

His Master's Voice? Work Choices as a Return to Master and Servant Concepts

MARY GARDINER*

Abstract

The Howard government's *Workplace Amendment (Work Choices) Act 2005* (Cth) was a curious mixture of government retreat from the labour market and government intervention. This article suggests that an explanation for this conundrum can be found by examining the legislation through the lens of master and servant concepts and laws. In particular, the feudal concept of status, where the dominance of masters and later employers was regarded as a natural right, has particular resonance in Work Choices. I argue not only was the purpose of Work Choices the coercion of labour but its underlying attitude towards employees as inferior was so feudal and antiquated it required particular prescriptive clauses in order to bring employers with more contemporary attitudes to the employment relationship into line. The echoes of master and servant concepts in Work Choices demonstrate the persistence and adaptability of the law as an instrument of labour coercion.

1. Introduction

Kim Beazley was going to tear it up.¹ Kevin Rudd declared he would throw it in the bin.² Yet there is more than a trace of Work Choices, the Howard government's radical industrial relations legislation,³ in the Rudd Labor government's new

* Candidate, Master of Labour Relations Law, The University of Melbourne and a Commonwealth public servant. The views expressed in this article are the author's own. I would like to thank John Howe and Jill Murray for their advice and encouragement and the two anonymous referees for their helpful comments.

1 The Hon Kim Beazley, Leader of the Opposition, 'Australian Values at Work' (Speech delivered to the NSW ALP State Conference, 11 June 2006).

2 The Hon Kevin Rudd, Leader of the Opposition, quoted in Katharine Murphy and Michael Bachelard, 'I'll Kill Work Choices', *Sydney Morning Herald* (2 February 2007).

3 The Howard Liberal/National government introduced the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth). This amended the *Workplace Relations Act 1996* (Cth) which remained unchanged in name. Most elements of the new legislation took effect on 27 March 2006. Both the Amendment Act and the revised Act were commonly referred to as 'Work Choices'. The main changes involved moving the primary constitutional power by which the Federal government intervened in industrial matters from the conciliation and arbitration power to the corporations power, strengthening the place of individual agreement making and reducing the role of trade unions. In this article I refer to the policy as 'Work Choices' and both the amending and amended Acts as the 'Work Choices Act'.

industrial relations legislation, which was introduced in Parliament on 25 November 2008.⁴ The Labor government initially moved quickly to replace the most coercive and contentious provisions of the *Work Choices Act*. A transition Act was passed in March 2008 to provide a mechanism for the eventual abolition of Australian Workplace Agreements ('AWAs') — statutory individual employment agreements — and the restoration of the No Disadvantage Test for new agreements.⁵ Yet the Fair Work Bill 2008 (Cth), while restoring much of the employee protection and union rights removed by Work Choices, does not return to a pre-Work Choices system. The corporations power remains the primary constitutional power. Union rights of entry have been restored but there are restrictions on bargaining for more expansive arrangements.⁶ The new institution, Fair Work Australia, has stronger powers to resolve disputes than the enfeebled Australian Industrial Relations Commission ('AIRC') did under Work Choices.⁷ But the AIRC itself, the jewel in the crown of Australia's conciliation and arbitration system, has been abolished. The test case function has not been restored.⁸ In addition the individual flexibility clause in collective agreements, despite safeguards, allows the possibility that employers may pressure individual employees to vary their conditions against their will.⁹ The shape of the Fair Work Bill 2008 (Cth) illustrates the power actual legislation on the statute books exercises over policy makers. Work Choices has gone, but its footprint remains. It may help future interpretations of Australia's latest industrial relations framework to explore what lay behind its predecessor — one of the most curious and contradictory pieces of legislation in Australia's history.¹⁰

What was the point of Work Choices? The main changes it introduced involved moving the primary constitutional power by which the Federal government intervened in industrial matters from the conciliation and arbitration power to the corporations power, strengthening the place of individual agreement making and reducing the role of trade unions. It is difficult to discern a coherent policy intention behind its introduction. It was introduced with haste, with no

4 Fair Work Bill 2008 (Cth).

5 *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Cth).

6 Fair Work Bill 2008 (Cth) s 194(f) and (g).

7 Fair Work Bill 2008 (Cth) s 595.

8 However the new mechanism to update awards has been described as broad enough to allow awards 'to be dynamic and relevant and adjusted to community standards'. Cath Bowtell, Senior Industrial Officer, Australian Council of Trade Unions, quoted in 'BOOT Test Tougher than NDT, says AIG; ACTU Disagrees' *Workplace Express* (28 November 2008).

9 Fair Work Bill 2008 (Cth) ss 202–204.

10 'Some of the tensions and evasions in the Act are not rational in the sense this term is usually applied to law': Jill Murray, 'Work Choices and Australian Statutory Labour Law' (2006) 35 *Industrial Law Journal* 343 at 364; Andrew Stewart, 'Work Choices in Overview: Big Bang or Slow Burn?' (2006) 16 *The Economic and Labour Relations Review* 26 refers to the 'peculiar political timidity at the heart of the Work Choices reforms'; Peter Waring, John Burgess and Alex de Ruyter, 'The Australian Fair Pay Commission: Rationale, Operation, Antecedents and Implications' (2006) 16 *The Economic and Labour Relations Review* 127 in describing the establishment of the Australian Fair Pay Commission state: 'Like much of the Work Choices legislation the basis for claims rests on assertions and beliefs, rhetoric and wishful thinking'.

government-sponsored economic research, minimal consideration of public submissions, and into an economy where all the indicators were booming.¹¹ There was no objective evidence to suggest that the industrial relations system of Australia needed a radical overhaul. Eighteen months after its implementation economic indicators remained steady while pay and conditions for many workers fell.¹² After consistent public criticism of the *Work Choices Act* the government passed another hasty piece of legislation to try to make employment agreements 'fairer'.¹³ Despite this Amendment Act the effect of Work Choices remained fundamentally the same.

The common explanation of the purpose of Work Choices — that it was an expression of neo-liberalism — accounts for its focus on individual bargaining¹⁴ but not for the increase in regulation and micro-management that characterised the legislation. This re-regulation ran contrary to the Howard government's public statements promoting a 'simple' system of industrial relations and a reduction in regulation.¹⁵ Liberalising markets does not necessarily equate with less regulation and less government control,¹⁶ but the rhetoric of the government in the lead up to the release of Work Choices suggested it was going to leave the workplace to the employer and employee to organise without interference from the government.¹⁷ Work Choices drew fire from both sides of the political divide. Its failure to disengage from the industrial relations arena more completely produced criticism from a range of neo-liberal groups;¹⁸ while its blatant anti-employee bias was criticised by trade unions, the Australian Council of Trade Unions ('ACTU'), State Labor governments, many labour law academics, and church and community groups.

What lay behind this inconsistency? Work Choices regulated for government intervention and government retreat. It ceded considerable freedom to employers in how they could bargain with employees, yet listed one by one the matters which

11 See Murray, above n10 at 361–5 for a discussion on the lack of rationale and objective research into the need for new legislation by the government; see also Stewart, above n10 for the lack of opportunity for public comment and Waring, Burgess and de Ruyter, above n10 on the healthy state of the Australian economy around the time of the introduction of Work Choices.

12 Marian Baird, Rae Cooper and Damian Oliver, 'Down and Out with Work Choices: the Impact of Work Choices on the Work and Lives of Women in Low Paid Employment' (Report to the Office of Industrial Relations, Department of Commerce, 2007); David Peetz, 'Brave New Work Choices: What is the Story So Far?' (Paper presented to the Association of Industrial Relations Academics of Australia and New Zealand, 21st Conference, Auckland, 2007).

13 *Workplace Amendment (A Stronger Safety Net) Act 2007 (Cth)* ('Amendment Act').

14 'I said at the outset that this government trusts employers and employees to make the right decisions in the workplace. Mr Speaker, the era of the select few making decisions for the many in the industrial relations system is now over': Commonwealth, *Parliamentary Debates*, House of Representatives, 26 March 2005 (John Howard, Prime Minister) at 43; Joel Fetter, 'Work Choices and Australian Workplace Agreements' (2006) 19 *Australian Journal of Labour Law* 210 at 210–12. The extent to which Australia should open its markets, reduce government intervention in employment matters and reduce labour arbitration has been a debate about degree rather than kind in Australian politics since the early 1980s. See Paul Kelly, *The End of Certainty* (2nd ed, 2008) for a detailed account of the progress of this debate which created internal divisions in both the Labor and the Liberal/National parties.

were forbidden to be part of a workplace agreement. The AIRC remained despite being stripped of many of its former powers. The only consistency was that each amendment increased employer power at the expense of employee power.

Many explanations have been put forward to explain the mixture of government control and market freedom in Work Choices: the weight of a hundred years of tripartite conciliation and arbitration could not be dislodged simply,¹⁹ government fear of political backlash if it went too far with its agenda to shift the balance of power to the employer²⁰ and simple incompetence. It can be argued that although the government was apparently concerned with reducing regulation, the neo-liberal view that unions were cartels and distorted the free market was sufficient justification for regulation in this area. However, this argument does not explain the *extent* of regulation, not just against unions, but against individual employees,²¹ and the *extent* of prescription against the freedom of employers, who were given so much unilateral power under Work Choices generally, to determine the matters which could form the content of an agreement. There is an undeniable tension in legislation which uses corporations, by definition a large well-resourced entity made up of a number of usually well-educated people, as the trigger for the application of employment legislation, and which also focuses on ‘individual’ agreement making. Despite the rhetoric of ‘greater freedom, flexibility and individual choice’,²² the individual in Work Choices is the employee only — the employer is the corporation. The government’s blind spot — in viewing unions as a distortion of the market whereas corporations are a legitimate part of the market — is symptomatic of its attitude to employees, which is the subject of this article.

