

Labour Law and New Economy Discourse

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Abstract: The purpose of this article is to explore the emergence of conflicting narratives of the New Economy and their applicability / relevance in a labour law context. In particular, the article highlights shifting theoretical characterisations of labour law, with corresponding implications for labour law's context and scope, and considers the significance of New Economy and globalisation discourses in this context, with particular reference to recent developments in Australian labour law and elsewhere.

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Introduction

The New Economy is upon us; or so we are endlessly informed. Indeed, so often is the phrase invoked and in so wide a range of contexts, it may be beginning to lose some of its sheen — not so much 'new' as 'nearly new', even a little dowdy. Remarkably, however, despite the wear and tear of overuse, the phrase retains a tenacious grip upon intellectual and political fashion. Deployed alongside, and often interchangeably with, other 'hip' neologisms — Globalisation, the Knowledge Economy, the Digital Era, the Information Economy¹ — the New Economy is the darling of the broadsheet financial pages, the popular obsession of well-respected political commentators, and the inspiration for and predominant rhetoric accompanying much of government policy in industrialised countries. Meanwhile, in the world of the academy, it is fast becoming a primary lens through which we view, understand, and account for economic, political, cultural, and technological phenomena.

It is unsurprising then to find the New Economy a key theme in current labour law discourse. Indeed, given the centrality of work in narratives of the New Economy, how could it be otherwise? Among labour law scholars in developed countries, the New Economy has excited a good deal of curiosity and cautious enthusiasm. Still reeling from the blows inflicted by neo-liberalism on traditional labour law regimes across the globe (encompassing, among others, Australia's conciliation and arbitration system), the labour law academy is anxious to move away from the 'productive disintegration'² of the discipline towards its 'redefinition',³ 'reinvention',⁴

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1 See the National Office for the Information Economy (<www.noie.gov.au>), a research and development initiative run under the auspices of the Department of Communications, Information Technology and the Arts.

2 H Collins, 'The Productive Disintegration of Labour Law' (1997) 26 *ILJ* 295.

maybe even ‘transformation’.⁵ In these circumstances, the *New Economy*, the very rawness of it, cannot fail to attract. Here at last is unclaimed ground, alien territory, filled with hidden dangers but also an abundance of opportunities. As we gaze upon the theoretical disarray occasioned by the collapse of classical labour law models;⁶ chart the dissolution of key concepts which labour law has traditionally comprised;⁷ witness the wholesale jettisoning of values and principles that once elevated labour law to the status of a ‘vocation’,⁸ the uncertainties of the *New Economy* seem like a way forward. This seems to be the view of many eminent labour law academics, for example, UK scholar, Hugh Collins, who sees in the *New Economy*’s unquenchable thirst for competition opportunities to develop new forms of regulation which not only meet the needs of the economy but also have the potential to empower workers.⁹ Similarly, American Kathy Stone, urges employers and workers alike to acknowledge and adjust to the ‘new psychological contract’ whereby employees agree to work, not for the promise of job security but rather for ‘employability’, in the form of opportunities to train and develop their ‘human capital’.¹⁰ Then there is Harry Arthurs of Canada who, it must be acknowledged, is not so much enthused by the *New Economy* as convinced both of its inevitability and inexorable reach, and with it the inescapable need to develop international modes of labour regulation in the wake of the enfeebled state.¹¹

These are formidable scholars whose ideas are influential and whose recommendations many are inclined to follow. And I am not suggesting that they are wrong. There can be little doubt that the *New Economy* *does* posit opportunities for workers that *should* be explored. It is true too that, as an interpretative apparatus, it has considerable explanatory power, helping to

3 R Mitchell (Ed), *Redefining Labour Law: New Perspectives on the Future of Teaching and Research*, Centre for Employment and Labour Relations, Melbourne, 1995.

4 H Arthurs, ‘Reinventing Labor Law for the Global Economy’ (2001) 22 *Berkeley J Emp & Lab L* 271.

5 J Conaghan, R M Fischl and K Klare (Eds), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities*, Oxford University Press, Oxford, 2002.

6 From the wide range of sources exploring this theme, see, in particular, K Klare, ‘Countervailing Workers’ Power as a Regulatory Strategy’ in H Collins, P Davies, and R Rideout (Eds), *Legal Regulation of the Employment Relation*, Kluwer Law International, London, 2000, p 63; and M D’Antona, ‘Labour Law at the Century’s End: An Identity Crisis?’ in Conaghan et al, above n 5, p 31. In a local context, see M Yraken, ‘Demise of the Australasian Model of Labour Law in the 1990s’ (1994) 16 *Comp Labor Law J* 1; and see the recent speech of Hon Justice Michael Kirby, ‘Industrial Relations: Call off the Funeral’ delivered at the launch of the ALLA in July 2001, urging labour lawyers *not* to write off Australia’s ailing conciliation and arbitration system.

7 See, for example, A Hyde, ‘Employment Law after the Death of Employment’ (1998) 1 *U Pennsylvania J Labour & Employment L* 99; and P Davies and M Freedland, ‘Labour Markets, Welfare and the Personal Scope of Employment Law’ (1999) 21 *Comp Labour Law and Policy J* 233, exploring, inter alia, the conceptual and practical difficulties dogging the concept of employment.

8 H Collins, ‘Labour Law as a Vocation’ (1989) 105 *Law Quarterly Rev* 468.

9 H Collins, ‘Regulating the Employment Relation for Competitiveness’ (2001) 30 *ILJ* 17.

10 K V W Stone, ‘The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law’ (2001) 48 *UCLA L Rev* 519.

11 See above n 4. On the enfeebled state, see *ibid*, ‘Labour Law without the State’ (1996) 46 *University of Toronto L J* 1.

make sense of the social, cultural and political changes in which much of the world is currently engulfed. Nevertheless, it is undoubtedly wise to approach the idea of the New Economy with a modicum of caution — scepticism even — as it is in relation to all narratives that frame and come to dominate our thinking.

In this context, it is worth considering for a moment the world of labour law practice. What, if any, are the effects of New Economy discourses and practices on the everyday experience of lawyers? Could it be that despite academic pronouncements of an ‘identity crisis’ in labour law,¹² the experience of lawyers is much the same as before — *more* of the same certainly, if legislative and litigation trends in Australia match that of the United Kingdom — but not qualitatively or radically different? This is not, of course, to suggest that dramatic changes have not taken place but rather to speculate about how far and in what ways those changes have affected the ‘frontline’ experience of lawyers in practice. Recently, Arthurs carried out a study of management-side lawyers across seven countries with a view, inter alia, to ascertaining the extent to which international labour standards impacted upon the practice of labour law.¹³ Remarkably, the lawyers — almost all of whom had some (if not extensive) experience of multinational corporations — were unanimous in insisting that they had not impacted at all: in their experience, domestic not international norms governed labour and employment relations. Thus, despite Arthurs’ own predictions of the death of domestic labour law, and despite the current preoccupation of many labour law scholars with international standards of regulation,¹⁴ the conclusion of a sample of experienced professionals from diverse countries (not including Australia) was that ‘the law of employment and industrial relations remains resolutely local in character’.¹⁵

By contrast, most Australian labour lawyers would acknowledge that international labour standards *have* had a direct impact on Australian labour law practice, with ILO compliance providing the constitutional base for the enactment of elements of the Industrial Relations Reform Act 1993 (Cth),

12 See, for example, D’Antona, above n 6. See also Richard Mitchell’s, ‘Introduction: A New Scope and Task for Labour Law’ in Mitchell, above n 3, p vii, which provides a useful overview of the kind of ‘identity’ issues currently preoccupying labour law scholars.

