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ENRON AND ONE.TEL:
EMPLOYEE ENTITLEMENTS AFTER
EMPLOYER INSOLVENCY IN THE
UNITED STATES AND AUSTRALIA
(AUSTRALIAN RENEGADES CHAMPIONING
THE AMERICAN DREAM?)

*Louise W. Floyd**

*Enron 401(k) Chief Defends Handling of Plan, Discloses He Sold
Stock in June*

—*The Wall Street Journal*, February 8, 2002.¹

Scandal of unpaid workers—The One.Tel Meltdown

—*The Australian*, June 6, 2001.²

LARGE-scale corporate collapse is, sadly, a familiar problem in the United States and Australia. The issues raised by such calamities, in terms of corporate governance and accounting standards, are being addressed by articles in the fall edition of this journal that deal with

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1. Kathy Chen, *Enron 401(k) Chief Defends Handling of Plan, Discloses He Sold Stock in June*, WALL ST. J., Feb. 8, 2002, at A5.

2. Duncan Macfarlane et al., *Scandal of Unpaid Workers—The One.Tel Meltdown*, AUSTRALIAN, June 6, 2001, at 1.

the Sarbanes-Oxley Act of 2002.³ This paper deals with the further, equally important part of the tragedy of corporate insolvency—the losses to workers of not just their jobs, but their unpaid wage and holiday entitlements as well as their retirement savings.

This article is structured in three parts: Part I introduces the types of labour systems that exist in the United States and Australia; Part II discusses the application of the law as analysed through case studies of the “cause celebre”—America’s Enron and Australia’s One.Tel; and Part III discusses the current law reform measures being debated and pursued.

It is to the latter debate that this article seeks to contribute. The basic argument is that the United States should adopt strong regulations to protect workers in the event of insolvency. Such regulations already exist in Australia in acknowledgment that workers are often the blameless victims of insolvency and are the least able to absorb the types of losses described above. Australia and the United States have traditionally adopted different approaches to labour law. Australia is collectivist and acknowledges a role for government intervention; the United States favours individualism and freedom from regulation. However, through a study of the Enron and One.Tel collapses, it is argued that the Australian approach, although different from the American stance, offers options that could be adapted for the United States. Such adaptations would protect U.S. workers, who are pursuing the mythical American dream,⁴ from alleged white collar criminals, who are not. This article concludes by alluding to the fact that robust worker protections are not uniquely Australian, but either exist or are being adopted in Great Britain, the European Union, and Canada. In short, strong regulation is not antithetical to the American experience and would make American law more in keeping with the international community.

I. NATIONAL APPROACHES

A. THE AMERICAN AND AUSTRALIAN SYSTEMS: A CONTRAST OF INDIVIDUALISM AND COLLECTIVISM?⁵

1. *United States: Individualism and Freedom*

a. The System

There are certain unionised “pockets” of the American labour force. They participate in what is essentially a collective bargaining system in

3. For similar articles dealing with Australian reform, see John H. Farrar, *Corporate Group Insolvencies, Reform and the United States Experience*, 8 *INSOLVENCY L.J.* 148 (2000); and Celia Hammond, *Insolvent Companies and Employees: The Government’s Year 2000 Solutions*, 8 *INSOLVENCY L.J.* 86 (2000).

4. While the notion of the American dream surely means different things to different people, it almost goes without saying that a part of the dream is realised through reward for individual talent and effort.

5. The author accepts that no culture is monolithic, but merely notes that there is a basic trend of individuality and collectivism in the American and Australian systems, respectively.

which the parties bargain with each other for collective agreements. Within that framework is the National Labor Relations Board, which considers alleged unfair labor practices and questions as to the rights of trade union representation. There is a duty to bargain in good faith and once a collective agreement is in place, it may provide for enforcement by way of arbitration on matters arising *out of* the collective agreement.

However, the emphasis of U.S. industrial relations increasingly turns to specialist employment law statutes, for example, the Employee Retirement Income Security Act (ERISA)—which, as the name suggests, deals with retirement benefits law.⁶ As will be noted throughout this article, ERISA governs 401(k) plans, which place the responsibility for investment decisions on the individual employee.

The further interesting aspect of the American system is the notion of “employment at will”—the idea that employment may be terminated at the behest of the employer, not necessarily with lengthy notice or reasons.⁷ In contrast, the International Labour Organization’s (ILO) Termination of Employment Convention promotes legislation prescribing fair notice and warnings.⁸

b. Rationale for the System

History

Hardin and Higgins, in *The Developing Labor Law*, undertake a breathtaking analysis of American labour law.⁹ They note that organised labour in the United States had a difficult development.¹⁰ Many early court decisions limited union activities and many early strikes were violent.¹¹ When protection and promotion of unionism did emerge in the form of the National Labor Relations Act (Wagner Act),¹² it was due to historical factors—the advent of the New Deal designed to overcome the effects of the Great Depression.¹³ Collectivism was not something embraced at the start of the American nation. Likewise, curtailment of the

6. Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* (1974).

7. There are exceptions to employment at will, such as academic tenure, but the concept is an interesting feature of U.S. employment law.

8. See generally Convention Concerning Termination of Employment at the Initiative of the Employer, June 22, 1982, International Labour Organization Convention No. 158, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C158> (last visited Mar. 27, 2003). This Convention has never been ratified by the United States. See International Labour Organization, List of Ratifications of International Labour Conventions: United States, available at <http://webfusion.ilo.org/public/db/standards/normes/appl/ Appl-byCtry.cfm?hdoff=1&CTYCHOICE=0610> (last visited Mar. 27, 2003). (The United States has ratified fourteen ILO conventions, twelve of which have entered into force.)

9. 1 *THE DEVELOPING LABOR LAW* (Patrick Hardin & John E. Higgins, Jr. eds., 4th ed. 2001).

