 November).
- **Professor David Weil**, Boston University School of Management, USA on ‘Fissured Employment’ (9 December).
**Major Events**

**Bargaining Processes in the US – Including the Requirement to Bargain in Good Faith** (2 February)
On Tuesday 2 February the Centre hosted a seminar with Fair Work Australia on ‘Bargaining Processes in the US’. Speaking at the event were the heads of two leading United States labour relations institutions – Mr George Cohen, Director of the Federal Mediation and Conciliation Service; and Mr Ronald Meisburg, General Counsel of the National Labor Relations Board.

**Workshop on Temporary Migrant Work and Social Justice** (7 April)
On Wednesday 7 April the Centre, along with the Social Justice Initiative from the University of Melbourne, hosted a workshop which aimed to examine the challenging social justice questions arising in relation to temporary migrant workers in Australia.

The workshop aimed to:
- situate temporary migrant workers in the context of changing migration patterns;
- examine their working conditions, living conditions as well as their social and political rights; and
- discuss the research agendas for temporary migrant workers and social justice.

Workshop participants were drawn from a range of backgrounds with academics and representatives from the government and community sectors attending.

**Regoverning the Workplace: From Self-Regulation to Co-Regulation** (21 April)
On Wednesday 21 April the Centre organised a roundtable seminar with guest speaker Professor Cindy Estlund from New York University Law School. We invited a number of Australian labour law academics to comment on Cindy’s work. The Roundtable provided an opportunity for discussion of the contribution of regulatory theory and ‘New Governance’ approaches to labour law scholarship and practice.

**Book Launch and Panel Discussion – Money and Politics: The democracy we can’t afford** (3 August)
On Tuesday 3 August Centre member Associate Professor Joo-Cheong Tham’s new book ‘Money and Politics: The democracy we can’t afford’ was launched. At this event a panel discussed the key challenges posed by money in Australian politics. The event was chaired by Professor Keith Ewing, King’s College in London and the panellists included Daryl Melham MP, Michael O’Brien MP, Lee Rhiannon, Greens NSW Legislative Council member, Joel Fetter, ACTU and Royce Millar, The Age.
Policy and Research Roundtable on the Promotion of Cooperative and Productive Workplace Relations (17 November)
The Centre co-hosted with the Fair Work Ombudsman (FWO) and the Workplace & Corporate Law Research Group, Faculty of Business and Economics, Monash University, a policy and research roundtable. The Roundtable was attended by staff from the Fair Work Ombudsman and was designed to assist the FWO in policy development and planning.

Enforcement of Minimum Employment Standards Workshop (1 December)
On Wednesday 1 December the Centre hosted a workshop for John Howe and Sean Cooney’s ARC Project on Enforcement of Minimum Employment Standards. A leading expert in the area of enforcement, Professor David Weil from Boston University in the US, was invited to speak at the event. Participants at the workshop included a number of academics as well as several members from the office of the Fair Work Ombudsman.
Editorial Roles
Australian Journal of Labour Law

The Australian Journal of Labour Law is the leading Australian scholarly publication in its field, publishing three issues per year, with each annual volume in the vicinity of 350 pages. It is a peer reviewed journal, and is currently ranked ‘A’ in the ERA journal ranking process. The Centre is the Journal’s administrative home.

During 2010 members and associates of the Centre continued to fill many of the roles in the editorial group. Ms Anna Chapman continued as a Co-Editor of the Journal, and Associate Professor Joo-Cheong Tham as the Reports Co-Editor, along with Emily Long. The work of the editorial team was ably supported in 2010 by Ms Catherine Dow who filled the position of Associate Editor and a team of Student Editorial Assistants.

Centre associates who worked on the journal during 2010 include: Professor Joellen Riley and Associate Professor Anthony Forsyth (Co-Editors) and Mr Anthony O’Donnell (Book Review Editor).

Other Academic Journals

Centre members hold positions on the editorial and advisory boards and committees of several other academic and professional journals, including the Australian Journal of Administrative Law, Australian Journal of Asian Law, Melbourne Journal of International Law, International Union Rights and the International Journal of Comparative Labour Law and Industrial Relations.

Centre Working Paper Series

Associate Professor Beth Gaze edited the Centre Working Paper Series during 2010, overseeing the publication of two issues.


We also published four issues of the Student Working paper series.