13 H Arthurs, ‘The Role of Global Law Firms in Constructing or Obstructing a Transnational Regime of Labour Law’ in R Appelbaum, W Felstiner and V Gessner (Eds), *Rules and Networks: The Legal Culture of Global Business Transactions*, Hart Publishing, Oxford, 2001, p 273.

14 See, for example, K V W Stone, ‘Labor in the Global Economy: Four Approaches to Transnational Labor Regulation’ (1995) 16 *Michigan J of International L* 987; and B Creighton, ‘The Internationalisation of Labor Law’ in Mitchell, above n 3, p 90, and J Murray, ‘The Sound of One Hand Clapping? The “Ratcheting Labour Standards” Proposal and International Labour Law’ (2001) 14 *AJLL* 306 for Australian scholarly engagement with international labour norms.

15 Arthurs, above n 13, p 275. Arthurs is not going so far as to argue that international norms do not shape and inform domestic labour law (although he is openly sceptical about the extent of their influence). Rather his point is that they are not generally perceived to be of relevance to labour law practice, even among lawyers of multinational corporations. He goes on to add that ‘[the practitioners’] views were not contradicted by the detailed account of the work that they actually did, of the arguments and advice they provided to clients, and of the legal sources they drew upon’: above n 13, at 280.

introducing federal protection against unlawful termination, as well as other minimum employment standards.¹⁶ There is evidence too that many of the developments we associate with the New Economy — privatisation, economic restructuring, trade liberalisation, technological advancements — are impacting on practice, in particular, by contributing to the development of a legal environment which is infinitely more complex and diverse.¹⁷ Clearly one of the virtues of an organisation such as the Australian Labour Law Association, comprised, as it is, of a healthy mix of scholars and practitioners, is that it offers a forum whereby ideas about labour law can be subject to regular reality checks, and the practice of labour law can in turn benefit from those ideas, whether through shaping and informing legal strategy, advising or critiquing policy makers, or in developing viable theoretical frameworks within which to better understand and evaluate longer term trends and developments. It is in such a critically reflective mode that I wish now to consider some of the narratives and counter-narratives of New Economy discourse and their implications in a labour law context.

The New Economy: Narratives and Counter Narratives

The ‘New Economy’ is not a neutral term. It has proponents and opponents, optimists and pessimists, sceptics and believers. For some, it is primarily a *descriptive* term, seeking to capture the nature, extent, and scope of change allegedly wrought by technological development. For others it is aspirational and *normatively* imbued, positing the surest route to a progressive future where economic instability and recession are a thing of the past.¹⁸ Then again, there are those who take issue both with the descriptive and normative claims of New Economy enthusiasts, questioning the ‘new’ credentials of the New Economy and its power to deliver to people on the ground.¹⁹ In short, the New Economy is a term shot through with contention as well as a key site of ideological and political conflict. This makes the whole business of determining its impact and effects on labour law difficult to say the least.

Narratives

Such discordance aside, the core of New Economy discourse undoubtedly lies in the impact of new technologies — information and communications

16 See M Pittard, ‘International Labour Standards in Australia: Wages, Equal Pay, Leave and Termination of Employment’ (1994) *AJLL* 170.

17 This assertion is supported by a number of papers presented at the Melbourne conference but see especially B Moore, ‘The New Economy: Impacts on the Practice of Labour law’ and R McCallum, ‘Conflict of Laws and Labour Law in the New Economy’ (2003) *16 AJLL* 50.

18 The American Economic Report of the President 2001 (<http://w3.access.gpo.gov/usbudget/fy2002/pdf/2001_erp.pdf>) exemplifies perfectly both the descriptive and prescriptive deployment of New Economy discourse, forming both an account of and a series of arguments for the New Economy as a progressive development. See, too, the DTI White Paper, *Our Competitive Future — Building the Knowledge Driven Economy*, Department of Trade and Industry, London, 1998, for similar kinds of arguments in a UK context.

19 See, for example, a useful collection of essays on ‘The New Economy: Myth and Reality’, (April 2001) *52/11 Monthly Review* (special issue on the New Economy).

technologies in particular — on production and the resulting economic, social, and political consequences. At an economic level, such technologies are widely believed to have been radically transformative, generating new and highly competitive markets with broader catalytic effects on the industrial and financial landscape. Markets are more complex, dynamic, and widely dispersed and, with advances in information/communications technologies and the liberalisation of trade, currency and investment, potentially geographically boundless. Competition is intensified, stimulating innovation and rewarding entrepreneurship in a global context in which capital mobility is greatly enhanced. Productivity is increased, with economic growth accelerated and sustained, inflation kept low and levels of employment generally high.²⁰ The world of business and high finance is also reconfigured, with vast increase in corporate mergers, the rise in power and significance of transnational corporations, and a revival of the stock market in the wake of substantial speculation, particularly in new technology (dot-com) stocks.

At a social level, the New Economy is said to hold out much promise. At the heart of such promise is the ‘knowledge worker’, whose technical skills, adaptability, and capacity for innovative thinking are crucial components of New Economy entrepreneurship. As British Prime Minister Tony Blair observes:

Our success depends on how well we exploit our most valuable assets: our knowledge, skills, and creativity. These are the key to designing high-value goods and services and advanced business practices. They are at the heart of a modern, knowledge driven economy.²¹

This demand for knowledge workers is thought to be having a number of positive social effects. These include the restructuring of workplace relations along more egalitarian lines, sweeping away old managerial hierarchies unsuited to modern workplace needs, and increased investment in education and skills, providing people with more and better opportunities for self-fulfilment and self-realisation.²² Combined with the material benefits conferred by faster economic growth and a stable economy, the prospect of greater prosperity and higher living standards comes into view; and with it, greater freedom of choice, new opportunities for enhanced citizenship and participation, a cleaner environment, improved health and education and a raft of other desirable social gains:

We recognise that . . . technology and innovation are not ends in themselves but means to advance larger progressive goals: more individual choice and freedom,

20 For an account of this ‘virtual cycle of growth and innovation’ see American Economic Report of the President 2001, above n 18, Ch 1.

21 The Right Hon Tony Blair MP, Prime Minister, ‘Preface’, *Our Competitive Future*, above n 18. On the virtues of the knowledge worker, see also C Leadbeater, *Living on Thin Air: The New Economy*, Penguin, Hamondsworth, 2000.

22 *Ibid*, especially, Chs 5 and 6, 16 and 18.

new economic opportunities and higher living standards, greater dignity and autonomy for working Americans, stronger communities and wider citizenship participation in public life.²³

Thus, the New Economy is not simply viewed in narrow economic terms. It is widely regarded as a positive social development.