10. 1 *id.* at 3-70.

11. See, e.g., 1 *id.* (discussing *In re Debs*, 158 U.S. 564 (1895)).

12. National Labor Relations Act (Wagner Act), 29 U.S.C. § 151 *et seq.* (1998). This statute established the National Labor Relations Board and gave employees the right to unionise.

13. See 1 *THE DEVELOPING LABOR LAW*, *supra* note 9, at 24. Basically, economists thought the low spending power of workers would prolong the effects of the Depression.

Wagner Act came only twelve years later with the passage of the Taft-Hartley Act.¹⁴

In a similar vein, Loewenberg reflects on U.S. labour laws in these terms:

Although the passage of the National Labor Relations Act was a watershed in the labor relations policy of the United States and provided a legal basis for unions' organising and bargaining activity, the basic idea of free collective bargaining remained unchanged. In the all-important area of impasses, the economic strike was still regarded as the appropriate method to determine superior bargaining power and hence outcomes. The National Labor Relations Act, therefore, did little to disturb the underlying notion that the parties in collective bargaining were equal in power, independent of other areas of society, and free to work out their own agreement within the framework of the law.¹⁵

National Character

In the preface to his book, *People of Paradox*, Michael Kammen makes the observation that:

For quite some time now, and particularly during the past twenty-five years, many books about American culture and character have been published. Some of them are extremely perceptive and interesting; others naïve or foolish; and most of them tend to confirm Jacques Barzun's observation that "of all the books that no one can write, those about nations and national character are the most impossible."¹⁶

In this Australian author's first foray into U.S. publishing, it is hardly appropriate for her to preach to an American audience about their own national character. May it simply be suggested that America is individualistic and cherishes freedom.

This ideal has flowed from *The Declaration of Independence* on July 4, 1776, in which Thomas Jefferson referred to the British Government of the day as a "Tyrant . . . unfit to be the ruler of a free people,"¹⁷ to the Gettysburg Address in 1863, where Abraham Lincoln referred to "a new nation, conceived in Liberty, and dedicated to the proposition that all

14. 1 *id.* at 19, 35 (discussing the Labor Management Relations Act (Taft-Hartley Act) 29 U.S.C. §§ 141-144 (1998)). The authors then go on to discuss the subsequent legislation, such as the Landrum-Griffin Act (1958). The combined effect of these statutes was to limit the right to strike, monitor trade union practices (not just employer practices), and allow freedom to refrain from joining union actions (not simply freedom to join). These changes have been attributed to alleged union abuse of the power they gained under the Wagner Act, as well as through ideological pursuits.

15. J. Joseph Loewenberg, *Compulsory Arbitration in the United States, in COMPULSORY ARBITRATION: AN INTERNATIONAL COMPARISON* 141-42 (J. Joseph Loewenberg ed., 1976). There is some capacity for voluntary conciliation at impasse, but no wide recourse to, for example, compulsory arbitration.

16. MICHAEL KAMMEN, *PEOPLE OF PARADOX: AN INQUIRY CONCERNING THE ORIGINS OF AMERICAN CIVILIZATION* xi (1972).

17. THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776).

men are created equal.”¹⁸

Judgments of the Supreme Court of the United States, such as *Lochner v. New York*,¹⁹ are interesting in this context. Although that case no longer stands as good law,²⁰ the colourful language of the judgment exemplifies the passion with which freedom of contract, as opposed to regulation, has been embraced at various times in U.S. labor law. In finding invalid a law which sought to regulate the hours of work in a bakery on health grounds, the Court pronounced:

The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution The right to purchase or sell labor is part of the liberty protected by this amendment

. . . .
It is a question of which of two powers or rights shall prevail—the power of the State to legislate or the right of the individual to liberty of person and freedom of contract

. . . .
. . . *the protection of the Federal Constitution from undue interference with liberty of person and freedom of contract is visionary [Without it, n]ot only the hours of employees, but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, lest the fighting strength of the State be impaired.*²¹

As noted earlier, there are, indeed, now statutes such as ERISA that, for example, offer some regulation of employees’ retirement benefits. But, even then, this author hastens to re-emphasise that the 401(k) plans governed by that statute emphasise the employee’s *individual* investment decisions. Further, collective bargaining and employment at will leave much responsibility for the terms of the employment relationship to the *parties themselves*.

2. *Australia: Collectivism and Egalitarianism*

a. The System

For the first eighty years of the twentieth century, the Australian system was based on the compulsory conciliation and arbitration of industrial disputes. In other words, large representative bodies of unions and employer organisations would represent their constituents before a central third-party “umpire” of sorts—an industrial commission—which would attempt to mediate disputes (conciliation) or arbitrate, if mediation proved unsuccessful. The result of arbitration was an award that

18. President Abraham Lincoln, Address at the Dedication of the Cemetery at Gettysburg (Nov. 19, 1863).

19. *Lochner v. Nork York*, 198 U.S. 45 (1905).

20. See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

21. *Lochner*, 198 U.S. at 53, 57-58 (emphasis added).

would set out the terms and conditions of employment to operate between the parties before the Commission. In the making of such award, the Commission would take into account the national (economic) interest—questions were asked, for example, as to what effect the award would have on future employment opportunities.

While awards were meant to be specific to a particular dispute, over time the Commission used its own decisions as precedents for other disputes within an industry, resulting in the emergence of industry-wide standards. There were “test cases,” for example, the *Termination, Change and Redundancy (TCR) Case*,²² which established certain entitlements to redundancy pay (namely, up to eight weeks pay, depending on length of service) in acknowledgement that the worker loses their job through no fault of their own; and requires compensation for disruption to their career.