ASSOCIATIONS

THE AUSTRALIAN LABOUR LAW ASSOCIATION

The Centre is the administrative home of the Australian Labour Law Association (ALLA). At ALLA’s AGM held in November 2010, the national committee said farewell to five members who did not stand for re-election: Michael Rawling, Amanda Coulthard, Robert Durbridge, Shelley Marshall and Arthur Moses. The national committee welcomed Ingmar Taylor, Paul Harpur, David Johns, Vince Rogers and Victoria Lambropoulos as new committee members.

In 2010, ALLA was able to further its aims to promote the study of labour law and social security law, providing a forum for discussion and debate for lawyers and others working in these fields through the Association’s 2010 National Conference, its affiliation with the International Society for Labour and Security Law (ISLSSL) and the ongoing activities of its State Chapters.

ALLA’s fifth Biennial Conference was held in Adelaide on Friday 19 and Saturday 20 November. The main theme of the conference was the ongoing changes that are occurring to Australian labour, in particular, the way in which the new Fair Work Act 2009 (Cth) is being interpreted and applied and also the process for harmonising Australia’s occupational health and safety legislation. The conference was well attended and prompted a productive and stimulating exchange of ideas. For the second time since its inception in 2008, the Phillipa Weeks Prize was awarded to Richard Naughton for his paper ‘The Low Paid Bargaining Scheme: An interesting idea, but can it work?’

Prior to the formal commencement of the ALLA National Conference on Thursday 18 November 2010, two workshops, ‘2010 Labour Law Teaching Workshop’ and ‘Doing Empirical Research in Labour Law’, were held at the University of Adelaide Law School. Academics, practitioners and others who attended have reported that the workshops were a great success.

ALLA continues to be an active affiliate of the International Society for Labour and Social Security Law and hosted the 19th ISLSSL World Congress in Sydney in September 2009. ISLSSL will hold their 20th World Congress in Santiago, Chile in September 2012.

State Chapters of ALLA organised a number of forums throughout the course of the year. Topics addressed at the Victorian Chapter forums included: ‘Understanding industrial relations challenges in developing ASEAN countries’ presented by the Honourable Justice Alan Boulton (Senior Deputy President of Fair Work Australia) in March; and ‘Negotiating the Bargaining Highway’, presented by the Honourable Jennifer Acton (Senior President of Fair Work Australia) in September.

For further information about ALLA please visit http://alla.law.unimelb.edu.au.
Membership of Other Associations

Staff in the Centre are members of the following committees and organisations:

- Association of Industrial Relations Academics of Australia and New Zealand (AIRAANZ);
- Australasian Law Teachers’ Association (ALTA);
- Australia Institute;
- Australian and New Zealand Society of International Law (ANZSIL);
- Australian Association of Constitutional Law;
- Australian Industrial Relations Society;
- Australian Institute of Administrative Law;
- Australian Labour Law Association;
- Australian Society of Legal Philosophy;
- Council of Australian Tribunals;
- Discrimination Law Association (UK);
- Industrial Relations Research Association (US);
- Industrial Relations Society of Victoria;
- International Centre for Trade Union Rights (ICTUR);
- International Commission for Labour Rights;
- International Industrial Relations Association;
- International Network of Transformative Employment and Labor Law (INTELL);
- International Society of Labour and Social Security Law (ISLSSL);
- JobWatch;
- Liberty Victoria;
- Regulating for Decent Work Network;
- Society for the Advancement of Socio-Economics;
- Socio-Legal Studies Association (UK).
**Appointments to Advisory Committees, Tribunal Appointments and Consultancies**

**A. Chapman**
- Undertook a consultancy for the Australian Human Rights Commission on discrimination law in relation to the grounds of sexuality and gender identity:
  
- Part of a group of academics who met at the Australian National University in July to discuss the Commonwealth government’s proposed consolidation of federal anti-discrimination law. The objective of the daylong meeting was to draft a group submission to the government.

**S. Cooney and J. Howe**
- Were asked by the Labour Administration Department of the International Labour Office to write a report on *Enforcement of Minimum Employment Standards and Occupational Health and Safety Regulation in Australia* for the Labour Administration and Inspection (LAB/ADMIN) Department of the International Labour Office.