15 ‘Despite the introduction of the *Workplace Relations Act* in 1996 Australia still has an over-regulated system. There is a legacy of adversarial relations and restrictive work practices which impede the Australian economy from reaching its full capacity, both in respect to productivity and in meeting other economic and social goals, such as lowering unemployment and increased workforce participation’: Kevin Andrews, then Minister for Employment and Workplace Relations, ‘A New System for a New Century’ (Speech delivered at Clayton Utz Seminar, 20 April 2005); ‘A national system is the next logical step towards a workplace relations system that supports greater freedom, flexibility and individual choice. It is not about empowering Canberra, but liberating workplaces right across the country’: Howard, above n14 at 42.

16 Steven Kent Vogel, *Freer Markets, More Rules: Regulatory Reform in Advanced Industrial Countries* (1996) at 3.

17 ‘Currently the process is long and frustrating to employers and employees, preventing many from coming to their own arrangements at the workplace ... Mr Speaker, the era of the select few making decisions for the many in Australian industrial relations is over’: Howard, above n14 at 6 and 12.

18 For example Ray Evans of the HR Nicholls Society, described Work Choices as ‘an unhappy story of disappointment and lost opportunity’: Ray Evans, ‘President’s Report’ (Speech delivered at the 2005 Annual General Meeting, HR Nicholls Society, 5 December 2005) at 5. Stewart, above n10 suggests that the government could have swept away existing laws and institutions in the manner of the New Zealand *Employments Contracts Act* 1991 (NZ) or the Victorian *Employees Relations Act* 1992 (Vic).

19 Rosemary Owens and Joellen Riley, *The Law of Work* (2007) at 130–2.

20 Stewart, above n10 at 2, 17.

21 Ibid. See also the proscription against unfair dismissal provisions: *Workplace Relations Regulations* 2006 (Cth) (‘WR Regulations’) reg 8.5(5).

22 Howard, above n14 at 9.

The coercive force of Work Choices is overt, but its underlying motivation is veiled. I suggest that a way to make sense of the contradictory elements of Work Choices is through the lens of the master and servant legislation of the 19th century. There, I suggest, one can find a legal regime with, arguably, a similar purpose and underlying attitude. My argument is that the purpose of both master and servant laws and Work Choices was labour coercion and that the underlying attitude can be characterised as a belief in the feudal concept of status.

2. *Setting the Scene — Common Themes in Master and Servant Laws and Work Choices*

I begin by introducing the main themes which master and servant laws and Work Choices had in common and which shed light on the underlying purpose of Work Choices. They are the feudal concept of status, the targeting of employee power, the role of the state in the coercion of workers, and the resistance of this coercion by workers and other groups.

A. *Feudal Concept of Status*

The feudal concept of status is a different concept from the modern idea of status which is designed to identify vulnerable workers as ‘employees’ in order to give them access to employment protection laws. Feudal ‘servants’ held their status by natural law — it was a state into which they were born.²³ I argue that master and servant laws coerced labour because the masters, with State support, thought it was in their interests and that they had a right. Masters considered they had this right because of their belief in status. Masters felt they had a natural jurisdictional right to control, to varying degrees, their servants, and servants had a corresponding obligation to obey.²⁴ Over the centuries belief in this right gradually faded, but its traces remained and were one of the reasons for the harshness of sanctions and severity of restrictions of movement that were the hallmarks of master and servant laws.²⁵ I suggest that Work Choices was based on a similar belief. Such a theory accommodates both the ‘gift of power’ to employers on the one hand, and the extreme prescriptions placed on employers on the other.²⁶ On the one hand, the Howard government had a strong belief in the supremacy of employers; on the other, its belief was so antiquated that they realised employers would have to be

23 Otto Kahn-Freund, ‘A Note on Status and Contract in British Labour Law’ (1967) 30 *The Modern Law Review* 635 at 640, referring to the definition of status by Sir Henry Sumner Maine writing in 1861. Maine considered this lack of choice to be acquired in one of two ways — by birth or by an inability to form judgment. According to Kahn-Freund, Maine’s definition of status in modern terms would only apply to children, people with a mental disability or non-citizens.

24 Douglas Hay and Paul Craven, ‘Introduction’ in Douglas Hay and Paul Craven (eds) *Masters, Servants and Magistrates in Britain and the Empire, 1562–1955* (2004) at 36; Robert J Steinfeld, *The Invention of Free Labor: The Employment Relation in English and American Law and Culture 1350–1870* (1991) at 11.

25 Hay and Craven, above n24 at 35–6.

26 Murray, above n10 at 362–4.

'helped' in some circumstances to apply the necessary degree of coercion.²⁷

B. Target: Employee Power

I will argue that both master and servant laws and Work Choices targeted the coercion of labour by focusing on particular manifestations of employee power prevalent at the time. The particular focus of master and servant laws was the employees' freedom to enter and exit from an employment agreement. In 19th century Australia (though earlier in Britain and America), the idea of the contract of employment — that servants or employees were free not only to start but also to leave the service of a master or employer if they so desired — was starting to emerge.²⁸ This freedom threatened the masters' reliance on a stable and predictable workforce. The Master and Servant Acts therefore focused on restricting the capacity of workers to leave an employer.²⁹ In the 21st century however, under Work Choices, the State-supported freedom of contract — the freedom to enter into or leave an agreement (with some exceptions explored below) — because this was no longer an area of concern to employers, although the skill shortage in Australia in some areas is starting to make this an issue.³⁰ The source of employee power now, apart from the few who have the desired skills to bargain individually, is the power of bargaining collectively. A collected, united voice can be a powerful tool for negotiating good pay and conditions, though the degree of government support for the process, the value of the product made or service provided and the availability of the required skills are significant variables.³¹ I argue that with a similar coercive purpose and underlying attitude towards status, but in a completely different environment, Work Choices targeted employee power by placing constraints on their power to make collective agreements and negotiate decent pay and conditions.

27 In 2002, Tony Abbott scolded employers for not utilising the Australian industrial relations commission for their own ends: 'The fact that it's hard to remember when employer organisations last seriously sought to use the Commission pro-actively suggests a worrying form of defeatism': The Hon Tony Abbott, then Minister for Workplace Relations, 'Losing the Legislation Fixation' (Paper presented at the proceedings of the XXIIIrd HR Nicholls Society Conference, Melbourne, 22–23 March 2002).

28 Simon Deakin, 'Legal Origins of Wage Labour: the Evolution of the Contract of Employment from Industrialisation to the Welfare State', in Linda Clarke, Peter de Gijssel and Jörn Janssen (eds), *The Dynamics of Wage Relations in the New Europe* (2000) at 33; John Howe and Richard Mitchell, 'The Evolution of the Contract of Employment in Australia: a Discussion' (1999) 12 *Australian Journal of Labour Law* 113.

29 Master and servant laws were also used against collective action, by tying workers to their contract obligations to prevent strikes or, particularly in former slave colonies, by directly outlawing collective bargaining. See for example *Order-In-Council (draft)* (1833) ss 5, 7 for British Guiana where if three or more workers combined to dispute they could be charged with unlawful conspiracy and be imprisoned with hard labour and 39 lashes; Hay and Craven, above n24 at 317.

30 'We should be trying to move to an industrial relations system where the predominant instrument is the individual contract, which provides high wages in return for good productivity and where there's ease of entry, ease of exit': Peter Costello, then Treasurer, in Michael Gordon, 'Costello's Very Own Crusade' *The Age* (19 February 2005) at 7.

31 Richard B Freeman and James L Medoff, *What Do Unions Do?* (1984).

C. *Role of the State*

In this analysis of Master and Servant Acts and Work Choices the role of the State is critical. The State may do nothing. It may use the power of the law to support either employers or employees, to establish some sort of balance or to act in the national interest. Master and servant laws conceptualised the employment relationship as an essentially private contract between employer and employee, and the State was used to support and enhance the power of the employer in this relationship. In 19th century Australia, the State clearly supported the masters but also had some sense of balance in terms of, for example, wage recovery for employees.³² In 20th century Australia, a significant part of the employment relationship was seen as belonging legitimately in the public sphere. The State aimed at achieving a balance between the competing sides and also the public interest through legal recognition of unions, quasi-statute type instruments like awards, with collective agreements having a similar status, and giving industrial tribunals a separate court or quasi-court status.³³ In the 21st century under Work Choices, the State moved back to a more private view of the employment relationship by rolling back the powers of the federal industrial tribunal, reducing the role of unions in the bargaining and standard setting process and advocating an employment agreement model that was based on little or no third party involvement. The legislation supported the coercion of employees by employers, yet contrary to the government's public exhortations of reducing third party interference, specified to a large extent how employers were to do this. This conundrum suggests that the State was unsure as to whether ordinary employers had the same attitude to employees as it did and whether they could be trusted to contract with employees in an appropriate way.³⁴ Only through specific legislation could the Howard government be sure that employers would adopt the required unilateral and coercive approach to employees that it wanted.

D. *Coercion is Resisted*

My final point is that history shows coercion of labour is always resisted. Not only in early Australia but in other British colonies, workers resisted the coercion of capital and at certain times the State, using whatever power they could wield at a particular point in time — avoidance, use of the courts, employer connivance, political mobilisation or collective organisation.³⁵ Gradually, extreme forms of coercion like corporal punishment and imprisonment were repealed. Similarly, there was a variety of resistance by employees and employee interests to Work Choices — demonstrations, legal challenges, Senate submissions, advertising and

32 *Victorian State Act* (1864) 27 Vic 198, s 16.

33 Keith Hancock and Sue Richardson, 'Economic and Social Effects' in Joseph Isaac and Stuart Macintyre (eds) *The New Province for Law and Order* (2004) at 139.