Obviously, times have changed greatly since the start of last century— instantaneous communication and the emergence of global competition require businesses to respond quickly to problems and to compete with the world’s best practice. The consequent need for flexibility within business is acknowledged in the main Australian legislation, the Workplace Relations Act of 1996.²³ This statute furthers decentralisation within Australian labour law—a greater capacity now resting with employers to strike enterprise-based agreements, which acknowledge particular business concerns, and individual agreements.

However, despite the move towards decentralisation, basic social safety nets—of the type outlined above—remain, and below them, no bargain should be struck.²⁴ Australia also has reasonable levels of compliance with ILO conventions as demonstrated by Australia’s unfair dismissal laws.²⁵

22. AUSTRALIAN CONCILIATION AND ARBITRATION COMMISSION, *TERMINATION, CHANGE AND REDUNDANCY CASE*, Print F6230 (1984).

23. Workplace Relations Act, 1996 (Austl.).

24. See Louise W. Floyd, *Workplace Relations: Employment Labour & Industrial Law*, in CLIVE TURNER, *AUSTRALIAN COMMERCIAL LAW* (24th ed. 2002). Obviously, the evolution of the Australian system, particularly decentralization, has been greatly simplified. For further reading, see BREEN CREIGHTON & ANDREW STEWART, *LABOUR LAW: AN INTRODUCTION* (3d ed. 2000). The strength of the safety nets has been considered by, for example, Omar Merlo, *Flexibility and Stretching Rights: The No Disadvantage Test in Enterprise Bargaining*, 13 *AUSTRALIAN J. LAB. L.* 207 (2000). The declining strength of Australian trade unions and the role that plays on worker protection has been considered by Louise W. Floyd, *Weipa and the Wharves: Australian Strike Law and Its Effects on Trade Union Power*, 18 *U. TASMANIA L. REV.* 65 (1999), and M. Vranken, *Labour Law Deregulation and the Australian Workplace Relations Act 1996*, in *LABOUR LAW AND INDUSTRIAL RELATIONS AT THE TURN OF THE CENTURY* 823 (Chris Engels ed., 1998). For specific sections of the Workplace Relations Act of 1996 relevant to decentralisation and basic safety nets, see, for example, sections 3, 88A, 170LT, and 170XA. See also AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION, *ACCOMMODATION, HOTELS, RESORTS, AND GAMING AWARD*, Decision 1533/97 M Print P7500 (1997), available at <http://www.osiris.gov.au>.

25. See Workplace Relations Act, 1996, pt. VIA, div. 3 (Austl.). See also International Labour Organization, *List of Ratifications of International Labour Conventions: Australia*, available at <http://webfusion.ilo.org/public/db/standards/normes/appl/appl-byCtry.cfm?cty>

b. Rationale for the System²⁶*History*

The system was created by the Conciliation and Arbitration Act of 1904.²⁷ That legislation was enacted after trade unions had engaged in a series of bloody and violent strikes across the country during the adverse economic conditions of the late 1890s. Although those strikes failed, the fracas and social dislocation they caused prompted even conservative voters to urge the government to adopt a system of peaceful industrial dispute resolution. Without such a system, how could investment in the fledgling Australian nation come to be?²⁸

The Australians were aware that such a system of compulsory arbitration had been rejected in the United States.²⁹ There, it was regarded as “antithetical to democratic ideals and practices.”³⁰ It was viewed as forcing the will of the State on freely negotiating parties, hence undermining collective bargaining, which the Americans believed worked effectively.³¹ *The Australians were not anti-American*, but to the Australians, the American system had problems of its own.³² Unfettered bargaining was said to risk elevating the strength of the bargaining parties above the justice of the issue at the heart of the dispute. In the Second Reading of the Bill to the Australian House of Representatives, then Attorney General, Sir Alfred Deakin, proclaimed:

This Bill marks, in my opinion, the beginning of a new phase of civilization. It begins the establishment of the People's Peace, under which the conduct of industrial affairs . . . may be guided Hitherto, there has been but one method of dealing with strikes and lock-outs, and one inevitable result. The strongest party has always prevailed. The cause was not in question; the matter of dispute was

choice=0040 (last visited Mar. 27, 2003) (Australia has ratified fifty-seven ILO conventions, forty-eight of which have entered into force.).

26. Materials in this subsection derive from Louise W. Floyd, *Glass Houses and Rock Solid Guarantees—Worker Protection in Australian Labour Law* (unpublished work-in-progress Ph.D. thesis, University of Sydney) (on file with author). Such work was presented to the year 2001 Legal Research Two and Three classes at the University of Sydney Law School for critical review. The author thanks the students in those classes for their feedback; the academics who took those classes—Professors Terry Carney and Hilary Astor; and, of course, her Ph.D. supervisor, Professor Ron McCallum.

27. Conciliation and Arbitration Act, 1904 (Austl.).

28. The historical background to the adoption of the arbitration system has been well documented. See *THE FOUNDATIONS OF ARBITRATION: THE ORIGINS AND EFFECTS OF STATE COMPULSORY ARBITRATION 1890-1914* (S. McIntyre & R. Mitchell eds., 1989) [hereinafter *FOUNDATIONS OF ARBITRATION*].

29. As noted by Loewenberg, compulsory arbitration has only been adopted in the United States in limited circumstances, for example, as a special measure to deal with a crisis such as war. Loewenberg, *supra* note 15, at 141-42.

30. *Id.* at xiii.