The social and economic benefits of the New Economy in turn generate a series of political imperatives which many western democratic governments, including Britain and the United States, have embraced. First and foremost is a commitment to free and flexible markets, including labour markets, and with it the policies of deregulation and flexibilisation with which we are all so familiar.²⁴ This is generally accompanied by a host of other competition-enhancing strategies designed to develop business capabilities, foster creative collaboration and partnership, and eliminate perceived obstacles to competition, for example, trade barriers and unfair competitive practices.²⁵ In addition, New Economy discourse has infiltrated and now threatens to dominate many government social agendas, with social policy objectives such as the eradication of poverty and the promotion of equality harnessed to an overarching economic norm of competitiveness. In this brave new world, there is little room for traditional state policies of redistribution based on high taxation and extensive welfare provision, both of which are widely perceived as anti-competitive,²⁶ particularly in a context where the nation-state is increasingly susceptible to global competitive pressures. The thrust of New Economy social policy now lies in creating the conditions for people to participate in and thereby benefit from productive activity, in particular through the deployment of social inclusion strategies designed to smooth the path to paid work for traditionally excluded groups.²⁷ To this end, political discourse has become heavily imbued with the rhetoric of citizenship with Robert Reich, for example, asserting that ‘the core economic responsibility of citizenship is to have a job and earn a wage’.²⁸ Participation in paid work is cast as a condition of citizenship (citizen-as-worker) while

23 Progressive Policy Institute (PPI), *Technology and New Economy Project*, summarised at <www.ppi.online.org>. The PPI is a ‘think-tank’ associated with the American Democratic Party.

24 On the development and application of these policies in an Australian context, see J Howe, ‘The Job Creation Function of the State: A New Subject for Labour Law’ (2001) 14 *AJLL* 242 at 245–51 and A Forsyth, ‘Reregulatory Tendencies in Australian and New Zealand Labour Law’, *JILL Forum*, Special Series No 14, March 2001, pp 2–5.

25 See, for example, *Our Competitive Future*, above n 18.

26 On the decline of traditional redistributive agendas, see K Klare, ‘The Horizons of Transformative Labour and Employment Law’ in Conaghan et al, above n 5, pp 8–10; and H Collins, ‘Is there A Third Way in Labour Law?’ in Conaghan et al, above n 5, pp 451–5. For a New Economy critique of the ‘post-war tax system’, see Leadbeater, above n 21, Ch 15.

27 See *ibid*, and also DSS, *Opportunities for All: Tackling Poverty and Social Exclusion*, UK Department of Social Security [now Work and Pensions] Cm 4445, September 1999. Social inclusion strategies are also at the heart of the EU *Social Agenda* Com (2000) 379 as well as informing aspects of Australian social policy: Howe, above n 24; and also A O’Donnell and C Arup, ‘Social Security and Labour Law: Constructing the Labour Market Subject’, CEJRL Working Paper No 24, 2001.

28 R Reich, *The Future of Success: Work and Life in the New Economy*, Vintage, London, 2002, p x.

notions of citizenship are simultaneously redeployed to elevate the normative status of the worker (worker-as-citizen) to that of equal ‘partner’ in the productive enterprise.²⁹

Counter Narratives

While New Economy enthusiasts are keen to ‘emphasise the positive’, painting an appealing picture of economic stability, social prosperity, and political progress, a series of counter narratives has emerged to challenge the hegemonic grip of this dominant portrayal.

First, a number of commentators question how *new* the New Economy really is. Efforts to liken recent economic developments to the Industrial Revolution or even to the impact of late nineteenth/early twentieth century technological developments (such as the advent of electricity and the motor car) are met with expressions of scepticism and assertions that less change has occurred than is generally thought.³⁰ Of course no one disputes that radical advances in information technology and communications have occurred, adding a new vibrancy and dynamism to markets in the technology and information sectors. It is the wider consequences of these developments that are questioned, particularly their allegedly favourable impact on productivity, growth, and economic stability.³¹ To a degree this sceptical stance is supported by recent economic developments, particularly in the United States, where the rosy glow of the New Economy is rapidly becoming superseded by gloomy pronouncements of recession.³² Similarly, confidence in the business stabilising effects of the New Economy have been shaken by the dramatic collapse of technology stocks in 2001, after a period of unrivalled stock market speculation (the so-called ‘millennium boom’).³³ Commentators further question the extent to which globalisation — in the form of new and increasingly interconnected markets which defy national boundaries — can be attributed to the New Economy, emphasising that capitalism is already ‘an

29 On citizenship, see L. Williams, ‘Beyond Labour Law’s Parochialism: A Re-envisioning of the Discourse of Distribution’ in Conaghan et al, above n 5, pp 106–13, and generally, L. Bosniak, ‘Critical Reflections on Citizenship as a Progressive Aspiration’ in Conaghan et al, above n 5, p 339. On the ‘partnership agenda’ in UK labour law, see, eg, S Wood, ‘From Voluntarism to Partnership: A Third Way Overview of the Public Policy Debate in British Industrial Relations’ in Collins et al, above n 6, p 111, and also Collins, above n 9.

30 Doug Henwood, American author, journalist, and business commentator, exemplifies this sceptical attitude. See ‘The New Economy and the Speculative Bubble: An Interview with Doug Henwood’ (April 2001) 52/11 *Monthly Review* 72, as well as his forthcoming book, *A New Economy?*, Verso, New York, 2003.

31 See the editors’ introduction to the special issue of *Monthly Review* (above n 19, at 1–15) for a rehearsal of the arguments against the supposed economic benefits of the New Economy.

32 This is highlighted by the sharp contrast in the opening remarks of the 2001 and 2002 *Economic Reports of the President*, the former opening with the pronouncement that ‘I am pleased to report that the American economy today is strong’ (2001, p 1), and the latter lamenting the fact that ‘the rate of economic growth has unacceptably deteriorated’ (2002, p 1), (<http://w3.access.gpo.gov/usbudget/fy2003/pdf/2002_crp.pdf>).

33 See R Brenner, *The Boom and the Bubble: The US in the World Economy*, Verso, New York, 2002; and, for his most recent assessment of the current perilous state of the American economy, see *ibid*, ‘Towards the Precipice’, 25/3 *London Rev of Books* 18 (6 February 2003).

international and internationalizing system'³⁴ and, that in any case, expansion in world trade remains largely confined to advanced industrial economies.³⁵ What is relatively undisputed, however, is the rise in power and prominence of multinational corporations and their increasing influence on global economic, political, and cultural developments.³⁶

The social benefits of the New Economy are also highly contested. Futuristic fantasies of technologically dominated and egalitarian workplaces, populated by independent, highly motivated and materially secure 'knowledge workers' have not emerged (at least outside the confines of Silicon Valley).³⁷ Rather, what is most striking about the modern world of work is the rise in contingent working arrangements, too often accompanied by declining working conditions and increased job insecurity.³⁸ It is questionable too whether the demand for knowledge workers — a key premise of the social and employment policies of many western governments — really exists. Recent evidence from the United Kingdom suggests that, during the 1990s, the highest growing areas of employment were in traditional low paid jobs in the service sector such as clerical and retail work, education, health, welfare, care and community work.³⁹ Similarly, despite policy initiatives to widen higher education, producing record numbers of graduates, evidence of an increased demand for graduate job applicants in the United Kingdom is thin on the ground.⁴⁰

There are additional grounds for scepticism about the social advantages of the New Economy. As is frequently pointed out, far from bringing new and unrivalled prosperity, the New Economy may be said to coincide with a period of growing material inequality, both within developed countries and between developed and developing countries. In Australia, for example, a country which, through the operation of a wage fixing system, has long enjoyed a comparatively even distribution of wealth,⁴¹ there is clear evidence of a widening income gap, reflecting similar trends of growing inequality in the

34 See Henwood interview, above n 30, at 73.

35 See, for example, P Hirst and G Thompson, *Globalization in Question: the International Economies and the Possibilities of Governance*, Polity Press, London, 1999.