34 Murray, above n10 at 365.

35 Michael Quinlan, 'Pre-Arbitral Labour Legislation in Australia' in S Macintyre and R Mitchell (eds) *Foundations of Arbitration* (1989) 29; Michael Quinlan, 'Australia 1788–1902. A Workingman's Paradise?' in Hay and Craven (eds) *Masters, Servants, and Magistrates* above n24 at 241–7.

finally the Federal election of 2007 which ended the Howard government.³⁶

Part 3 traces the development of coercion of labour in master and servant laws, focusing on the feudal idea of status, the targeting of employee power through the restricting of entry and exit and how the development of the contract of employment modified the nature and operation of status. Part 4 follows this evolution into the 20th century, where employment relations adopted a more balanced and cooperative approach. Part 5 examines Work Choices and compares the similarities of its coercive purpose and its attitude to employees with master and servant concepts and laws. Part 6 concludes that the similarities in purpose and underlying attitude of master and servant laws and Work Choices illustrate the enduring capacity of the law to be used as an instrument of labour coercion.

3. Idea of Coercion in Labour Relations: Master and Servant Laws

It has long been recognised that coercion — the use of power to enforce behaviour — has been a feature of labour relations. Steinfeld, and Hay and Craven both argue that coercion in labour relations should be viewed as a continuum.³⁷ Rather than free labour on the one hand and unfree labour on the other, there are degrees of coercion authorised by the law whether by direct statute or by shaping the market in which a private bargain is formed.³⁸ Hay and Craven argue that there is not a ‘dichotomous bright line’ between freedom and coercion, but rather a continuum of ‘free’ and ‘unfree’ labour.³⁹ Slaves, indentured labour, apprentices, servants or employees all at different times and in different places were subject to differing degrees of coercion. For example, domestic servants in some jurisdictions were ‘free’ to enter into a contract but not ‘free’ to leave. Slaves, under some circumstances, could be paid wages, own property, bargain and conduct work stoppages.⁴⁰ The devil is in the detail and the line is always shifting. This continuum of coercion can be observed by tracing the development of master and servant laws, which were:

[A] catalog of constraints and disincentives: the penal sanctions of course, but also minimum terms, maximum wages, discharge certificates, obligations and offenses, and a host of other terms of the bargain and conditions of enforcement, all constitutive of the boundaries of the market within which bargaining could take place.⁴¹

36 Mary Gardiner, ‘Come Spring: The Australian Fair Pay Commission as Legal Transplant’ (2007) 20 *Australian Journal of Labour Law* 159 at 177. Work Choices was cited by most commentators, and even Howard government ministers, as a major factor in the defeat. ‘The people have spoken, the Labor Party has a mandate to tear up WorkChoices and they’ll be able to use that mandate’: The Hon Joe Hockey quoted in Katharine Murphy and Michael Bachelard, ‘Liberal Moderates Ditch Work Choices in Race to Centre’ *The Age* (28 November 2007).

37 Steinfeld, above n24 at 10; Hay and Craven, above n24 at 26.

38 Hay and Craven, *ibid.*

39 *Id.* at 28.

40 *Ibid.*

41 *Id.* at 33.

Although it is difficult to generalise about the content of master and servant laws, as they covered several centuries and many continents, the intention of the Acts was nearly always the same — to make labour supply and performance more reliable. The expression of this intention, the provisions and enforcement penalties, however, varied throughout Britain and its colonies.⁴²

These Acts represented an extreme form of coercion in labour relations. Their coercive objectives were backed by command and control regulation.⁴³ In their earliest manifestation, they expressed in legal form existing customs and local regulations and featured two main elements: the obligation to serve and the enforcement of this obligation by imprisonment.⁴⁴ There was also a paternalistic element to them — most of the Acts, even the early ones, had some protective provisions. However, for most of the history of master and servant laws, the coercive provisions in favour of the master were overwhelmingly dominant. It was not until the mid- to late-19th century that employees became the main prosecutors of the Acts, which they used to recover wages.⁴⁵

One can also see the State stepping in here to use the Acts to maintain social stability and predictability of labour supply.⁴⁶ However, the 14th and 15th century Acts were largely ineffective at maintaining traditional labour patterns — Johnstone and Mitchell point out the plethora of Acts which indicate both the persistence and failure of the State to maintain the old feudal system of work.⁴⁷

As Howe and Mitchell show, in 19th century Australia the master and servant laws were essentially mechanisms to subordinate the efforts and skills of certain workers to the control of masters, or as they later became known, 'employers'.⁴⁸ The jurisdiction for the hearing of cases, the making of decisions and the enforcement of orders relating to these Acts belonged to Justices of the Peace, or magistrates. These Acts were based on British laws going back to 1747 when the first master and servant law was enacted to remedy the deficiencies of the Elizabethan Statute of Artificers. In turn, the antecedents of the Elizabethan Code were statutes harking back to the Black Death and the consequent labour shortage in the 14th century.⁴⁹

A. *Master and Servant, Status and Contract*

In this section I argue that the feudal concept of status in human relationships was integral to a belief that subordination was an essential ingredient to employment

42 Id at 26.

43 John Howe, "Deregulation" of Labour Relations in Australia: Toward Command and Control' (Working Paper No 34, Centre for Employment and Labour Relations Law, University of Melbourne, 2005) at 6.

44 Richard Johnstone and Richard Mitchell, 'Regulating Work' in Christine Parker, Colin Scott, Nicola Lacey and John Braithwaite (eds) *Regulating Law* (2004) at 104.

45 Adrian Merritt, 'The Historical Role of Law in the Regulation of Employment — Abstentionist or Interventionist?' (1982) 1 *Australian Journal of Law and Society* 56 at 62.

46 Johnstone and Mitchell, above n44 at 104.

47 Ibid.

48 Howe and Mitchell, above n28.

49 Johnstone and Mitchell, above n44 at 104.

relationships and justified the use of coercion by masters in custom, common law and statute. As ideas of liberty and the development of the contract of employment reduced the power of masters to coerce workers, master and servant laws took up where status left off. Their main purpose was to restrict a worker's increasingly legitimised right to enter or exit an employment agreement. Worker independence did not accord with the masters' desire for a stable and compliant workforce in an industrialised era.

The employment relationship in medieval England was originally based on status rather than any sort of agreement. Status was a social norm that placed one group in society above another and allowed the higher group to control the lower group.⁵⁰ The higher up the social scale the worker was, the lower the level of restriction imposed. There was almost completely unfree labour — villeinage, then the less restrictive arrangements for servants, lesser still for labourers and artificers, and finally independent workers such as artisans, stewards and professionals.

The first English master and servant laws reflected the notions of subordination inherent in status and made them law.⁵¹ The laws were based on an idea of some sort of agreement between the servant and the master — the existence of an agreement established the jurisdiction of the laws. However, this agreement did not have to be voluntary. They were not contracts or contracts of employment as we would now recognise them, although throughout the period of the Acts they were developing into such.⁵² Some of the agreements reflected the feudal type arrangements of being 'in service', which captured the traditional domestic servant or farm hand who lived on the estate and whose lives in general, not just their working lives, during their period of service, were given over to their master.⁵³ Some of the agreements reflected the less comprehensive but still restrictive arrangements that applied to labourers and artificers. These were people who had perhaps worked as servants when they were young, single and with no savings, but having worked as servants had gained sufficient financial independence to lease a cottage and some land, and work on their own plot, as well as hiring themselves out to do a variety of work for a master.⁵⁴ In early master and servant laws the hiring out was not negotiable. Unless a labourer or artificer could demonstrate that they were usefully occupied, they were obliged to serve. Labour was viewed as a resource of the community to be put to the service of the community via the authority of the master. This tradition, a sense that masters had a jurisdictional right over the work and bodies of a certain type of person, underpinned the legitimacy of the restriction on the movements of labourers and artificers.⁵⁵

50 Kahn-Freund, above n23 at 686.

51 Deakin, above n28.

52 Johnstone and Mitchell, above n44 at 106–7; Merritt, above n45; Otto Kahn-Freund, 'Blackstone's Neglected Child: the Contract of Employment' (1977) 93 *Law Quarterly Review* 508; Howe and Mitchell, above n28.

53 Steinfeld, above n24 at 19.

54 *Id* at 64.

55 *Ibid*.

During the 18th century, the development of ideas of liberty and notions of a 'contract' of employment began to reduce the relevance of status, though these ideas were very slowly evolving and variable.⁵⁶ The master's right to rule became based less on status, the master's natural right to rule as head of household, and as part of the natural order of things, and more on a contractual right.⁵⁷ From the 17th century onwards, English thinkers had popularised ideas of liberty and equality, centred on the idea of individual autonomy. Power legitimately held by status, a 'jurisdictional' right, came to be seen as one held legitimately by contract. Workers held a property right in their energies and labour, which they sold or leased freely to the master. The power that masters had over servants was not the master's automatic jurisdictional right, but a right that was freely given by the servant: 'If some forms of service were nevertheless servitude, they were at least consensual and therefore arguably legitimate'.⁵⁸ Once this power was given, the master was almost free to rule as before.

A comparison between the master's right to beat servants and the master's right to withhold wages illustrates this point. It became increasingly illegitimate for a master to exercise corporal punishment on his servants or employees.⁵⁹ Steinfeld has argued that: 'The change in this rule was apparently an expression of growing discomfort contemporaries had begun to feel over one unrelated adult governing another in their "private" lives'.⁶⁰ Masters as heads of households could exercise physical punishment over their children only because this was seen as a temporary educational mechanism exerted over a human in a temporary state — childhood.⁶¹ Servants, however, were free adults and flogging or other physical punishment was considered an infringement on their liberties. However, the right to withhold wages for work completed remained. This was an economic power considered legitimate as a device to discourage workers from leaving before their time was up. Once the employment relationship was viewed as an economic contract whereby the servant sold or leased his or her 'energies' to another person, then an economic decision to leave could be countered with an economic counter parry of withholding wages.