31. See *supra* notes 29-30.

32. In fact, in Parliamentary Debate before the Australian House of Representatives, a number of members praised the American people and their enterprising nature. See, e.g., SIR ALFRED DEAKIN, *CONCILIATION AND ARBITRATION ACT OF 1904*, HOUSE OF REPRESENTATIVES, 15 COMMONWEALTH OF AUSTRALIA PARLIAMENTARY DEBATES 2868 (July 30, 1903).

not weighed. Give to one side numbers and means now, and it wins. The cause counts for nothing; power counts for everything; might makes right. Under the new system—and here is the revolution—a different aim will operate. Might is not to make right. But, as soon as it can be discerned and determined, right is to make might.³³

The Australians acknowledged that in the United States it was some unions, rather than some employers, who had become autocratic in the pursuit of their ends.³⁴ Thus, Deakin noted that arbitration was to apply equally to employers and unions to find peaceful and fair resolution of conflict.³⁵ Deakin also reflected on the need to allow for the free operation of business and the development of Australian trade. Significantly, though, he believed that such goals cannot be meaningfully attained through the exploitation of others. In other words, the Australians saw social justice and business efficacy as mutually supportive, not mutually exclusive goals. To use Deakin's words, "[p]ermanent prosperity can only be based upon institutions which are cemented by social justice."³⁶ The arbitration commission was to operate free from dogma or dictation; its judgments were to be confined to the facts and the merits of any given case. It was not to be rigidly controlled by Parliament, nor was it to interfere too much in the operations of business or the relationship between the parties. It had as its only direction the requirement that "in the hearing and determination of every industrial dispute the court shall act according to equity, good conscience and the substantial merits of the case."³⁷

National Character

That such a system should be adopted in Australia owes much to the character of its people. As Walker noted in his analysis of Australian arbitration, the working men who built up Australian trade unions drew on their often bitter experience in Britain.³⁸ Some of them had been forcibly deported for illegal combination. Others had taken part in radical activities: Irish rebels, participants in the chartist revolt, and other dissi-

33. *Id.* at 2864.

34. REID, CONCILIATION AND ARBITRATION ACT OF 1904, HOUSE OF REPRESENTATIVES, 15 COMMONWEALTH OF AUSTRALIA PARLIAMENTARY DEBATES 3186 (Aug. 6, 1903).

35. SIR ALFRED DEAKIN, CONCILIATION AND ARBITRATION ACT OF 1904, HOUSE OF REPRESENTATIVES, 15 COMMONWEALTH OF AUSTRALIA PARLIAMENTARY DEBATES 2870 (July 30, 1903).

36. *Id.* at 2868. The language has a strong human rights bent, noting that Australia "did not desire" to become like Ancient Egypt, where the might of the pyramids was built off the "abject misery . . . of the masses." *Id.* There is a vision for the type of egalitarian society that he wants Australia to become. However, the surrounding passages of the speech do note an acknowledgment of the needs of business and enterprise, so it is submitted the speech notes the mutual dependence of business and humanitarian prosperity—it is not merely a motherhood statement.

37. *Id.* at 2870.

38. Kenneth F. Walker, *Compulsory Arbitration in Australia*, in COMPULSORY ARBITRATION, *supra* note 15, at 2.

dents. "Trade union organisation was a natural growth among such a population, many of whom were sympathetic to wider social reform."³⁹ Further, the people were pragmatic—and arbitration was a practical attempt to gain peace.⁴⁰

While all these factors came to bear on the shaping of the Australian system at the turn of the twentieth century, Australia's egalitarian spirit came to imbue many aspects of the country's working life as well as the kaleidoscope of fundamental institutions that formed its government. The speeches emblematic of Australia's two political parties—both right wing and left wing—went on to provide a looking glass for this approach.

A radio address by Sir Robert Menzies in 1942 outlined his views for social policy. These views later became the foundation of conservative Australian politics and a plea to nurture endeavours of the burgeoning middle class. Yet, interestingly, they accepted a role for Government intervention:

If the new world is to be a world of men we must be not pallid and bloodless ghosts, but a community of people whose motto shall be, "*To strive, to seek, to find, and not to yield.*" *Individual enterprise must drive us forward. That does not mean that we are to return to the old and selfish notions of laissez faire. The functions of the State will be much more than merely keeping the ring within which the competitors will fight. Our social and industrial obligations will be increased. There will be more law, not less; more control, not less.* But what really happens to us will depend on how many people we have who are of the great and sober and dynamic middle-class—the strivers, the planners, the ambitious ones. We shall destroy them at our peril.⁴¹

Perhaps unsurprisingly, the signature speech of the left-wing, union-based, Australian Labour Party also championed the need for the State to protect the weakest members of the community. On November 14, 1949, Prime Minister J.B. Chifley gave his address, *The Light on the Hill*:

We affirm for every man the right to receive a fair return for his labour, enterprise, and initiative. But we do say that it is the duty and the responsibility of the community, and particularly those more fortunately placed, to see that our less fortunate fellow citizens are protected from those shafts of fate which leave them helpless and without hope. That is the objective for which we are striving. It is . . . the beacon, the light on the hill, to which our eyes are always turned and to which our efforts are always directed.⁴²

39. *Id.*

40. *Id.* at 3; see also FOUNDATIONS OF ARBITRATION, *supra* note 28.

41. Sir Robert Menzies (Radio broadcast, May 22, 1942), reprinted in THE FORGOTTEN PEOPLE (Angus & Robertson 1943) (emphasis added).

42. Prime Minister J.B. Chifley, *The Light on the Hill*, Address at the Australian Labour Party Campaign Launch (Nov. 14, 1949). The author is indebted to Roslyn Russell, who organised the 1999 "Going My Way" Exhibition in Old Parliament House, Canberra, Australia, for her cooperation in the provision of this extract from Chifley's speech.

II. CASE STUDIES

A. ENRON: UNITED STATES

1. *The Problem of Enron*

In the years 2000-2001, Enron's stock price rose as high as \$90 per share and it was ranked as the seventh largest company (based on revenue) in "The Fortune 500."⁴³ Later, in 2001, Enron declared a loss of \$618 million⁴⁴ and restated its annual financial statements for the previous four years.⁴⁵ Consequently, the stock price dropped to almost nothing and the corporation collapsed by 2002.⁴⁶ Enron's employees lost their jobs and their retirement benefits, which had been invested heavily in company stock.