36 See R Reich, *The Work of Nations*, Alfred Knopf, New York, 1991, charting the rise of multinationals and their implications for workplace relations. It would be wrong, however, to assume that domestic corporations have been totally eclipsed (see Murray, above n 14, pointing out the analytical and strategic errors that can arise from making this assumption in a labour law context).

37 American labour law scholar, Alan Hyde, has authored a number of essays on the 'high-velocity' labour markets of Silicon Valley, highlighting their departure from traditional norms and exploring the emancipatory potential of the regulatory models that are emerging; see, for example, 'A Closer Look at the Emerging Employment Laws of Silicon Valley's High-Velocity Labour Market' in Conaghan et al, above n 5, p 233; and see generally the work of A L Saxenian, particularly, *Regional Advantage: Culture and Competition in Silicon Valley*, Harvard University Press, Cambridge, Ma, 1996.

38 See ACIRRT, *Australia at Work*, Prentice Hall, Sydney, 1999, charting these changes in an Australian context, as well as R Owens, 'Decent Work for the Contingent Workforce in the New Economy' (2002) 15 *AJLL* 209.

39 See further R Taylor, *Britain's World of Work: Myths and Realities*, ESRC Future of Work Seminar Series, 2001.

40 See, for example, the comments of S Parker, 'Down the Brain Drain' in *The Guardian*, 14 August 2002, p 17, arguing that 'too many graduates are chasing too few high-skill jobs'.

41 Although the scope of equitable distribution may rightly be questioned; see R Hunter,

United States⁴² and the United Kingdom.⁴³ Nor can it easily be claimed that the New Economy has brought global benefits, certainly in terms of (in)equity of distribution.⁴⁴ Indeed, the ‘flipside’ of globalisation, viewed in terms of practical reality, might fairly be argued to include a global distributive shift from labour to capital and increased opportunities on the part of the first world to improve its material position at the expense of the third. Certainly, the scope and extent of world deprivation, highlighted, at the World Summit on Sustainable Development in Johannesburg in 2002, in which the vast majority of people still live without access to clean water,⁴⁵ seriously undermines claims that the New Economy is delivering benefits at a global level.

Finally, there are many who view the political implications of New Economy discourse with great suspicion if not outright hostility. The New Economy, it is argued, is a neo-liberal economy, with the same fiscal discipline and a host of market-privileging, anti-regulatory, union-bashing tendencies. It is the mere continuation of an ideological agenda which originated in the policies of political conservatives such as Reagan and Thatcher in the 1980s, and finds its modern expression in the seemingly more enlightened policies of post-millennium governments with social democratic credentials (most obviously typified by Britain’s New Labour).⁴⁶ Within this viewpoint, globalisation is reformulated as the exportation of neo-liberalism,⁴⁷ effecting a worldwide political convergence of neo-liberal ideology and institutions.⁴⁸ As financial bodies such as the IMF, the World Bank and OECD become deeply implicated in the political restructuring of developing countries and countries in economic transition,⁴⁹ thus ensuring the creation of favourable political conditions for free market activity, the New Economy emerges not as a natural phenomenon — no self-generating spontaneous economic miracle —

‘Women Workers and Federal Industrial Law: From *Harvester* to Comparable Worth’ (1988) 1 *AJLL* 147; R Owens, ‘The Traditional Labour Law Framework: A Critical Evaluation’ in Mitchell, above n 3, p 3.

42 Reich, above n 28, pp 101–4.

43 See J Hill, *Income and Wealth: the Latest Evidence*, Joseph Rowntree Foundation, 1998 (summarised at <<http://www.jrf.org.uk/knowledge/findings/socialpolicy/spr368.asp>>), reporting that income inequality in Britain is currently greater than at any time since the late 1940s.

44 On the rise of inequality worldwide in the context of a global shift in policy agendas from equality to poverty, see K Rittich, *Recharacterizing Restructuring: Law Distribution and Gender in Market Reform*, Kluwer Law International, The Hague, 2002, pp 263–82.

45 See WSSD, *A Framework for Water and Sanitation* (2002), stating that four out of five people worldwide live in conditions of water scarcity.

46 See, for example, K Ewing and J Hendy (Eds), *A Charter of Workers’ Rights*, Institute of Employment Rights, London, 2002, p 12.

47 Harry Arthurs has described globalisation as ‘a political system sometimes known as neo-liberalism’, above n 4, p 273.

48 There is considerable disagreement as to the extent to which such convergence has in fact occurred. See J L Campbell, ‘Convergence or Divergence? Globalization, Neoliberalism and Fiscal Policy in Postcommunist Europe’ in S Weber (Ed), *Globalization and the European Political Economy*, Columbia University Press, New York, 2001, p 107.

49 For an account of the global pressures exerted on postcommunist countries to adopt neo-liberal policies, see *ibid*, pp 113–15; and, for more detailed analysis, see M Lavigne, *The Economics of Transition: From Socialist Economy to Market Economy*, St Martin’s Press, New York, 1995, as well as Rittich, above n 44, focusing, in particular, on the gender implications of restructuring.

but rather a carefully manufactured political event, a considered strategy to extend the reach of neo-liberal tentacles to all parts of the world.

Further evidence of the New Economy's covert political identity is said to lie in the social policy it spawns, firmly endorsing the anti-distributive stance of earlier neo-liberal policy-makers. Indeed, it is viewed as highly ironic that redistribution is so thoroughly erased from political discourse just as national and global patterns of growing inequality might suggest a serious need for it.⁵⁰ Similarly, it is frequently noted that as conditions for workers deteriorate the political climate for active unions remains inhospitable⁵¹ with promises of industrial partnership sitting uncomfortably alongside market strategies which continue to privilege shareholder interests over those of workers.⁵²

Labour Law in the New Economy

My account so far has set out to demonstrate that there is no single New Economy narrative from which labour lawyers can easily draw. I now wish to explore this lack of narrative consistency and some of its myriad implications in a labour law context. In so doing, I will draw, inter alia, from my experience of and work with INTELL⁵³ and, in particular, from the recently published collection of INTELL essays, *Labour Law in an Era of Globalization*,⁵⁴ which, more than anything, is a sustained engagement with the narratives and counter-narratives of New Economy discourse, addressing in particular the troubling question of how the developments we are witnessing impact upon and might be harnessed to the advancement of progressive labour law agendas. It is striking, I think, that a group of labour lawyers hailing from all over the world should have come together, almost spontaneously, to consider,

50 K Rittich, 'Feminization and Contingency: Regulating the Stakes for Women' in Conaghan et al, above n 5, p 121.

51 In a UK context, it has recently been argued that New Economy rhetoric operates ideologically to 'reinforce intellectually an in-built hostility to organised labour and labour market regulation from some of those within the Labour Government, and explains the failure adequately to address the legacy of a de-regulated employment law inherited from the Conservative governments': Ewing and Hendy, above n 46, p 24.