Gradually, depending on the period and the country, harsher and more extreme forms of dominance — corporal punishment, imprisonment and eventually withholding of wages — were repealed. The situation was now one where workers had gained a significant degree of freedom in that they were, in theory at least, able to refuse to enter into a contract with an employer and free to leave without being thrown into prison. This was a social freedom supported by law. But once in the contract, master and servant laws dictated, usually in the employer's favour, the

56 Deakin, above n28 at 36; Howe and Mitchell, above n28 passim; Kenneth William Wedderburn, *The Worker and the Law* (1971) at 75–6; Mark Freedland, *The Personal Employment Contract* (2003) at 5.

57 Deakin, above n28 at 33.

58 Steinfeld, above n24 at 99.

59 *The Statute of Artificers* (1562) 5 Eliz, c 4, ss IV and VI.

60 Steinfeld, above n24 at 118.

61 Lawrence Stone, *The Family, Sex and Marriage in England, 1500–1800* (1979) at 164.

terms and conditions of the employment contract. Additionally, the freedom to contract or not was limited by economic constraints. Most workers had to enter into some sort of agreement with some sort of employer in order to live, a reality which undermined the ideal of freedom of contract.

At the same time that ideas of liberty were freeing workers from feudal bonds of status, however, the industrial revolution was in the process of creating a new way of working which was characterised by manufacturing rather than agricultural work, factories rather than cottages or small workshops, and early attempts at management by a generalist ‘manager’ rather than individuals managing themselves or a master craftsmen managing his group.⁶² Previously independent, high or semi-skilled workers were drawn into a subordinate relationship via mechanisation and the division of labour.⁶³ Increasingly, employers or masters wanted a workforce which they could rely on, day in day out, to produce standardised goods.⁶⁴ The emerging contract of employment where workers could come and go as they pleased was not conducive to a disciplined, integrated and controllable workforce. From the master or employer perspective, the agreement or ‘contract’ which governed these workers was far too vague and uncertain to give a satisfactory level of control to employers without the restrictions provided by master and servant laws.⁶⁵

Employers wanted workers whom they could control, not free agents who could come and go as they pleased. The employment regime, which was applied to ‘servants’ and legitimated by the Elizabethan Code, provided part of the answer for employers, but its coverage was very narrow. It was widely believed it applied only to servants in husbandry, hired for a year and workers whose wage rates were set by local justices.⁶⁶ Employers wanted control over a wider range of workers than just servants or labourers. Thus the first Master and Servant Act of 1747 set out to address the deficiencies and doubts relating to the coverage of the Elizabethan Code. The 1747 Act included a number of other trades: ‘artificers, handicraftmen, miners, colliers, keelmen, pitmen, glassmen, potters and other labourers’, and so clearly brought the jurisdiction of master and servant legislation to a far wider range of workers.⁶⁷ Prior to this legislation, many of these workers had a relationship with their ‘employers’ that we would recognise nowadays as not unlike some aspects of an independent contractor association. They did not run their own business as the modern sense implies, but they were not subordinated or obligated in a pervasive way to another. This lack of subordination to unspecified but powerful control was a barrier to ‘the more integrated and disciplined workforce’⁶⁸ that employers sought.

62 Harry Braverman, *Labor and Monopoly Capital: The Degradation of Work in the Twentieth Century* (1974) at 59–69.

63 *Id.* at 70–83.

64 Quinlan, ‘Pre-Arbitral’, above n35 at 27; Merritt, above n45 at 57–8.

65 Alan Fox, *Beyond Contract: Work, Power and Trust Relations* (1974) at 183–4; Merritt, above n45 at 58.

66 Deakin, above n28 at 32.

67 *Master and Servant Statute* (1747) 20 Geo II, c 19 (‘1747 Act’); Deakin, above n28; Merritt, above n45 at 57.

In Australia, the coverage of master and servant laws was generally wider than those in Britain.⁶⁹ Driven by periodic labour shortages endemic in an isolated community and particular events — the gold rush for example — the Australian Acts tried to incorporate as many workers as possible into the net of master and servant.⁷⁰ As Quinlan says: 'they were intended to restrain workers from exercising their economic advantage in the understocked colonial labour market'.⁷¹ A number of Acts were disallowed by the Colonial Office on account of their wide sweeping jurisdiction.⁷²

The Secretary of State refused the 1840 Western Australian Bill because he thought that nearly all workers in WA would be caught by it and be subjected to fines and imprisonment on summary conviction.⁷³ This reveals the persistent thread of the feudal idea of status running through the Acts. That is, the belief that it was appropriate for some workers to appear before a magistrate and be imprisoned, but not others. It was considered legitimate for some workers to operate outside the reach of master and servant laws. Stewards, bailiffs and some craft workers worked for a single employer in a way which we would recognise today as employee-like. Nevertheless, because of their high status, they were not subjected to the subordination and restrictions assumed either by local or common law, or by master and servant statute. The South Australian and Tasmanian laws were also disallowed for being too sweeping in scope, too arbitrary, and giving masters too much power.⁷⁴

In Britain and particularly in Australia, masters took advantage of the subordination and coercion permitted by master and servant laws to incorporate, by means of naming actual occupations, nearly all of the less free worker categories and some of the independent ones.⁷⁵ England and Australia therefore used master and servant laws to restrict employment contracts, particularly employee mobility, well into the 19th century.

68 Merritt, above n45 at 57.

69 Quinlan, 'Pre-Arbitral' above n35 at 30.

70 Quinlan, 'Workingman's Paradise' above n35 at 225. The 1840 Western Australian Bill empowered magistrates: To hear and determine all cases of complaint by or against master and servants of every description, whether domestic servants, servants in husbandry, or any other sort of servants, or by or against artificers, workmen, and labourers of every description employed to perform any work, whether by the hour, or by the day, or in any other manner in respect of time, or by the piece, or the job, or in any other manner in respect of work: Western Australian Bill (1840) 4 Vic No 2, cited in Ian Henry Vanden Driesen, *Filling in the Gaps. Five Essays on the Labour History of Western Australia* (2003) at 84.

71 Quinlan, 'Workingman's Paradise' above n35 at 225.

72 Quinlan 'Pre-Arbitral' above n35 at 30 remarks: 'Indeed, British authorities found the early laws to be so sweeping in scope, so lop-sided, so arbitrary (in terms of discretionary powers geanted to magistrates) and so repugnant to British notions of justice that the 1828 NSW Act was only assented to after some deliberation, and the first statutes introduced into South Australia (1837), Tasmania (1837) and Western Australia (1840) — all similar to the NSW statute — were disallowed.'

73 Vanden Driesen, above n70 at 85.

B. Content of Master and Servant Laws

The idea of status underpins not only the restrictions on movement in master and servant laws, but also the imbalance in their sanctions. In this section, I show how the provisions of master and servant laws coerced workers by targeting the source of employee power as it manifested itself in the 19th century.⁷⁶ This power was the growing freedom of workers to contract in and out of employment agreements. Master and servant provisions, therefore, focused on entry and exit restrictions.

An examination of the Victorian 1864 Act, demonstrates the areas of concern manifest in and the penalties applied by the master and servant legislation.⁷⁷ For servants, 3 months' gaol appears as a penalty for all offences,⁷⁸ sometimes with hard labour.⁷⁹ Most offences were to do with mobility: absenting from service,⁸⁰ not turning up,⁸¹ absconding with an advance,⁸² or forging/using a forged discharge certificate.⁸³ The discharge certificate was a particularly restrictive provision because it affected workers' ability to enter new employment relationships if they could not produce one. The penalties for employing a servant without a discharge certificate or not providing a former employee with one, fell to the master. However for masters, the only penalty that involved imprisonment was if they defaulted on an order to pay wages⁸⁴ or actually forged a discharge certificate.⁸⁵

The lack of balance in the severity of the penalties is stark. Gaol was an option for all servant offences, except absconding with an advance where gaol was mandatory. If not gaol, then an unspecified amount of wages could be abated. Imprisonment was only an option for a master if he or she defaulted on paying back wages and the sale of chattels fell through. The penalties were harsher under Australian law compared to British law. This reflected the punitive nature of law and order in a convict settlement and the uncertainty of the line between free and convict labour:

The similarity of the convict discipline offences to master and servant legislation produced a creative confusion which led magistrates to overlook legal restraints

74 Quinlan, 'Workingman's Paradise' above n35 at 225. However some of the Acts that were allowed do not seem that much less wide ranging. The definition of 'servant' in the NSW Act of 1840 are: 'artificer, manufacturer, journeyman, workman, shepherd, laborer or other male servant ... engaged for the execution, performance and completion of any work, job or business taken in task by the piece or in gross': *Act to Ensure the Fulfilment of Engagements and to Provide for the Adjustments of Disputes Between Masters and Servants in New South Wales and its Dependencies* (1840) 4 Vic 23 (NSW) ('NSW 1840 Act') s 2. Merritt notes the specific inclusion of 'shepherd' in the NSW 1840 Act, probably because at that time shepherds were the main subject of labour disputes and the makers of the Act wanted to be sure of their inclusion. She also notes the change of the term 'menial' to 'manual' which meant skilled occupations were also captured, not just servile or domestic ones: Merritt, above n45 at 66. Most Master and Servant Acts in Australia also included piecework, so workers whom we would now view as genuine independent contractors were also subsumed by the laws: NSW 1840 Act s 2; *Masters and Servants Statute* (1864) 27 Vic No 198 (Vic) ('Victorian 1864 Act') s 12; See also Quinlan, 'Workingman's Paradise' above n35 at 233–4.

75 Deakin, above n28 at 32.

76 Vanden Driesen, above n70 at 87.

on their powers over free workers, and to augment their power over the pool of available labour.⁸⁶

The unfairness of the penalties is arguably a direct reflection of the feudal concept of status — it is acceptable to imprison one party in the employment relationship but not the other.