Some of the various employee lawsuits that have arisen concerning Enron are detailed below. The main complaint arises in pension law.⁴⁷ It alleges that the total amount of loss to the employee retirement savings plan members was \$1.3 billion (U.S. dollars), representing more than 62% of the total asset value of all investments in the Enron Savings Plan, and that such loss stemmed from breaches of duty by Enron fiduciaries.⁴⁸

According to the complaint, the story of the rise and fall of Enron hinges on the alleged use of "special purpose entities" (SPEs) and breaches of U.S. accounting standards by the company, its accountants, and other advisors.⁴⁹ Simply put, the complaint alleges that Enron and its board had extremely close links with its accountants and lawyers—all of whom were being paid millions in fees by Enron. Together, they were able to "hide" corporate losses in off-the-books SPEs to make the company appear more profitable than it was.⁵⁰ The profits that were reported to the Government and public were inflated, and the financial reports, although certified as correct by the accountants/auditors, were in breach of U.S. accounting standards.⁵¹ While painting a "glowing picture" of Enron's future, the directors, who knew of the inner workings of the company, were selling their own stock.⁵² When the stock price finally crashed, the directors had predominantly sold out of the company, yet they changed the administrator of the Savings Plan, which caused a lockdown and prevented the employees from selling their Enron stock.⁵³

43. First Consolidated and Amended Complaint at para. 199, *Tittle v. Enron Corp.* (S.D. Tex. 2002) (No. H 01-3913) [hereinafter *Tittle Complaint*], available at <http://enron.erisa.com/complaint.html> (last visited Mar. 8, 2003).

44. *Id.* para. 274.

45. *Id.* para. 15.

46. *Id.* para. 23.

47. *See id.*

48. *Id.* at paras. 10, 273.

49. *Id.* paras. 133-138, 149-156, 199-203.

50. *Id.*

51. *Id.* paras. 205-239.

52. *Id.* paras. 64-94, 137, 207, 240-273, 276.

53. *Id.* paras. 64, 137, 256, 276.

2. Legal Action

Under section 507 of the U.S. Bankruptcy Code, employees take what is owed to them (by way of unpaid wages and the like) only *after* secured creditors have been paid and administrative expenses satisfied;⁵⁴ and their entitlements are subject to a *ceiling* of \$2,000.⁵⁵ However, Epstein notes, “most employees will not [even] get \$2,000” as, in the typical bankruptcy, most of the limited funds available will have already been used on meeting the (aforementioned) prioritised claims.⁵⁶ Although there are reasons for this situation—the existence of security for certain debts and the necessity of facilitating the administration of the bankrupt estate—the employees of Enron were obliged to take action, themselves, to secure some of the wage and retirement funds they had lost.⁵⁷ These actions included bankruptcy proceedings and employee benefits claims. In the bankruptcy proceedings, it was argued that severance pay was payable under a binding severance plan. It was alternatively argued that such funds, along with wages and vacation pay, were an administrative expense of the bankruptcy and, therefore, entitled to preference.⁵⁸ In the action regarding employee benefits claims, it was alleged that the administrators of the Enron 401(k) Savings Plan breached their fiduciary duty.⁵⁹

a. Bankruptcy Claim⁶⁰

The Bankruptcy Court appointed a committee to represent the interests of the former employees and, subsequently, the AFL-CIO was able to intervene in the matter. The document at the centre of the dispute was The Enron Severance Plan, which provided for severance pay calculated as “one week of base pay for each full or partial year of employment plus one week of base pay for each \$10,000 (or portion thereof) of base pay, less any severance previously paid to such employee, subject to a \$30,000 cap per employee.”⁶¹ An essential provision of the Severance Plan, found in section 8.1, indicated that the plan “shall be terminated upon the

54. “Administrative expenses” are defined in 11 U.S.C. § 503(b)(1)(A) (1993) as “the actual, necessary costs and expenses of preserving the estate, including wages, salaries or commissions for services rendered after the commencement of the case.” See DAVID G. EPSTEIN ET AL., 2 BANKRUPTCY § 7-11 at 301-02 (1992).

55. EPSTEIN ET AL., *supra* note 54, § 7-12 at 304.

56. *Id.*

57. *Id.*

58. This case has since been settled out of court.

59. At the time of writing, the action on the employee benefits claim was ongoing.

60. *In re Enron Corp.* (Bankr. S.D.N.Y. 2002) (No. 01-16034). The author is grateful to Mr. Lowell Peterson of Meyer, Suozzi, English & Klein, P.C., 1350 Broadway, Suite 501, New York, New York 10018, for supplying a copy of the settlement documents in this case. The author also wishes to thank Mr. Damon Silvers of the AFL-CIO for his generosity and the time he spent discussing the basics of this case.

61. Joint Motion of Official Committee of Unsecured Creditors for an Order Approving (A) Settlement of Severance Claims of Similarly Situated Claimants, (B) Procedures for Opting Out of Settlement, (C) Form and Manner of Notices to Eligible Former Employees and (D) Assignment of Authority to Prosecute Certain Avoidance Actions para. 8, *In re Enron Corp.* (Bankr. S.D.N.Y. 2002) (No. 01-16034) [hereinafter Joint Motion].

happening of . . . Bankruptcy.”⁶²

The primary issue in the case was whether the Severance Plan *did* automatically terminate on the bankruptcy petition date. The former employees argued that the plan did not terminate on the company's insolvency because the Summary Plan Description, which controlled the Severance Plan, did not contain a reference to the automatic termination of the plan.⁶³ Enron and the creditor's committee concentrated on the actual words of the plan itself.