52 S Konzelmann, 'Can "Real Partnership" in Employment Relations Survive?' 52/1 *Federation News* (GFTU/IER, Spring, 2002) 10. The adoption of a rhetoric of partnership in the context of employment relations tends to bring issues of corporate governance on to the labour law agenda, as is evident in current Australian labour law debate and exemplified by CELRL's ongoing research project on Employee Participation and Workplace Governance, CELRL Annual Report, 2001, p 20. For a radical approach to corporate governance reform arguing for the restructuring of private property (ie, share) rights, see P Ireland, 'From Amelioration to Transformation: Capitalism, the Market and Corporate Reform', in Conaghan et al, above n 5, p 197.

53 INTELL (International Network on Transformative Employment and Labour Law) began as a conference organised by US labour law scholar, Karl Klare, in Andover, Massachusetts, 1994. Attended by over 70 lawyers — scholars and practitioners — from all over the world, it was an amazingly productive meeting, signifying both the urgency and commonality of the concerns then preoccupying progressive labour law. Since then, INTELL participants have met regularly in diverse locations to pursue an agenda which links the kind of issues at the heart of New Economy discourse with a commitment to legal scholarship and practice which is broadly egalitarian and facilitative of the empowerment of subordinated groups.

54 Above n 5. Part of my brief at the Melbourne conference was to introduce INTELL concerns and scholarship to ALLA members. I hope, therefore, I may be forgiven for frequent references to a book of which I am co-editor.

under the mantle of INTELL, the questions posed by the changes attributed to the New Economy. It is striking too that while in many ways our experiences are very different, in others ways, they are all too familiar. This was also my experience when I set out to learn more about Australian labour law in preparation for the ALLA Inaugural Conference. There are many aspects of the Australian system which are different from that of the United Kingdom, for example, the central role traditionally played by the state in the collective representational process, and the presence of simultaneously operating federal and state regulations. There is also the Australian landscape, geographical location, and colonial history with its legacy of racism, all of which I found crucial to a proper understanding of the Australian labour law system. At the same time, while I learned much that was new, I was surprised too by the resonances, the extent to which, despite differences perhaps in political emphasis, the issues Australians currently confront are the same as or not dissimilar to those facing labour lawyers in the United Kingdom and elsewhere. There is clearly much to be gained from the international exchange of views, although it is also incredibly important to acknowledge and consider carefully the operative significance of the local.

Is there a new labour law to go with the New Economy? There is certainly a strong sense that things have radically changed.⁵⁵ We have witnessed a cross-national decline in influence and number of trade unions⁵⁶ and the widespread displacement of collectively-based regulatory strategies in favour of individual legal mechanisms of worker and employer redress.⁵⁷ We have watched traditional working arrangements in the form of full-time long-term employment in the manufacturing sector give way to a proliferation of contingent, non-standard forms of work, predominantly in the service sector.⁵⁸ We have charted the significant rise in the numbers of women engaged in paid labour, bringing with them a host of new concerns not typically falling within the purview of traditional labour law.⁵⁹ And we have noted a gradual shift in

55 Australian labour law literature reverberates with the theme of radical change and transition. See, in particular, A Forsyth, *Tradition and Change in Australian Labour Law*, Institute of Employment Rights, London, 1999, as well as many of the essays in Mitchell, above n 3.

56 In Australia, union density fell from 52% in 1962 to 35% in 1996 and falling (Forsyth, above n 55, p 12). In the United Kingdom, once boasting a tradition of strong unionisation, union density is currently hovering at about 28% (source: <www.tuc.org.uk>). In both contexts, the number of union members in the shrinking public sector is considerably more than in the expanding private sector.

57 A process, Forsyth and other commentators describe as 'decollectivization' (Forsyth, above n 24), signalled in particular by the introduction of Australian Workplace Agreements (Workplace Relations Act 1996 (Cth)). Similarly, in the 1980s and 1990s, collective bargaining in the United Kingdom increasingly gave way to individual contractual arrangements (W Brown, S Deakin, M Hudson, C Pratten and P Ryan, 'The Individualisation of Employment Contracts' EMAR Research Series No 4, DTI, London, 1999) and it remains to be seen how far the recently introduced statutory recognition procedure is likely to reverse the decollectivist trend. On the UK's new recognition procedures, see, in particular, K Ewing (Ed), *Employment Rights at Work: Reviewing the Employment Relations Act 1999*, Institute of Employment Rights, 2001, Chs 1 and 2.

58 See above n 38; but see also Ewing and Hendy, above n 46, pp 25–32 who warn against overstating the extent of labour market restructuring, particularly in terms of non-standard working arrangements.

59 Most notably issues of maternity/parental pay and leave; see, for example, *Valuing Parenthood: Options for Paid Maternity leave*, a discussion paper published by the

the focus of labour law scholars beyond the employment relation per se,⁶⁰ and beyond local agendas, that are nation state-based, towards international arenas of legal and political decision-making.⁶¹

At the heart of this sense of transition is the perceived collapse of classical labour law, understood in primarily *redistributive* terms, and the corresponding rise of an alternative regulatory agenda that is overridingly *economic*, concerning itself with goals such as allocative efficiency and the promotion of competitiveness. This is not to say that labour law until recently was not informed by economic objectives. Indeed, it is arguable that the system of labour law that emerged in industrialised countries in the twentieth century was the political and legal expression of an essentially Keynesian economic strategy and survived only as long as and to the extent that its economic underpinnings allowed.⁶² However, while it is true that labour regulation and economic policy have long been closely allied, the degree of intimacy has not always been rendered quite so explicit. Thus, in traditional labour law discourse, characterised, in particular, by the theoretical writings of Otto Kahn-Freund, the rhetorical justification for labour regulation was political not economic: it was the distribution of power between capital and labour that was the express focus, not the economic outcome of the exchange in which the parties were engaged.⁶³ From this perspective, it was the *justice* of the exchange that was labour law's purported concern, not its profitability. This in turn yielded a clear strategy — recently characterised by Karl Klare⁶⁴ as Countervailing Workers' Power or CVWP — for delivering on labour law's promise.

While it may rightly be questioned whether CVWP really *did* deliver justice for workers (as opposed merely to privileging the interests of some workers over those of others),⁶⁵ the discursive impact of this normative gloss cannot be denied. Labour law scholarship became imbued with an ethical/political dimension within which developments in the field were framed, considered,

Australian Federal Sex Discrimination Commissioner in 2002 (available at <www.hreoc.gov.au/sex_discrimination>). The potentially radical implications for traditional labour law of a woman-centred work agenda are discussed by J Conaghan in 'The Family-Friendly Workplace in Labour Law Discourse: Some Reflections on *London Underground v Edwards*', Collins et al, above n 6; see also Rittich, above n 50.

60 See, for example, P Gahan and R Mitchell, 'The Limits of Labour Law and the Necessity of Interdisciplinary Analysis', in Mitchell, above n 3, p 62, arguing for a conception of labour law in terms of labour market regulation, rather than simply the regulation of the employment relation: p 70.

61 Arthurs, above n 4. See also above n 13.

62 For a sustained account of post-war British labour law in these terms, see P Davies and M Freedland, *Labour Legislation and Public Policy*, Clarendon Press, Oxford, 1993. For similar arguments in an Australian context, see Howe, above n 24, at 245–7.