In the early- to mid-19th century in Australia, absconding was the major offence up to 1860, representing 40 per cent of cases between 1845 and 1860, and 39 per cent of workers convicted of absconding were imprisoned.⁸⁷ The treatment of abscondments reflects represents the overriding concern at that time in the minds of masters concerning the supply of labour — the growing freedom of servants to take up or leave employment at their time of choosing. Certainly misconduct and damaging property were forbidden and carried severe penalties, but these were simply inevitable consequences of the main game — the restriction of the free movement of the servant from one job to another. Masters who could secure this degree of control over another were surely entitled to a similar degree of control over their behaviour once in the relationship; a belief inextricably caught up with concepts of status.⁸⁸

4. From Coercion to Balance: a Brief Overview of 20th Century Australian Employment System

At the start of the 20th century, the coercion of labour by employers began to diminish. The feudal idea of status, whereby masters had a legitimate right to

77 The Victorian 1864 Act repealed the *Act to Amend and Consolidate the Laws between Masters and Servants in New South Wales* (1845) 9 Vic No 27 (NSW) ('NSW 1845 Act'). The colony of Victoria relied on NSW legislation until it passed its first master and servant Act in 1864. This Act repealed the NSW 1845 Act but is very similar in provisions and penalties to the NSW 1845 Act, which in turn was very similar to the NSW 1840 Act.

The NSW 1845 Act repealed the NSW 1840 Act which did not include any general prohibitions against disobedience or misconduct by servant or ill-treatment of servant by master, had no discharge certificate, refusal of necessary provisions or dishonoured cheque provisions, did not include livestock in the damaging property provision, required 'double the value' (!) to be paid as compensation for damage rather than 'reasonable damages' in the NSW 1845 Act, did not have a lesser penalty for mere negligence rather than wilful damage and referred to 'sum' rather than 'wages' in the recovery of moneys provision. The NSW 1840 Act had fewer provisions — the additional ones include both pro-employer and pro-employee provisions.

78 Victorian 1864 Act s 11.

79 Victorian 1864 Act s 12. The hard labour option was for obtaining an advance and then refusing to serve.

80 Victorian 1864 Act s 11.

81 Victorian 1864 Act s 11.

82 Victorian 1864 Act s 12.

83 Victorian 1864 Act s 27.

84 Victorian 1864 Act s 16.

85 Victorian 1864 Act s 27.

86 David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (1991) at 134.

87 Quinlan, 'Workingman's Paradise' above n35 at 240.

coerce their servants, and which was reinforced by law, started to give way to the idea of a contract between equal parties: the employer and the employee. The relevance of the Acts faded away as an accommodation between the two groups was made through a system of compulsory conciliation and arbitration. Social liberalism, higher standards of living and education drove legislation which protected the employee and worker, rather than the reverse.⁸⁹ The growth of unions to protect workers from the economic disadvantage they faced in trying to negotiate employment conditions with employers gave employees greater power than ever before. Just as masters attempted to subvert the unwanted consequences of ‘freedom of contract’ through legal restrictions on movement, so too did employees try to resist the economic imbalance of the employment contract through collective action. Master and servant provisions were used to counter these actions through charges of absence, absconding, neglect of work or breaching agreement.⁹⁰ Laws designed to coerce the individual through imprisonment and fines were less successful in stopping collective action. This was largely because such action, directed against a group of people, politicised the strategy and laid open the one-sidedness and harshness of the laws.⁹¹ Public opinion was often on the side of the workers and magistrates followed suit.⁹² During the massive industrial action in the shearing and maritime industries of the late 19th century, employees argued that ‘freedom of contract’ gave them the right not to recognise or deal with unions.⁹³ This insistence on the fiction of freedom of contract as a state which existed between two equal parties can be seen as the death knell for master and servant laws once *their inequities and injustices* became widely known, although it was a long and arduous process. As Frank says about the successful English protests against the proposed 1844 enlargement of master and servant laws:

The campaign drew attention to the injustices of the law and its administration and brought labor into ongoing debates about the magistracy ... It began a tradition of trade-union opposition which would ultimately culminate in repeal.⁹⁴

Work Choices’ individualisation philosophy, which sets up a preferred model of employment agreements as being between two individuals only — the employer and the employee — had similar validity and public relations problems, as we see

88 Though the question of how far correction followed contract was a matter for debate and disagreement in discussions over the scope of authority a master who ‘contracted’ with a servant had. See Steinfeld, above n24 at 118–20.

89 Stuart Macintyre and Richard Mitchell, ‘Introduction’ in Stuart Macintyre and Richard Mitchell (eds) *Foundations of Arbitration* (1989) at 11–12.

90 Quinlan, ‘Workingman’s Paradise’ above n35 at 246.

91 Paul Craven, ‘Canada, 1670–1935: Symbolic and Instrumental Enforcement in Loyalist North America’ in Hay and Craven (eds) *Masters, Servants, and Magistrates* above n24 at 202.

92 Quinlan, ‘Workingman’s Paradise’ above n35 at 247.

93 Macintyre and Mitchell, above n89 at 9; Quinlan, ‘Workingman’s Paradise’, above n35 at 247.

94 Christopher Frank, ‘Britain: The Defeat of the 1844 Master and Servants Bill’ in Hay and Craven (eds) *Masters, Servants, and Magistrates* above n24 at 421. The bill was ‘A Bill for Enlarging the Powers of Justices in Determining Complaints between Masters, Servants, and Artificers, and for the More Effectual Recovery of Wages before Justices.’

below. As an anti-union tactic, master and servant laws became less and less successful as trade unions grew in size, public popularity and political strength. When Australia became a sovereign country in 1901, employee power, expressed through trade unions, was given a legitimate and central role,⁹⁵ though not without a struggle.

The concept of status was changing and being challenged by these social and economic changes. Increasingly, status came to refer to a category of worker who was either covered or not covered by protective employment legislation. Despite the efforts of colonial master and servant laws to enlarge their coverage, there were many categories of worker — piecemeal, ‘contractors’, clerical, public service, professional, managerial and higher income workers — who were not covered by the laws. There was a tendency of the courts in the early days of Australia to equate ‘master and servant’ with ‘employer and employee’, and as a result many vulnerable workers, such as clerical workers, were not considered ‘employees’.⁹⁶ Many ‘higher status’ workers, like managers or professionals, were excluded from protection because it was assumed they did not need it. Status as a marker of the right to access the protection of a variety of employment legislation now has wide acceptance in Australian labour law, although the boundaries of eligibility for this protection have been, and are still, contested. But the new notion of status is different from the master and servant notion of status which was a marker of master superiority and dominance. The concept of managerial prerogative incorporated some of the feudal notions of status, but these notions were softened by requirements for due process, recognition of the economic vulnerability of many employees, and the benefits of ‘voice’.⁹⁷

For most of the 20th century, labour relations balanced the needs of employee and employer, and regulated their respective power through State intervention via the conciliation and arbitration system.⁹⁸ Unlike the master and servant regime, this system comprised a variety of regulatory styles. While there were elements of command and control, for example, when the Court and then the AIRC exercised its arbitration powers, there was a large and significant co-regulation as well as self-regulation component relating to collective bargaining, as manifested in internal firm or industry wide codes of conduct and human resources policies.⁹⁹ It was a tripartite system, predicated on communication between the different actors — employees through their union, employers and government — and legal recognition of each one’s right to participate in dispute settling and condition setting.¹⁰⁰ Conditions were set through awards, industry collective bargaining and protective employee legislation.

95 Macintyre and Mitchell, above n89 at 15–18.

96 Howe and Mitchell, above n28 at 6.

97 Breen Creighton and Andrew Stewart, *Labour Law* (4th ed, 2005) at 99.

98 Hancock and Richardson, above n33 at 203.

99 Howe, above n43 at 20–1; Sean Cooney, John Howe and Jill Murray, ‘Time and Money Under Workchoices: Understanding the New Workplace Relations Act as a Scheme of Regulation’ (2006) 29 *The University of New South Wales Law Journal* 215 at 223–5.

100 Cooney, Howe and Murray, above n99; Howe, above n43 at 20–2.

This system delivered, for the most part, decent wages and conditions, and rising productivity.¹⁰¹ It began to be unravelled in the 1980s and 1990s, with the opening up of the Australian economy to world markets. Industrial relations and the site of contest over labour coercion began to change from a centralised conciliation and arbitration focus to an enterprise bargaining focus. By 1996, rather than intervening directly and setting standards, the central tribunal took on an indirect certification role. The award system still existed, but enterprise bargaining became the chief way Australian workers achieved pay increases and improved conditions. Towards the end of the 20th century, collective bargaining at the enterprise rather than the industry level became dominant. With the election of the conservative government under John Howard in 1996 there also came a focus on individual agreement making at the expense of collective bargaining.¹⁰² The *Workplace Relations Act 1996* (Cth) (hereafter ‘*WR Act 1996*’) created an individual statutory instrument known as an Australian Workplace Agreement,¹⁰³ and placed a number of restrictions on the traditional role of unions as the chief vehicle of collective bargaining. This included the creation of a ‘non-union’ certified agreement,¹⁰⁴ freedom not to belong to a union,¹⁰⁵ and more flexibility regarding which union to join.¹⁰⁶ Lack of control in the Senate lessened the impact of some of the government’s policies, but these changes laid the foundation for the more radical changes which the *Work Choices Act* was to introduce. Along the continuum of coercion of labour, non-unionised employees or employees with little bargaining power once again became vulnerable to the economic coercion of employers.¹⁰⁷

In summary, while the value and application of the conciliation and arbitration system was and is highly contested, for most of the 20th century Australia had an industrial relations system in which the State moderated the coercive power of employers and employees alike through an independent body. However, in the late 20th century with the *WR Act 1996*, employment legislation began again to prefer the employer to the employee. This became far more pronounced in the early 21st century with the amendment of the *WR Act 1996* by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).¹⁰⁸

101 Hancock and Richardson, above n33.

102 Stephen Deery and Richard Mitchell, ‘The Emergence of Individualisation and Union Exclusion as an Employment Relations Strategy’ in Stephen Deery and Richard Mitchell (eds) *Employment Relations Individualisation and Union Exclusion: An International Study* (1999) at 3–6.

103 *WR Act 1996* s 170.