A subsidiary issue also arose as to the nature of severance pay. In this connection, the argument raised by the former employees was that regardless of the termination date of the Severance Plan, the severance payments were administrative expenses and, therefore, gained some priority pursuant to the decision in *Straus-Duparquet, Inc. v. Local Union No. 3 International Brotherhood of Electrical Workers*.⁶⁴ In this case, it was decided that once the eligibility period is served, full severance pay is due whenever termination of employment occurs. Severance pay is compensation for termination—it does not accrue from day-to-day work. Rather, it is an expense of the administration of the bankrupt estate where the termination is an incident of that bankruptcy. The employees argued that this decision made their claims administrative expenses.⁶⁵

Enron and the creditor's committee countered that *Straus-Duparquet* was not applicable where claimants have provided no post-petition benefit to the debtor's estates.⁶⁶ Further, they argued that *Straus-Duparquet* had been modified by subsequent Second Circuit decisions such that severance pay that represents payment for past services is not entitled to administrative expense priority.⁶⁷

62. *Id.* para. 33.

63. *Id.* para. 34. The settlement documents also contain numerous other arguments raised by the former employees in this context; namely, that the automatic termination provision of the Enron Severance Plan is an unlawful ipso facto clause prohibited under the bankruptcy code; and that, in any event, Enron was required to follow the amendment procedures in the Enron Severance Plan in order to terminate it.

64. *Straus-Duparquet, Inc. v. Local Union No. 3 Int'l Bhd. of Elec. Workers*, 386 F.2d 649 (2d Cir. 1967).

65. It is interesting to note that the actual terms of the severance pay requirements in *Straus-Duparquet* were as follows:

To those employees who have been in the employ of the company one (1) year but under three (3) years, one (1) week's severance pay. To those over three (3) years, two (2) weeks' severance pay, provided, however, they were discharged through no fault of their own. Employees shall be paid at the time of separation.

Id. at 650. On the topic of vacation pay, the court in *Straus-Duparquet* held that such was recoverable as an administrative expense only to the extent of the proportionate part of total vacation pay earned during the period from beginning of bankruptcy administration to the date of the termination of employment. Vacation pay was not properly classified as an expense of administration because it is earned from day-to-day over the period of a year intervening between vacations. The rules on vacation pay were as follows: after twelve months employment, two weeks vacation with pay; after 15 years or more, three weeks with pay. *Id.*

66. See Joint Motion, *supra* note 61, para. 35.

67. *Id.*

Under Bankruptcy Rule 9019(a) and (b), the Bankruptcy Court may approve compromises and settlements if they are in the *best interests of the bankrupt estate and where they fix a class of controversies*.⁶⁸ In August 2002, the court did this by providing that employers make cash payments to settling former employees in satisfaction of allowed administrative expenses calculated by reference to the Enron Severance Plan (up to a maximum of \$13,500).⁶⁹ Basically, had the former employees succeeded in this case, the company would have been required to pay an additional \$68 million, while the estimated cost of the settlement was \$28.8 million. Given the nature of the case and the questions involved therein, there was a strong probability that one party would appeal, no matter what decision was rendered.

In consideration for this settlement, the employees waived their rights to a universe of claims—except for those under ERISA.

b. Retirement Benefits Claim⁷⁰

The first case filed on behalf of the participants in the Enron 401(k) retirement plan is the class action, *Tittle v. Enron Corp.*⁷¹ This complaint brings actions against, among others, the administrators of Enron's 401(k) plan for breach of fiduciary duty and other ERISA violations.⁷²

The central fiduciary duties found in ERISA are as follows:

“[A] fiduciary shall discharge his duties with respect to a plan solely in the interests of the participants and beneficiaries and

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

68. FED. R. BANKR. P. 9019(a), (b). In making the decision whether to sanction such settlements, the court looks at a variety of factors such as (1) the balance between the probability of success on the merits by either the defendant or the plaintiff, and the benefits of the settlement to the estate; (2) the prospects of complex and protracted litigation including any attendant expense, inconvenience and delay; and (3) the breadth of the releases.

69. Interview by Tim Russert with John Sweeney, President, AFL-CIO, *Meet the Press* (NBC television broadcast, Aug. 11, 2002).

70. Most of the facts and allegations derive from the Tittle Complaint. See Tittle Complaint, *supra* note 43.

71. *Tittle v. Enron Corp.* (S.D. Tex. 2002) (No. H 01-3913).

72. Tittle Complaint, *supra* note 43. The complaint includes other claims such as those brought under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 664 (2000). *Id.*

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title⁷³

Essentially, the complaint alleges that the conduct outlined above transgresses the fiduciary duties in a number of ways:⁷⁴

- The directors' reports, statements, and assurances, induced thousands of employees to invest millions in Enron stock for the purposes of the Enron 401(k).⁷⁵ The argument is that this supports the claims that the plan was not run for the exclusive benefit of the employees.⁷⁶
- The directors' assurances also contributed to the fact that the employees did not diversify.⁷⁷ The lack of diversification ran afoul of the terms of the plan, which required diversification (although it is conceded in the complaint that diversification rules do not necessarily apply to plans of this type).⁷⁸
- The plan administrators ordered a "lockdown" of the Enron 401(k) plan knowing such action would prevent employees from moving their Enron stock into more profitable investments.⁷⁹
- There was a failure in monitoring the plan's fiduciaries and in disclosing to them material facts concerning Enron's condition.⁸⁰

As presented, the evidence alleged in the complaint would, at first blush, appear compelling:

- At an employee meeting on September 26, 2001, Enron's chief executive officer, Kenneth Lay, was asked the direct question by an employee:

Enron has been aggressive in the use of SPVs collateralizing future cash flows for the sake of present earnings. I couldn't help but notice our auditor, Arthur Andersen of Houston, recently admitted guilt and paid the largest fine ever for criminal falsifications related to SPVs on behalf of another large Houston corporation. You are a man of integrity, so my "question" is a chance for you to reassure us we have no such problems here at Enron.⁸¹ • To this, Lay responded: To begin with, I can assure you that I or the Board of Directors, would not approve the use of any SPVs or other types of financial vehicles unless we were convinced both by all of our internal officers as well as our external auditor and counsel, that they were legal and totally appropriate.⁸²

73. Employee Retirement Income Security Act, 29 U.S.C. § 1104(a)(1)(A)-(D) (1999).

74. Tittle Complaint, *supra* note 43, paras. 736-783.

75. *Id.*

76. *Id.*

77. *Id.* paras. 255, 269, 272, 763.