63 'The main object of labour law has always been, and I venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relation': O Kahn-Freund, *Labour and the Law*, Stevens, London, 1977, p 6.

64 Klare, above n 6. Klare describes CVWP as 'a particular regulatory strategy, namely, using law to reconstruct labour markets, so as to foster countervailing workers' power': pp 63–4. He goes on to assess CVWP's dubious success as a redistributive strategy.

65 *Ibid.* See also Owens and Hunter, above n 41; and J Conaghan, 'The Invisibility of Women in Labour Law: Gender-Neutrality in Model-Building' (1986) 14 *International J Sociology of Law* 377.

assessed, rejected, or embraced. In the United Kingdom this took the form of an almost religious deference to voluntarism — or collective laissez-faire to use Kahn-Freund's famous phrase — as the preferred mechanism for ensuring industrial peace and protecting workers' interests. In Australia, where, from the outset, the state was more directly involved in facilitating collective industrial relations,⁶⁶ it produced a conception of labour law that was strongly welfarist, deeply implicating labour law in the conferral of social rights and protections.⁶⁷

Thus, across the discipline, Kahn-Freund's famous maxim cast a progressive, liberal hue so much so that while labour law can be and often is politically repressive, labour law scholarship traditionally is not. Social justice and the empowerment of workers are the 'natural' concerns of labour law academics. Or were. Although continuing to figure as considerations, it can no longer be said that these concerns are at the forefront of current labour law debate. A new set of priorities, very different in nature and form, has emerged and it is this displacement of the 'object of affection', as much as anything that is at the heart of labour law's 'crisis of identity'.

For a time, labour law scholars struggled to make sense of the sea changes taking place around them, hampered, as Collins has rightly observed, by the parameters of the disciplinary frame they had constructed for themselves.⁶⁸ The neo-liberal assault on collective regulatory mechanisms in particular seemed almost to leave them without a subject.⁶⁹ What was the purpose of labour law, if not to facilitate collective industrial relations? How otherwise could it be understood and accounted for? There are reasons for thinking, along with Collins, that, painful though this may have been, this 'disintegration' of traditional labour law discourse was productive, even liberating, as it freed scholars from the limitations of a framework which bounded and, at times, distorted their thinking, particularly in relation to the needs of workers who failed to fit the traditional industrial paradigm.⁷⁰ At the same time, it left a normative vacuum, a purposelessness which existed uncomfortably alongside labour law's traditional sense of purpose, the idea of labour law as a vocation.

In this context, the emergence of a new narrative to fill the normative and interpretative gap, accounting both for the decline of the old and the shock of the new, is seductive. This narrative invests labour law with a role which is much more explicitly economic, in terms both of macro-economic

66 The Commonwealth Conciliation and Arbitration Act 1904 established the system of centralised wage bargaining which was to dominate Australian labour relations for most of the century.

67 Howe, above n 24.

68 Collins, above n 2.

69 See, for example, K Ewing, 'The Death of Labour Law' (1989) 8 *Oxford J Legal Studies* 293.

70 Collins, above n 2. Karl Klare has similarly remarked, 'Some labour lawyers lament the crisis in the discipline. Interrogating and rethinking the tradition may involve disorientation and loss, but opportunity and hope also wait down this path': above n 26, p 29. Feminists in particular have seized the opportunity to reassess labour law fundamentals. See, for example, Owens, above n 41 and J Conaghan, 'Feminism and Labour Law: Contesting the Terrain' in A Morris and T O'Donnell (Eds), *Feminist Perspectives on Employment Law*, Cavendish Publishing, London, 1999, p 13.

management and micro-efficiency considerations, but it also includes a social dimension in the promise of substantially increased opportunities to participate in paid work which is fulfilling and economically rewarding.⁷¹ The gist of this new narrative, neatly captured by Collins' phrase, 'regulating for competitiveness',⁷² is closely associated with New Economy discourse. It locates labour law at the centre of a range of national and global strategies to maintain and enhance economic competitiveness.

The discursive starting point here is the assertion that to survive and succeed in the New Global Economy businesses must be competitive. This in turn requires them to be flexible, dynamic, and creative, able to keep pace with technological change as well as respond rapidly to radical fluctuations in market demand. Businesses, too, must be productive and efficient in the deployment of their resources, including labour, unencumbered by burdensome regulation or high levels of taxation. The role of labour law in this context is the generation and maintenance of conditions in which competitive businesses can thrive. This requires, in particular, the institution and promotion of labour markets which are free from rigidities which inhibit competition and/or discourage efficiency, which might be thought to translate, in labour law terms, to the familiar neo-liberal agenda of deregulation.⁷³ However, just as visions of low-paid, insecure workers, in unsafe workplaces without adequate social or legal protection begin to come into view, New Economy discourse shifts our gaze: the object, it is argued, is not to render workers *vulnerable* but better to equip them for the new economic order by making them more *employable*, thereby enhancing their opportunities for success and fulfilment. Some years ago now, Collins suggested that labour law might usefully be deployed 'to advocate the establishment of patterns of employment which provide opportunities for secure, flexible, and properly remunerated work for everyone'.⁷⁴ More recently, Gahan and Mitchell have suggested that:

The principle purpose of labour market regulation is to regulate capital and labour for the broad purpose of maximising opportunity for employment, recognising that all forms of work are socially valuable, and providing a working environment and conditions of employment which are respectful of the preferences and needs of the participants.⁷⁵

These suggestions echo the aspirations of current, avowedly progressive, labour law initiatives in the United Kingdom:

Social justice and economic progress go hand and hand. Our goal is full employment with social inclusion so that everyone shares in the rising prosperity of the nation —

71 See, for example, the recent UK government discussion paper, *Full and Fulfilling Employment: Creating the Labour Market of the Future*, DTI, London, July 2002.

72 Collins, above n 9.

73 As has often been remarked by labour law commentators, 'deregulation' here is a misnomer because it describes a set of strategies which do not correspond to less state intervention but rather to a particular form of intervention, recently characterised by Anthony Forsyth in terms of three primary features: the pursuit of flexibility in labour relations, decentralisation (a movement away from national/industry-based regulation), and de-collectivisation (the individualisation of labour law); Forsyth, above n 24, pp 1–2.

74 Collins, above n 8, at 482.

75 Gahan and Mitchell, above n 60.

higher employment and higher productivity leading to higher incomes. People should have the opportunity of fulfilling, well-paid employment. Unemployment is a waste of human potential and a source of social exclusion, as well as a drain on the economy.⁷⁶

This then is labour law's new vocation.

From a public policy perspective, the realisation of these aspirations requires at least a three-pronged strategy: (1) greater investment in education and skills; (2) the removal, as far as possible, of labour market obstacles to employment; and (3) the institution of more flexible relations of production. As only (3) might properly be characterised as the traditional terrain of labour law, this new vocation demands a fundamental rethink both of labour law's traditional content and its parameters.⁷⁷ In particular, a focus on labour market regulation widens the boundaries of labour law as a discipline⁷⁸ to encompass spheres of regulation such as social security,⁷⁹ immigration,⁸⁰ tax,⁸¹ intellectual property (specifically the ownership of human assets),⁸² and, increasingly, the regulation and governance of corporations.⁸³

Even within traditional terrain, the outlook is arguably very different, with the primary interpretative apparatus hovering perpetually on the verge of collapse. Certainly, the concept of the contract of employment, described by Kahn-Freund as 'the cornerstone of the edifice', loses much of its explanatory power with the proliferation of non-standard working arrangements.⁸⁴ Additionally, the normative grip of the idea of the workplace as a bounded and

⁷⁶ *Full and Fulfilling Employment*, above n 71, p 2.