104 *WR Act 1996* s 170LK.

105 *WR Act 1996* s 298A.

106 *WR Act 1996* s 189(1)(j).

107 Owens and Riley, above n19 at 102.

108 I refer to the amended *WR Act 1996* as the ‘*Work Choices Act*’.

5. From Balance to Coercion: a Comparison of the Workplace Relations Amendment (Work Choices) Act 2005 with Master and Servant Laws

I have traced above the movement of labour relations along a continuum from 'unfree' to very close to 'free'. We have seen the relationship between masters/employers and servants/employees evolve from physical control based on status and local custom, to legal restrictions on the freedom of contract to limit the movement of labour, to State moderation of the coercive powers of both sides, to a more decentralised approach where both sides were freer to exercise their power (or powerlessness) in the market place. I now move to 2006–7, where the State stepped up its intervention by limiting the power of collective action and bargaining, in order to reduce employee power; thus moving labour relations back down the continuum towards 'unfree'.

Like master and servant laws, Work Choices was a classic form of command and control regulation.¹⁰⁹ It was an attempt to attack the employees' power to influence the terms and conditions of the employment contract by diminishing the role of trade unions and collective bargaining. Work Choices used an ideology of individualisation to coerce labour. In the 19th century, the main source of employee power came from employees' legal capacity to strike an individual bargain with an employer and to leave that arrangement for another employer in a time of labour shortage. As a result, master and servant laws targeted the individual contract of employment, such as it was. By the 20th century, employees had won the legal right to take up and leave a contract of employment. The site of battle moved from the entry and exit of the contract to the contents of the contract. Employees increased their power to negotiate good terms and conditions by forming trade unions and bargaining collectively. As discussed earlier, master and servant laws were less successful at countering collective action, not because the offences and penalties could not be applied to groups of workers as well as to individuals, but because public opinion, when alerted to the situation through trade union meetings and messages, and media coverage of group trials, would not stand for it.

I argue that Work Choices targeted collectivism in order to reduce it as a source of employee power. Work Choices quite radically diminished conditions and collective bargaining. Stewart argues that Howard had a powerful conviction that:

Australia will be more productive and prosperous if employers are allowed to get on with running their businesses without hindrance from trade unions or industrial tribunals, and if they are permitted (with certain exceptions) to offer employment on whatever terms workers are prepared to accept.¹¹⁰

I suggest that this does not explain the micromanagement of so much of Work Choices. An alternative rationale for the conundrum of Work Choices is that the Howard government prescribed so many conditions, and set so many boundaries

109 Howe, above n43.

110 Stewart, above n10 at 17.

on the manner in which employers and employees interacted and on the contents of agreements, because it needed to re-educate employers to take on a role not experienced by them since the 19th century. The underpinning rationale behind Work Choices was not that the government believed that increasing employer power would make workplaces more productive, but because it had an atavistic belief in the rightness of the feudal concept of status.¹¹¹

To support this contention, the following sections examine the similarities between Work Choices and master and servant laws in the idea of coercion. I shall look at how the restrictions on collective bargaining affected the right to freedom of contract and diminished the concept of cooperation in the employment relationship. I examine the impact that the prohibited content of workplace agreements and the dismantling of the test case function had on collective bargaining. I conclude that these provisions enhanced managerial prerogative and represented an extreme attack on the power of employees. I also suggest that a clue to the reason behind this attack can be found in the dissonance between the promotion of employer freedom and the restriction of employer freedom in Work Choices. This dissonance represents the struggle to introduce 19th century ideas, last seen in master and servant laws, into the 21st century.

A. *The Work Choices Act, Status and Contract*

(i) Freedom of Contract

We have seen how the idea that the power of the master came from a jurisdictional right, emanating from ancient social norms, gradually transformed into the idea that the power of the master came from a right freely given by servants or employees. This was the idea of freedom of contract. Freedom of contract was, and is still, constrained by the economic imbalance between employer and employee. This inequality has been addressed in modern times by collective bargaining, which is globally accepted as a legitimate form of employment contracting.¹¹² In Australia, the system of statutory awards, statutory collective agreements and, more recently, statutory individual workplace agreements (AWAs) has meant the common law contract of employment has frequently taken a back seat to these instruments. However, from the point of view of employees and employers negotiating the terms of their employment relationship, the decision about what

111 The belief that employees should know their place naturally led to a belief in the illegitimacy of the union movement and the power they wielded. Hugh Morgan, former Western Mining Corporation's Executive Director and influential advocate of New Right philosophies said in 1986: 'They are our masters. Can you name any other country in the world that has to take its budget to the trade union movement and get approval before putting it to the House?': Quoted in Kelly, above n14 at 261.

112 *Convention Concerning the Promotion of Collective Bargaining (ILO No 154)*, adopted 19 June 1981, 1331 UNTS 267 (entered into force 11 August 1983); *Convention Concerning Freedom of Association and Protection of the Right to Organise (ILO No 87)*, adopted 9 July 1948, 68 UNTS 257 (entered into force 4 July 1950); *Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (ILO No 98)*, adopted 1 July 1949, 96 UNTS 257 (entered into force 18 July 1951).

form the final agreement will take, whether a contract of employment only, a statutory instrument as well, or a 'side' agreement, is a legitimate part of the bargaining process. Inequality can result in the form of regulation being imposed by one party over the other. But historically, Australia attempted to redress imbalances in bargaining power by establishing unions as central players in the bargaining process and the AIRC as the arbiter of disputes. Under the traditional model, the AIRC had a range of powers including the ability to make binding awards through arbitration of disputes between organisations of employers and employees. Since 1993 and the introduction of the statutory non-union agreement, the AIRC's scope for shaping regulatory outcomes has been diminished.¹¹³ Despite the continuing narrowing of the statutory basis for the AIRC's powers, it continued to find some role for itself in relation to the bargaining process. Even after sweeping changes to the Federal statute in 1996,¹¹⁴ the AIRC still exercised some powers to make orders regarding the bargaining process as an ancillary to its conciliation powers.¹¹⁵ The process of statutory limitations on the AIRC culminated under Work Choices, where the AIRC lost its capacity to use any discretion in making orders concerning the bargaining process.¹¹⁶ The effect of this was to make the choice of employment agreement, except in a few circumstances where economic power lay with the employee, the preserve of the employer.

This lack of choice about the regulatory mechanism to govern the employment relationship is a throw back to the days when the servant status restricted the freedom servants, and later employees, had to enter into or leave a contract. The servant status of a worker was defined by lack of choice — a servant had no choice whether to enter into an agreement or not. Hence the main effect of status was on freedom to contract, and this was therefore the main area targeted by master and servant laws. As we saw earlier, ideas of equality and liberty, and the modern development of protective employment legislation introduced a different idea of status.¹¹⁷ The modern definition of status now revolves around who has access to the *content* of the contract — minimum conditions and laws like health and safety which act on the contract — not the ability to contract *per se*.

113 *Asahi Diamond Industrial Australia Pty Ltd v Automotive, Food, Metals and Engineering Union* (1995) 59 IR 385; *Australian Workers Union v BHP Iron-Ore Pty Ltd* (2000) 106 FCR 482; Ron McCallum, 'Good Faith Bargaining, Protected Action and the Need for a Statutory Trade Union Recognition Procedure' (Paper presented at the Tenth Annual Labour Law Conference, Sydney, 21 March 2002); Braham Dabscheck, 'The Slow and Agonising Death of the Australian Experiment with Conciliation and Arbitration' (2001) 43 *Journal of Industrial Relations* 277.

114 *WR Act* 1996 s 89(a) permitted the AIRC to exercise its arbitration powers only 'as a last resort'.

115 *Sensis Pty Ltd v Members of the Full Bench of the Industrial Relations Commission* (2005) 145 FCR 570; Andrew Stewart, 'The AIRC's Evolving Role in Policing Bargaining' (2004) 17 *Australian Journal of Labour Law* 245.

116 The AIRC could issue orders in highly specified situations such as unprotected industrial action (*Work Choices Act* s 496), pattern bargaining (s 431) or under exceptional circumstances when directed by Minister (s 498(5)(c)); Anthony Forsyth, 'Arbitration Extinguished: the Impact of the Work Choices Legislation on the Australian Industrial Relations Commission' (2006) 32 *Australian Bulletin of Labour* 27.

117 Kahn-Freund, above n23 at 640.

However, in Work Choices a number of restrictions struck directly at an employee's ability to contract. First, for new employees, Work Choices denied the legitimate right of individual employees to have a say over which type of employment agreement they wanted. When AWAs were first introduced in the *WR Act* 1996, new employees were not necessarily 'free' to negotiate an individual employment contract. Under Work Choices, this restriction was made explicit. Employers were allowed to offer new employees (not existing ones) AWAs on a take it or leave it basis.¹¹⁸ Not even employees, as individuals, were free to bargain for a common law contract only, without the overlay of an AWA, or join up to an existing collective agreement. If offered an AWA, potential new employees had to take it or 'choose' not to take up employment.¹¹⁹

Second, there was the creation of an Employer Greenfields Agreement, where an agreement could be made by the employer unilaterally, without any consultation, negotiation or bargaining with any employee or employee body, for a new business or undertaking.¹²⁰ The contempt for the concept of freedom to contract probably had its nadir in this clause.

Third, by removing the power of the AIRC to intervene and arbitrate disputes, Work Choices gave employers the capacity, if they so desired and were prepared to fight, to refuse to finalise a collective agreement, even if the majority of workers wanted one.