78. *Id.* para. 696.

79. *Id.* para. 748.

80. *Id.* para. 778.

81. *Id.* para. 269.

82. *Id.* (emphasis omitted).

- Answering another question concerning stock price, Lay is alleged to have replied:
[T]here have been all kinds of reckless and unfounded rumors about Enron and the financial condition of Enron. To the extent that our employees begin repeating those rumors and spreading those rumours to other employees as well as family members and friends outside the company, it gives them a level of credibility that they do not deserve. And, thus damages the stock price. The company is fundamentally sound. The balance sheet is strong. Our financial liquidity has never been stronger. And we again have record operating and financial results.⁸³
- At the same time he was making these statements to the employees, Lay was selling approximately \$26 million of his own Enron stock.
- Likewise, before plan administrators ordered the lockdown of the plan, which they knew would prevent employees from selling their Enron stock, Lay and another plan administrator were warned by a company vice president that she was “incredibly nervous that [Enron would] implode in a wave of accounting scandals.”⁸⁴ This statement was never disclosed by Lay to plan participants or the broader administrative committee.

A problem facing the Enron employees was noted in the luminous work of Susan Stabile in her article *Freedom to Choose Unwisely: Congress' Misguided Decision to Leave 401(k) Plan Participants to Their Own Devices*.⁸⁵ Essentially, section 404(c) of ERISA limits fiduciary responsibilities in cases where employees exercise control over their own investments:

In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary [of Labor]), then (A) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and (B) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.⁸⁶

Stabile has been valiant in her attempts to demonstrate the problems with that section.⁸⁷ Essentially, it was part of ERISA before 401(k) plans were

83. *Id.* (emphasis omitted).

84. *Id.* para. 686.

85. Susan J. Stabile, *Freedom to Choose Unwisely: Congress' Misguided Decision to Leave 401(k) Plan Participants to Their Own Devices*, 11 CORNELL J.L. & PUB. POL'Y 361, 365-66 (2002); see also Marisa Rogoway, Comment, *Proposed Reforms to the Regulation of 401(k) Plans in the Wake of the Enron Disaster*, 6 J. SMALL & EMERGING BUS. L. 423, 427 (2002).

86. 29 U.S.C. § 1104(c)(1)(A)-(B) (2002).

87. In fact, one might say that Professor Stabile has been valiant in her efforts to demonstrate a number of problems with 401(k) plan regulations (from an employee perspective) for many years. She has been writing about the problem of possible over-invest-

invented. The fiduciary provisions were meant to protect against any deficiencies of the managers of defined benefit funds. The assumption was that employees would only act in their own interests and that their investment decisions were their own private concern. But, as Stabile points out, few employees understand every investment document they read and many employees may be influenced by the way their employer presents their various investment options. In other words, does the employee really have control at all or, to speak colloquially, have they been given just enough rope to hang themselves?⁸⁸

The Tittle Complaint questions whether the Enron employees had the requisite degree of control and alleges that the Enron 401(k) plan did not comply with the relevant Department of Labor regulation governing section 404(c):⁸⁹

In order to qualify as a § 404(c) plan [under that regulation], a plan must provide plan participants with a broad range of diversified investment options, liberal opportunities to transfer assets among allocations, and sufficient information to make sound investment decisions Equally important, such a plan must put participants explicitly on notice that it intends to qualify under § 404(c). This is . . . something the Enron 401(k) Plan has never done.

[This] means that at all times Enron and the Administrative Committee were and are liable for the results of all investment decisions taken with respect to the Plan's assets, including decisions ostensibly made, in whole or in part, by Plan participants themselves.⁹⁰

At the time of writing, an application to strike out the *Tittle* proceedings was being considered. The Secretary of Labor was opposing such application to strike (*amicus curiae*).

3. Conclusion

Under U.S. law, in the event of employer insolvency, employees must protect their own entitlements. They will almost never receive back the full amount they have lost. In bankruptcy, they may be forced into lengthy legal disputes to gain entitlements like severance pay, which they thought was a valid part of their employment contract. In terms of ERISA, there is an obstacle to overcome in the form of section 404(c).

The following analysis of a similar problem in Australia demonstrates a more employee-friendly, interventionist approach. It is used to support an argument for reform of the American system.

ment in employer stock as early as 1998. See Susan J. Stabile, *Pension Plan Investments in Employer Securities: More Is Not Always Better*, 15 YALE J. ON REG. 61 (1998); discussion *infra* notes 147-55.

88. Stabile, *supra* note 85, at 380-83.

89. See 29 C.F.R. § 2550.404c-1 (2003).

90. Tittle Complaint, *supra* note 43, paras. 670-671 (citations omitted). Stabile notes that protection afforded by regulation 404(c) has been interpreted broadly. Stabile, *supra* note 85, at 377-78 (discussing *In re Unisys Sav. Plan Litig.*, 72 F.3d 420 (3d Cir. 1996)).