⁷⁷ For a theoretical overview of the shifting terrain which labour lawyers must currently negotiate, see Klare, above n 26.

⁷⁸ See C Arup, 'Labour Market Regulation as A Focus of Labour Law Discipline', in Mitchell, above n 3, p 29. The first sustained attempt to recast labour law in these terms is P Davies and M Freedland's, *Labour Law: Text and Materials*, London, Butterworths, 1984, discussed by Collins, above n 8.

⁷⁹ O'Donnell and Arup, above n 27. This is not to say that labour law and social security were not hitherto related; rather their interconnectedness was less apparent when viewed from a traditional labour law lens. In this context, Williams argues forcefully that 'any progressive transformation of labour law requires intense engagement with welfare law', above n 29, p 93.

⁸⁰ See here A O'Donnell and R Mitchell, 'Immigrant Law: The Regulatory Framework' (2001) 14 *AJLL* 306 for an analysis of the regulation of immigrant labour in Australia, simultaneously signifying the broadening of the discipline in the ways I am describing. On the implications of immigration policies for European labour law agendas, see B Caruso, 'Immigration Policies in Southern Europe: More State, Less Market?' in Conaghan et al, above n 5, p 299.

⁸¹ Taxation increasingly features as a prominent aspect of current UK employment policy. See, for example, *Full and Fulfilling Employment*, above n 71, especially Ch 4.

⁸² See here an interesting recent symposium in the *Connecticut Law Review*, including contributions from K Stone, 'Knowledge at Work: Disputes over the Ownership of Human Capital in the Changing Workplace' (2002) 34 *Conn L Rev* 721, and C Fisk, 'Reflections on the New Psychological Contract and the Ownership of Human Capital' (2002) 34 *Conn L Rev* 765.

⁸³ See above n 52; and Lord Wedderburn, 'Employees, Partnership and Company Law' (2002) 31 *ILJ* 99.

⁸⁴ Davies and Freedland, above n 7. Simon Deakin has recently offered a more upbeat analysis of the future of the contract of employment, emphasising its historical evolution and continued adaptability: Conaghan et al, above n 5, p 177.

self-contained sphere⁸⁵ within which, *inter alia*, the workforce can organise and collectively express their interests, has been seriously undermined by the emergence of ‘boundaryless workplaces’ in which workers pursue careers not employment and drift nomadically from job to job, dispensing with the need for a workplace in any traditional sense.⁸⁶ This breaching of the boundaries within which ‘work’ has been physically and conceptually confined seriously threatens the coherence of labour law as traditionally understood. In particular, as ‘work’ encroaches upon ‘life’, the encumbrances of ‘life’ appear to impact upon ‘work’ in new and unexpected ways, so much so that calls for a better ‘work/life balance’ raise interesting and, potentially, highly disruptive questions about what we understand as ‘work’ and ‘life’, at the same time highlighting the contingent and socially located nature of those understandings.

A central factor here is the increased participation of women, particularly those with young children or other caring responsibilities, in paid work. The difficulties which workers with caring responsibilities pose for employers is revealing of the extent to which businesses have traditionally relied upon a gender division of labour and the corresponding divorce of work from family concerns. Inevitably, the increasingly significant presence in paid work of workers whose responsibilities extend beyond financial provision for their families challenges the viability of divorcing work and family. This is particularly so in a political environment in which many governments are committed to the pursuit of social inclusion policies, that is, policies which seek to eliminate obstacles to paid work, including those which are a historical product of a particular economic model of the family that is no longer dominant. What is required is no less than the fundamental reassessment of many workplace assumptions, including the idea that family considerations are beyond the concerns of business. In labour law terms this translates into the raft of family-friendly initiatives pursued by the current UK government and evident to a growing extent in Australian employment policy.⁸⁷ But it also has ramifications for labour law discourse as a whole — for the ideas and categories through which labour law as a conceptual framework is constructed and represented — and these have been far from fully acknowledged. In particular, recognition that arrangements governing reproductive work (understood in broad terms to encompass the different kinds of caring work carried out in a family context) affect and, in turn, are affected by

85 Symbolised by the vast factories of the past; see D’Antona, above n 6, describing large factories as one of the four ‘pillars’ of traditional labour law (along with the nation-state, full-time employment and general representation through a union).

86 On the ‘boundaryless workplace’, see Stone, above n 10. For Stone, the ‘boundaryless workplace’ is the modern workplace in which the close bond between employer and worker has been severed by the demise of ‘the old psychological contract’. But the modern workplace is also, in simple, spatial terms, boundaryless or, at least less bounded. This is as a result, in particular, of advances in technology and communications which bring with them enhanced possibilities for working in a variety of different places — home, work, or even in transit: workplaces are ‘virtual’ now: see M Pittard, ‘The Disappearing Workplace: Implications of Electronic Work for Labour Law and practice’ (2003) 16 *AJLL* 69.

87 For a review of recent UK initiatives in the field of family-friendly policies, see J Conaghan, ‘Women, Work and Family: A British Revolution?’ in Conaghan, above n 5, p 53. On Australian initiatives, see above n 59.

arrangements governing productive (that is, market-based) work not only challenges the prevailing assumption that unpaid work is beyond the sphere of labour law, but calls into serious question the normative prioritising by labour law scholars and activists of the interests of paid over unpaid workers.⁸⁸ To put it another way, the participation in *paid* work of workers who also engage in significant amounts of *unpaid* work inescapably renders problematic any concept of work or labour which is limited to the productive sphere.

If new labour law narratives open up a host of questions about the proper scope and legitimate boundaries of the discipline so also do they trouble conventional assumptions about the merits and appropriateness of different regulatory *mechanisms*. Specifically, forms of regulation corresponding with traditional ‘command and control’ approaches are increasingly being displaced in favour of more flexible regulatory strategies.⁸⁹ Perhaps ironically, this is generating a revival of interest in contractual approaches to the employment relationship with both Collins and Stone arguing for broadly expressed contractual obligations as a means of maintaining flexibility in the employment relation while, at the same time, striking a fair balance between the interests of workers and employers.⁹⁰ This notion of mutuality is crucial and relates directly to the vocational dimension of the new labour law. As Collins and others emphasise, the kind of flexibility which modern employers require will more easily be facilitated by the provision of a ‘credible commitment to the workforce that this flexibility will not become vulnerable to opportunism, such as the intensification of work effort and the diminution of rewards’.⁹¹ The price of flexibility is fairness, and the job of labour law, it seems, is to deliver both. The risk of course is that the flexibility agenda will supersede any serious consideration of what fairness entails, in particular, by eroding *standards* of fairness in the interests of flexible work relations. Moreover, as long as fairness is formally included in the regulatory equation, its lack of substantive content can easily be overlooked. After all, once it is agreed that economic goals and justice considerations *can* coincide, it requires a very small shift in political and legal rhetoric to assert that they, in fact, do.⁹²

88 See further Rittich, above n 50, and Williams, above n 29.

89 Collins, above n 9. See also Collins et al, above n 6, in which regulation is the thematic focus of this collection of labour law essays.