Although not stated directly in the legislation, the consequence of an employer and an employee group not coming to an agreement is that a collective agreement may never be made.¹²¹ The *Work Choices Act* stated that the employer must give the bargaining agent a reasonable opportunity to meet and confer with the employer about the agreement during the bargaining period. But this time frame is up to the employers, so it is a meaningless provision in terms of compelling an employer to finalise a collective agreement.¹²²

An example of this situation was the Boeing dispute in 2006. The company refused to negotiate for a collective agreement in NSW and carried out its business by hiring an alternative work force. The NSW Industrial Relations Commission held an inquiry and said:

Under the WRA there is no obligation on the employer to engage in collective bargaining ... There's no guarantee that a bargaining period will result in a

118 *Work Choices Act* s 400(6). Prior to the *Work Choices Act*, several cases had indicated that such action did not constitute duress or coercion under the law: *Schanka v Employment National (Administration) Pty Ltd* (2000) 97 FCR 186 at 193; *Maritime Union of Australia v Burnie Port Corp Pty Ltd* (2000) 101 IR 435.

119 *Work Choices Act* s 400(6).

120 *Work Choices Act* s 330; Braham Dabscheck, 'The Contract Regulation Club' (2006) 16 *The Economics and Labour Relations Review* 2.

121 'There is, however, no obligation to negotiate in good faith and there is certainly no obligation on an employer to negotiate one form of agreement rather than another': Sean Cooney, 'Command and Control in the Workplace: Agreement Making under Work Choices' (2006) 16 *The Economic and Labour Review* 147.

122 *Work Choices Act* s 335 (3).

collective bargain ... Boeing's determination and capacity to carry on its business ensures that absent outside intervention, its position will prevail ... What is clear is that the federal system of industrial regulation substantially limits the ability of employees to have their claims and grievances arbitrated by an independent tribunal applying the usual criteria of fairness. It is a bargaining system based on survival of the fittest.¹²³

It is one thing to promote and encourage individual bargaining; it is another to make collective bargaining the gift of the employer. The argument that this simply allowed an individual worker to sit down with an individual employer to negotiate a mutually beneficial agreement is a fiction. The authority for Work Choices came from the corporations power. Corporations were its jurisdiction. Apart from some small businesses, most organisations that employ people are managed by a range of managers, accountants and HR specialists. In law, a corporation is a single person; in the reality of the workplace, it is a highly organised, well resourced and skilled collective body that negotiates in its interests, which may or may not coincide with its employees' interests. This reality made the utterances about bargaining between a (single) employer and a single employee hollow. As Stewart has said: 'But for the great majority, the position today is no different to what it was a century or more ago. Without the support of a union, most workers faced a simple choice — accept the terms offered or find another job'.¹²⁴

The underpinning ethos of such clauses was that only one party — the employer — had the right to determine the type of contract and the nature of the contracting. This belief moved the playing field away from the arena of regulating the *content* of a contract, which had been the main area of employment law for a hundred years, and back into the realm of freedom of contract — the world where feudal ideas of status first originated.

(ii) *The Cooperative Workplace*

Managerial prerogative is a concept closely tied up with feudal notions of status and the implied terms of an employment contract. In modern times, it refers to the freedom that a manager or an employer has to run the enterprise.¹²⁵ The extent of the freedom parallels the extent of the restrictions on the employee. The 'implied terms' that exist for an employee in an employment contract — obedience, loyalty, obligation — come from feudal notions of service.¹²⁶ Managerial prerogative can be seen as the modern expression of a status right to rule.¹²⁷

123 *Inquiry into Boeing Dispute* [2006] NSWIRC 52 at 234; See also *United Collieries Pty Ltd v Construction, Forestry, Mining and Energy Union* (2006) 153 FCR 543 at [25] (Gyles J): Work Choices sanctions 'a power struggle with no holds barred'.

124 Stewart, above n10 at 17.

125 Hugh Collins, 'Justifications and Techniques of Legal Regulation of the Employment Relation' in Hugh Collins, Paul Davies and Roger W Rideout (eds) *Legal Regulation of the Employment Relation* (2000) at 6.

126 Johnstone and Mitchell, above n44 at 106.

127 *Re Cram; Ex parte NSW Colliery Proprietors Association Ltd* (1987) 163 CLR 117.

However, the one-sided nature of the employment contract increasingly does not reflect the modern reality of the work relationship. Concepts like the implied term of mutual trust and confidence¹²⁸ and the ‘new psychological contract’¹²⁹ are chipping away at some of the more traditional notions of master or employer supremacy in the employment relationship. As Riley has said:

It is important to remember that employees have long been subject to an obligation of faithful performance. The argument now emerging is that this obligation should be mutual. In other words, *both* parties to the contract of employment should be subject to a reciprocal obligation to take account of the interests of the other in the relationship, in exercising any power or exploiting any opportunity conferred upon them by the relationship.¹³⁰

However, Work Choices was not interested in setting up an industrial relations system which recognised a partnership model that would help Australia succeed in the modern economy.¹³¹ The eye of Work Choices was firmly set on the lowest common denominator — the low paid, low skilled sector where profits are made not from innovation, quality or research, but from cutting labour rates.¹³² Work Choices viewed the relationship between an employer (or more strictly, a corporation) and a group of collective employees as an entirely negative relationship. It saw collective bargaining as driving up the costs to employers by increasing wages and improving conditions. This led to the fixation on restricting collective bargaining and the removal of the test case function to adjust minimum standards. Yet this is a very narrow view of the collective bargaining story.

The modern world of work is characterised by constantly changing technology, product innovation, and new and often international markets which require highly skilled, highly motivated and continuous learning environments. It is commonplace that firms that are to succeed in today’s world need workers who can use their judgement and initiative, keep up to date with the environment, drive rather than adapt to technological change, and engage in continuous re-skilling and learning.¹³³ Certainly there are industries which are built on cheap unskilled

128 *Malik v Bank of Credit & Commerce International SA (in liq)* [1998] AC 20; *Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR 144; Douglas Brodie, ‘Mutual Trust and the Values of the Employment Contract’ (2001) 30 *Industrial Law Journal* 84.

129 Katherine VW Stone, ‘The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law’ (2001) 48 *UCLA Law Review* 519.

130 Joellen Riley, ‘Mutual Trust and Good faith: Can Private Contract Law Guarantee Fair Dealing in the Workplace?’ (2003) 16 *Australian Journal of Labour Law* 28 at 31.

131 If the government had been genuine about wanting to make the relationship between employer and employee more of a partnership but without explicit support for collective bargaining, it could have done what New Zealand did in 2000 and 2004. ‘[I]t is possible to make simple modifications to the common law principles (such as defining a duty of good faith or imposing a duty of mutual trust and confidence) in order to moderate the disadvantage’: Cooney, above n121.

132 Bradon Ellem, Marian Baird, Rae Cooper and Russell Lansbury, ‘“WorkChoices”: Myth-Making at Work’ (2005) 56 *Journal of Australian Political Economy* 13 at 26.

133 Tara J Fenwick, ‘Learning as Grounding and Flying: Knowledge, Skill and Transformation in Changing Work Contexts’ (2006) 48 *Journal Of Industrial Relations* 691; Peter H Sawchuk, ‘“Use-value” and the Rethinking of Skills, Learning and the Labour Process’ (2006) 48 *Journal of Industrial Relations* 593.

labour but this is not the sort of industry with which Australia has historically championed or realistically can compete.¹³⁴ The changing role of leadership and management over the last twenty to thirty years reflects attempts by all players in the world of paid work to explain and respond appropriately to constantly changing technology, instant communication and international markets.¹³⁵ Managers increasingly play a different rather than superior role to operational staff. Rather than 'telling' staff what to do and expecting 'obedience' and 'loyalty', many managers are high-level coordinators who ensure that the work independently produced by highly skilled and increasingly highly specialised workers aligns with other products and services, and organisational targets and objectives.¹³⁶ The concept of managerial prerogative, a 'manager's right to manage', has a very different flavour in today's complex workplace than it did a hundred years ago.

Over the last 20 years, collective action by employees, primarily through the union movement both on a national level and on an enterprise level, has helped Australia adapt its economy to meet the challenges of technology and globalisation. Initiatives such as the Accord, union amalgamation, award restructuring and agreement to tie wage increases to productivity gains were critical to the modernisation of the Australian economy.¹³⁷ A number of AIRC test cases introduced flexible working arrangements into Australian workplaces.¹³⁸ At the enterprise level, numerous collective agreements and arrangements have introduced team-based work practices and innovative work/life balance initiatives to help move the Australian economy and workplace into the 21st century.¹³⁹ A study of AWAs by Mitchell and Fetter, on the other hand, found very few of these individual agreements incorporated partnership or participatory arrangements such as information sharing, consultation, joint decision making or team work.¹⁴⁰ An individual employee will rarely, if ever, be a 'match' for an employer over an individual wage packet or individual hours of work. Yet collectively, employees are able to see the bigger picture and work with managers and employers to move beyond short-term personal gain, and instead work out arrangements which can secure the long-term future of individual enterprises and of the national economy.¹⁴¹

134 John Mathews, *Catching the Wave: Workplace Reform in Australia* (1994) at 285.

135 John P Kotter, *A Force for Change: How Leadership Differs from Management* (1990); Peter Drucker, *People and Performance: the Best of Peter Drucker on Management* (2007); Peter Senge, *The Fifth Discipline: The Art and Practice of the Learning Organization* (1994).

136 Joellen Riley, 'Who Owns Human Capital? A Critical Appraisal of Legal Techniques for Capturing the Value of Work' (2005) 18 *Australian Journal of Labour Law* 1 at 24.

137 Kelly, above n14 at 271–81.

138 For example, Personal/Carer's Leave 1995; Parental Leave for Casual Employees, 2001.

139 See a number of case studies on the introduction of teams, technological change and skill based pay in Mathews, above n134.

140 Richard Mitchell and Joel Fetter, 'Human Resource Management and Individualisation in Australian Labour Law' (2003) 45 *Journal of Industrial Relations* 292 at 317.

141 Jill Murray, 'The AIRC's Test Case on Work and Family Provisions: The End of Dynamic Regulatory Change at the Federal Level?' (2005) 18 *Australian Journal of Labour Law* 325 at 342–3.