**J. Howe**
- Attended a consultation meeting with the Australian National Contact Point, the Australian government official with responsibility for administration of the OECD Guidelines for Multinational Enterprises, on 31 May 2010. The OECD is considering revisions to the Guidelines, and John made oral submissions in relation to areas of improvement.

**Media Engagement**

During 2010 Centre members and associates contributed widely as commentators on labour and employment law issues, in the print and electronic media. Contributions included radio interviews, and publications in both print and online media.

Outputs included:

**B. Gaze**
- Interview for Women on the Line, National women’s current affairs show, 3CR Melbourne on gender equity in the workforce and the *Equal Employment for Women in the Workforce Act* (13 September 2010).

**J. Tham**
- *Union fees to the ALP are a special case*, The Age, Melbourne, p. 11 (15 January 2010);
- *Cashing out democracy*, The Drum, ABC (30 July 2010).
# Conference and Seminar Papers

In 2010 members of the Centre delivered papers to a range of Australian and international conferences and workshops, and delivered seminars to industry, government bodies and community groups.

## April

<table>
<thead>
<tr>
<th>Person</th>
<th>Title</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>J. Tham</td>
<td>‘Challenges to regulating the working conditions of temporary migrant workers’</td>
<td>Presented at the workshop on Temporary Migrant Workers and Social Justice at the Melbourne Law School, 7 April 2010.</td>
</tr>
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## June

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<thead>
<tr>
<th>Person</th>
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<tbody>
<tr>
<td>B. Gaze</td>
<td>‘Equal Opportunity in Employment for Women at the University of Melbourne’</td>
<td>Arts Faculty Equal Opportunity for Women Panel, 9 June 2010.</td>
</tr>
<tr>
<td>J. Howe</td>
<td>‘Labour law’s place in the flexicurity debate’</td>
<td>Presented at the Brotherhood of St Laurence Flexicurity in Australia Roundtable, Melbourne, 24 June 2010.</td>
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## September

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<tr>
<th>Person</th>
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<tbody>
<tr>
<td>J. Tham</td>
<td>‘Regulation of Temporary Migrant Work in Australia’</td>
<td>Presented at the 7th LAWASIA Labour Law Conference, Hong Kong, 17-18 September 2010.</td>
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<tr>
<td>S. Cooney</td>
<td>‘Chinese enforcement of unpaid wages’</td>
<td>Beijing Workshop – jointly organised by Melbourne Law School and Beijing Normal University, 24-25 September 2010.</td>
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## October

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<tbody>
<tr>
<td>S. Cooney</td>
<td>‘La rupture du contrat en Australie’</td>
<td>Presented at La relation de travail salariée en Chine et en France, Université du Peuple Renmin, Beijing, China, 30-31 October 2010.</td>
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</table>
**NOVEMBER**

**J. Howe**
- ‘Promoting harmonious and cooperative workplaces’, presented with Associate Professor Peter Gahan at the FWO Policy and Research Roundtable, Melbourne Law School, 17 November 2010.

**T. Hardy, J. Howe and S. Cooney**

**J. Howe**

**J. Howe**

**B. Gaze**

**DECEMBER**

**J. Howe**

**J. Howe**
**PUBLICATIONS**

**AUTHORED RESEARCH BOOKS**


THAM, JC. ‘Money and politics: The democracy we can’t afford’, (1 ed, 2010).

**EDITED BOOKS**


**CHAPTERS IN EDITED COLLECTIONS**


**JOURNAL ARTICLES - REFEREED**

JOURNAL ARTICLES - UNREFEREED


MAJOR REPORTS AND WORKING PAPERS


CENTRE WORKING PAPERS SERIES


### Summary of Centre Accounts

#### General Account

**Income 2010**

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<td>Faculty Allocation</td>
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**Expenditure 2010**

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<td>Salaries (student fellow, research assistants)</td>
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**UNCOMMITTED BALANCE**

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## Grants and Commissions Received

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<tr>
<td>Anna Chapman and Beth Gaze</td>
<td>3 years</td>
<td>ARC Discovery Grant</td>
<td>Reshaping Employment Discrimination Law: Towards Substantive Equality at Work?</td>
<td>$217,000</td>
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<tr>
<td>Sean Cooney and John Howe</td>
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<td>ILO Labour Administration and Inspection Programme</td>
<td>Study on Labour Inspection Sanctions and Remedies: The case of Australia</td>
<td>$5,000 USD</td>
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