90 Collins, above n 9 and Stone, above n 10. Collins argues for a range of regulatory mechanisms of which implied contractual terms are just one. For signs of a similar ‘renewal’ of contract in Australian labour law, see C Arup, ‘Labour Law as Regulation: Promises and Pitfalls’ (2001) 14 *AJLL* 229 at 232–3, and J Riley, ‘Mutual Trust and Good Faith: Can Private Law Guarantee Fair Dealings in the Workplace?’ (2003) 16 *AJLL* 28.

91 Collins, above n 9, at 46.

92 It is interesting here to note the rise of human rights rhetoric in British labour law debate, a product not only of the changing legal culture brought about by the Human Rights Act 1998 but also by the need, within progressive labour law discourse, to adopt a normative stance which cannot easily be subsumed within macro-economic agendas or made subject to trade-offs: see, for example, Ewing and Hendy, above n 46. The British human rights approach mirrors and draws legitimacy from the efforts of the ILO and other international organisations addressing the concerns of workers. In this sense, one can detect increasing interaction and interdependence between national and international labour movements and strategies. The question of whether a human rights approach — a departure from the traditional conception of labour as a collectivity rather than as individual rights-bearers — will adequately serve the interests of workers remains a live and increasingly pertinent one.

A final feature of new labour law is the discursive repositioning of the nation state within the terrain of international economic and political concerns. In this regard, the pursuit of competitiveness may be said simultaneously to enhance and diminish the role of the nation state. On the one hand, the nation-state is viewed as *limited* in its freedom to act, for example, by engaging in domestic redistributive policies which might reduce profit, undermine productivity, or limit flexibility; in other words, compromise competitiveness.⁹³ On the other hand, the nation-state is clearly very *active*; it is deeply implicated in rendering competitiveness norms operative, intervening to foster the conditions in which competition will thrive, through, in some cases, the radical and purposeful reconstruction of the industrial and political landscape, its institutional, legal, and ideological infrastructures.⁹⁴ Thus, it may be that the role of the nation-state in effecting the global changes attributed to the New Economy is significantly understated. This is certainly the view of Frances Raday who points out that while New Economy discourse might encourage us to view the widespread phenomenon of de-unionisation as a 'natural' product of economic and industrial change, concrete exploration of the experience of different countries reveals that domestic law is in fact crucial to the creation of conditions which are hostile to trade union organisation and activity.⁹⁵

This suggests that New Economy discourse can and often does effect intellectual and ideological closure by characterising concrete political choices in terms which present them as wholly compelled by circumstances. There is thus a serious risk that the current competitiveness agenda, even allied to desirable social goals, will yield a new labour law that is as limiting as its predecessor, simultaneously setting the terms of engagement by which it asserts itself to be bound. Perhaps then we should consider Collins' account of the productive disintegration of traditional labour law as a cautionary tale. Perhaps now is the time to heed his warning that 'it would be a mistake . . . to replace one dominating context with another . . . This step would merely replace one kind of deafness with another'.⁹⁶ Surely it is the job of labour law scholars to work to ensure that the multiplicity of discourses that disintegration has unleashed are not eclipsed by any new super-narrative, whether it be the New Economy, regulating for competitiveness, or anything else. This is not to argue against the New Economy or for a particular New Economy narrative. It is rather to emphasise that even reconstructive projects, such as that which might be said to characterise labour law at the moment, should be subject to the discipline of constant critical scrutiny and theoretical revision.

Nor is it wise, I think, to become overly enamoured of labour law's alleged vocation in the sense of an insistence that labour law be viewed through a

93 But see Dennis Davis, calling for a sceptical approach to claims that the nation-state is without room for manoeuvre in the pursuit of progressive labour policies or that protective labour laws necessarily produce deleterious economic consequences: 'Death of a Labour Lawyer?' in Conaghan et al, above n 5, p 159.

94 See here in particular Rittich, above n 44.

95 F Raday, 'The Decline of Union Power: Structural Inevitability or Policy Choice' in Conaghan et al, above n 5, p 353.

96 Collins, above n 2, at 308.

single, privileged, normative lens. It is more important to recognise it as a sphere of contestable and hotly contested norms. Because labour law concerns activities which are crucial to our material, psychological, and moral well-being, and because it directly and significantly affects the allocation of power and resources in that context, it is inextricable from considerations of social justice, equality, dignity, and human flourishing while by no means delivering a single, authoritative view of their content and scope. Norms and aspirations will always be at the forefront of labour law debate because work is at the heart of what we do and, therefore, what we are. Moreover, if labour law must have a vocation, it should at least be one which recognises this in terms which envisage a world of work extending far beyond the limited arena currently occupied by labour lawyers.

This point is made most clearly by Rosemary Owens who, in a recently published paper initially presented at the ALLA inaugural conference, drew upon the ILO concept of 'decent work'⁹⁷ to call for 'a much broader, richer and more complex understanding of *all* work relations'.⁹⁸ Owens emphasises that the notion of decent work that the ILO has embraced 'traverses territory far more diverse than traditionally considered the domain of labour, employment and industrial relations',⁹⁹ to include, *inter alia*, recognition of forms of productive activity beyond the paid work arena. This requires an even greater openness within labour law scholarship to questions pertaining to the scope and the parameters of the discipline. It demands of them a readiness to reassess and, where necessary, discard old orthodoxies, to shed allegiances to concepts and traditions which perpetuate the hierarchy of paid over unpaid work in labour law discourse and forestall recognition of their intimate connection and interdependence. Above all, it requires a willingness, among labour lawyers, labour activists, and policy-makers, to take the concept of decent work seriously, not as a rhetorical justification for positions already formed, stances assumed, or interests identified and protected without it in mind, but rather as a progressive critical tool for assessing, scrutinising, and — who knows — maybe even transforming the legal, political, and normative terrain we currently understand as labour law.

97 See, in particular, International Labour Office, Report of the Director-General, *Decent Work*, International Labour Conference 87th Session, Geneva, 1999; and International Labour Office, Report of the Director-General, *Reducing the Decent Work Deficit — a Global Challenge Report I(A)*, International Labour Conference, 89th Session, Geneva, 2001, in which the Director-General observes:

The goal of decent work is best expressed through the eyes of people. It is about your job and future prospects; about your working conditions; about balancing work and family life, putting your kids through school or getting them out of child labour. It is about gender equality, equal recognition, and enabling women to make choices and take control of their lives. It is about your personal abilities to compete in the market place, keep up with new technological skills and remain healthy. It is about developing your entrepreneurial skills, about receiving a fair share of the wealth that you have helped to create and not being discriminated against; it is about having a voice in your workplace and your community. In the most extreme situations it is about moving from subsistence to existence. For many, it is the primary route out of poverty. For many more, it is about realizing personal aspirations in their daily existence and about solidarity with others. And everywhere, and for everybody, decent work is about securing human dignity.

98 Owens, above n 38, at 214.

99 *Ibid.*, at 8.