Work Choices advocated an old model of work which encouraged employers to act unilaterally and coercively. Its espoused vision was of the employer as the master, who was the owner of a small enterprise, possibly in a rural or manufacturing setting, and who knew the details of the business better than anyone else, and would sit down, man to man, with a decent worker who knew his or her place but was prepared to come to a common sense arrangement about pay and conditions, and if not, could move on.¹⁴² A world, in fact, where managerial prerogative ruled, not as a means to greater prosperity, but as an end.

B. Content of Work Choices

The content of master and servant laws was aimed at restricting the free movement of servants or employees from one job to another. The freedom of employees to contract was the main source of employee power and was hence targeted. Absconding, absenting and the imposition of discharge certificates were the main items, with absconding being the major offence in Australia until the mid 19th century. The main source of employee power in the 21st century is the capacity of employees to bargain collectively and this was the inevitable target of Work Choices. So, although the content of Work Choices was different from master and servant laws, the intention was the same — the coercion of workers through restrictions on their source of power. We have seen above how Work Choices attempted at the start of the contracting process to restrict the type of contract to individual agreements. In this section, I look at how the prohibited content provisions and the setting of minimum standards by Parliament restricted collective action by employees to progress their interests.

(i) Prohibited Content

Work Choices directly and specifically prohibited a number of union-related activities and any terms that committed an employer to bargain with a union.¹⁴³ This means that even if an employer has a good relationship with the relevant union and would like to include union related provisions, he or she is not permitted to do so. Payroll deductions of union fees, entitlement to trade union training leave and the right of entry for union officials were all terms forbidden to be included in a workplace agreement.¹⁴⁴ Perhaps the most extraordinary and repressive item was the prohibition of anything that would constitute a ‘remedy for unfair dismissal’.¹⁴⁵ As Stewart says, ‘Promising to be a good and considerate employer, it would seem, is to be outlawed’.¹⁴⁶ One wonders what the Colonial Office would

142 John Howard, ‘Workplace Relations Reform: the Next Logical Step’ 17 *The Sydney Papers* (3/4) 78; Bradon Ellem, ‘Beyond Industrial Relations: WorkChoices and the Reshaping of Labour, Class and the Commonwealth (2006) 90 *Labour History* 211; ‘Provided no coercion, intimidation or fraud is involved, and provided minimum standards are met, the Government believes that workers and managers should be allowed to act like adults capable of making their own choices’: The Hon Tony Abbott, ‘Reflections of a New Boy’ (Paper presented at the proceedings of the XXIInd HR Nicholls Society Conference, Melbourne, 23–24 March 2001).

143 *Work Choices Act* s 356. *WR Regulations* reg 8.5.

144 *WR Regulations* reg 8.5 (1) (a), (c) and (g) respectively.

145 *WR Regulations* reg 8.5(5).

have made of it.¹⁴⁷

This proscriptive list of items which must not be included in a workplace agreement illustrates clearly the contradictory nature of Work Choices. On the one hand, the legislation gave employers great freedom and power over the type of contract they could offer to employees — a statutory individual agreement, a common law contract or a collective agreement — yet on the other hand, employers were told what they could and could not include in the content of these contracts. The government's protestations of releasing the workplace from over-regulation in order to create a situation where the employer and employee would negotiate employment terms freely rang false in the light of these provisions. The coercion of labour in these provisions appeared an end in itself, rather than a mechanism for flexibility or competitiveness.

(ii) *Minimum Standards — Loss of the Test Case Function*

The test case function, which for years ensured that minimum standards in Australia did not atrophy, was removed. The rise of enterprise bargaining in the 1990s had started the gradual atrophy of awards, although for many years the majority of workers enjoyed what were known as 'above award' conditions. However, this atrophy was kept in check not only by the annual safety net reviews of the AIRC but by the test case function. This was a process initiated by collective action of employees through the trade union movement. Trade unions would bring a case relating to a particular condition, for example, maternity leave, reasonable working hours or redundancy, to the AIRC who would hear submissions and make a decision on a new standard accordingly.¹⁴⁸ The decision would be written into all awards and apply to all employers and employees who were party to the award.¹⁴⁹

There was no capacity for this function to continue under Work Choices because the AIRC could no longer make new awards. Minimum conditions, apart from wages, were to be set by Parliament and restricted to four areas: annual leave, personal (including carer's) leave, parental leave and maximum ordinary hours of work.¹⁵⁰ This, along with the minimum wage,¹⁵¹ was known as the Australian Fair Pay and Commission Standard.¹⁵² There was no legislative requirement for these

146 Stewart, above n10 at 8.

147 Both regimes were extreme. Work Choices was only passed after the Howard government secured an almost unprecedented majority in both houses of Parliament. The Colonial Office rejected a number of Master and Servant laws because of their wide ranging, oppressive and arbitrary nature. See Quinlan, above n72.

148 *Maternity Leave Case* (1979) 218 CAR 120; *Re Working Hours Case* (2002) 114 IR 390; *Termination, Change and Redundancy Case* (1984) 8 IR 34.

149 See Murray, above n141 at 340–3 for discussion on how the test case functions as a dynamic regulatory system.

150 *Work Choices Act* Part 7 Div 4 ss 227–238; Part 7 Div 5 ss 239–261; Part 7 Div 6 ss 262–316 and Part 7 Div 3 ss 223–226 respectively.

151 *Work Choices Act* Part 7 Div 2 ss 176–222.

152 *Work Choices Act* Part 7 Div 1 ss 172–175.

conditions to be reviewed. The trade unions were effectively cut out of establishing improved minimum conditions for employees.

Thus the boundaries of minimum standards, instead of being potentially limitless and responsive to the work issues of the moment, were now restricted to those conditions named in the *Work Choices Act*. Improvement in minimum conditions or a new condition required Parliament to amend the *Work Choices Act*. There is an argument that for employees, the setting by Parliament of one set of minimum standards for all employees regardless of industry can be better than the award system because it can be simple, uniform and easily disseminated; and therefore more widely applied.¹⁵³ If one were setting up a system from scratch, there are distinct advantages. But no system can be taken out of context. Because of Australia's constitutional constraints on universal minimum standard setting, the test case system that was developed had its own strengths. It was a dynamic process initiated by trade unions, who were familiar with the current needs and issues of employees; argued out in public by employers and other interested parties; and decided with a view to the public interest by an independent body.¹⁵⁴ Although obviously not free of politics, it was administered at arm's length from the government and was thus able to avoid party political opportunism in its decisions and legislative delay.¹⁵⁵

Prohibited content and the loss of the test case function to modify minimum standards are only two examples of Work Choices restricting the opportunities of employees to use collective methods to advance their interests. Restrictions on industrial action, rights of entry for union officials and pattern bargaining are other examples where Work Choices has pushed the individualisation of the workplace. Yet the government's failure to allow individual employees and individual employers genuine freedom to work out their own arrangements suggests that the government was more concerned about ensuring the parties followed its own vision of workplace relationships, rather than a desire to see genuine individual negotiation between employer and employee.¹⁵⁶ This concern extended to placing restrictions on employer autonomy where the government considered employers might not follow its vision.

6. Conclusion

In 21st century Australia, we see employment legislation which is completely different from the 19th century master and servant laws and yet uncannily similar. As Hay and Craven remarked: 'Master and servant statutes were everywhere the same and everywhere different'.¹⁵⁷ It seems that after more than a hundred years of cooperative, balanced (though never uncontested) industrial interaction between State, employer and employee, a form of master and servant has again

153 Owens and Riley, above n19 at 276–7.

154 Murray, above n141.

155 For example, the freezing of the Federal minimum wage in the US in the 1980s and 1990s.

156 Cooney, above n121.

157 Hay and Craven, above n24 at 14.

appeared; sort of the same, and sort of different. The similarity lies not in the outward form of the two regimes — the source of employee power targeted and the contents are different — but in their purpose and underlying attitude. Both are extreme forms of employee coercion, the enactment of which was greeted by legal challenges, worker resistance and, in the case of Work Choices, political defeat at the ballot box. Both regimes used the power of the State to coerce labour by enacting legislation which aimed to curb employee power and to enforce the interests of employers at the expense of employee interests. For master and servant statutes, that power was entry and exit from the employment contract; for Work Choices it was overwhelmingly collective bargaining. Both regimes had at their heart, a belief in the feudal concept of status — a belief that employers have a natural right to coerce employees because employers occupy a superior place in the social order.

The restrictions on the power of employees to choose the regulatory mechanism that governed the employment relationship, and to negotiate decent pay and conditions through a focus on individualisation, illustrate Work Choices' attempts to shift labour further down the continuum towards unfree. That the government was possibly driven by a belief in status helps explain why the government did not give employers more discretion than it did in undertaking this task. In the 19th century, status, as a legitimate reason for coercion, was still part of the fabric of society. Its use as a justification for unfair employment laws foundered when the growing trade union movement exposed its true nature in the late 19th and early 20th centuries. In 21st century Australia, such a belief in the natural subordination of employees is not widespread. This, I argue, is the reason why so much of Work Choices consisted of the micro-management of what employers and employees could or could not do. The government could not be sure that employers held the same belief in status as it did and would adopt the required degree of coercion if they were left to themselves. The appearance of a legal regime like Work Choices so long after master and servant laws had become an irrelevancy, and after a hundred years of attempts to balance labour relations, demonstrates the persistence and adaptability of the law as an instrument of labour coercion.

As with master and servant laws, the implementation of Work Choices was resisted on a number of fronts. Neither employees, trade unions nor other interested players lay down, and the election of the Rudd Labour government was to a large degree the result of voter disillusionment with Work Choices.¹⁵⁸ The *Workplace Relations Amendment (Transition to Forward with Fairness) Act* 2008 and the *Fair Work Bill* 2008 (Cth) are nowhere near as oppressive or internally incoherent as Work Choices. This suggests that the Labor Party's traditional link to workers prevent it from being prey to the underlying beliefs in the social hierarchy that haunted Work Choices.

158 See above n36.