B. ONE.TEL: AUSTRALIA

Although it went through its short life with the slogan “You tell your friends about One.Tel,” the One.Tel communications company collapsed in such a spectacular fashion that those who had told their friends about the company probably had few friends left. The collapse of One.Tel may loosely be described as Australia’s Enron. The importance of the comparison is to demonstrate how workers were treated differently and, in the view of this author, more fairly, under Australian law than the former Enron employees have been treated under American law. The reason for this difference, it is submitted, is that the Australian system is more interventionist. It recognises employees as victims of corporate collapse. Most times, they have not contributed to the employer’s insolvency, and often they have been misled by those who did.

1. *The Problem of One.Tel*

Investigative journalist, Paul Barry, chronicled One.Tel’s rise and fall in his pithy and, at times, witty book, *Rich Kids: How the Murdochs and Packers Lost \$950 Million in One.Tel*.⁹¹ Basically, Barry explains how the company grew from nothing in the late nineties, to a business that “spanned seven countries, employed 3,000 staff and had annual sales close to \$1 billion” by 2001, only to crash that same year.⁹² It seemed, notes Barry, that the company structure was more akin to a family business and did not develop appropriate accounting systems and controls as it grew. Its founders excelled at selling the vision of the business and were brave enough to take risks, but did not suit the “tedious, daily grind” of management.⁹³ One management consultant was quoted as saying: “There weren’t enough boring people in the company. There weren’t enough men in grey cardigans.”⁹⁴ The beginning of the end for One.Tel came when the Australian corporate watchdog, the Australian Securities and Investments Commission (ASIC),⁹⁵ advised the company to deduct \$173 million worth of advertising and customer acquisition costs it had previously deferred. Consequently, the company showed a total loss of \$291 million. Cash flow was a problem and the directors indicated further losses would be declared in the next year.⁹⁶

Unlike the scandal surrounding the Enron collapse, it has not been alleged that One.Tel directors deliberately misguided employees into investing in the company.⁹⁷ Yet, there is a striking similarity to Enron. A major allegation is that the One.Tel directors concealed the true financial

91. PAUL BARRY, *RICH KIDS: HOW THE MURDOCHS AND PACKERS LOST \$950 MILLION IN ONE.TEL* (2002).

92. *Id.* at 185.

93. *Id.* at 187.

94. *Id.*

95. ASIC is akin to, for example, the SEC in the United States.

96. BARRY, *supra* note 91, at 208-09.

97. In any event, the Australian retirement benefits structures are different from those of the United States. See *infra* Part II.B.1.b.

state of the company and allowed the company to trade while insolvent.⁹⁸ As Barry notes:

[N]one of [the loss] was highlighted in the glossy annual report that One.Tel sent to its shareholders in September, which managed to avoid using the word “loss” in the first 37 pages. There was nothing about the \$291 million loss in the chairman’s letter or the personal missive from Jodee [Rich]. Nor was there any mention of it in an entire page of “Key Financial Information” about the company. Strangely enough, the directors also felt it too trivial to talk about in their review of operations. It was in the accounts, of course, as it had to be [under Australian law]. And there was one solitary line . . . which reported blandly that: “The consolidated loss of the Consolidated Entity after providing for income tax amounted to \$291.1 million.”

As always, the rest of the One.Tel story was about “success,” “achievement,” “growth,” “the future,” “exciting opportunities” and a whole range of businesses that were going to become profitable very, very soon.

The losses were not the only topic that One.Tel’s annual report glossed over. Deep in the financial statement, where companies have a statutory duty to disclose what they have paid their directors, was the extraordinary revelation that Brad [Keeling] and Jodee [Rich] [the two directors] had helped themselves to bonuses of \$6.9 million apiece—on top of annual salaries of \$560,000—despite the company’s shocking performance.⁹⁹

While One.Tel’s directors, Brad Keeling and Jodee Rich, were making \$6.9 million in bonuses as the company went broke, One.Tel’s workers, who earned on average \$28,000 per year, lost their jobs.¹⁰⁰ The question of accessing unpaid wages and holiday pay was of obvious importance to people of such limited means—they could hardly absorb the loss, which they had not created. In the case of One.Tel, these outstanding entitlements exceeded \$17 million owed to 1,600 former employees.¹⁰¹

The following is a discussion of (1) how One.Tel’s Australian employees gained outstanding pay and leave entitlements, and (2) how the question of retirement benefits was resolved.

98. BARRY, *supra* note 91, at 326-27 (referring to complaints in the New South Wales Supreme Court).

99. *Id.* at 210.

100. Press Release, Community & Public Sector Union, One.Tel Staff Deserve Protection (May 31, 2001), available at http://www.cpsu.org/media/apr_jun_01/One310501.htm (last visited Mar. 8, 2003).

101. Press Release, Community & Public Sector Union, Paid in Full: Some Justice at Last for One.Tel Workers (July 24, 2001) [hereinafter Paid in Full], available at http://www.cpsu.org/media/jul_sept_01/onetel240701.htm (last visited Mar. 8, 2003).

a. Pay and Leave Entitlements

Employees as Preferred Creditors and Union Intervention in the Insolvency Process

On the face of it, the position of employees of insolvent companies in Australia begins in much the same vein as in the United States. Under section 556 of the Corporations Act of 2001, employees take their entitlements after payment of both the secured creditors and of the liquidator's expenses, but before other unsecured creditors—even the Australian Taxation Office.¹⁰² This preference suffers the same flaw in Australia as it does in the United States—namely, that there may be no assets left to cover employee claims.¹⁰³ In Australia, however, there is at least one consolation; there is no ceiling on the amount of entitlements the employee may be awarded. Thus, in the event (albeit unlikely) that a liquidator had sufficient assets to pay employees, then, technically, there would be nothing barring those employees from being awarded the full amount owed to them.

Aware of its weakness, the relevant Australian union, the Community and Public Sector Union (CPSU), did exactly what the AFL-CIO did in the United States; it sought to influence the insolvency process directly at the stage of Voluntary Administration (the Australian equivalent of Chapter 11 Bankruptcy in the United States). This is where differences in the systems emerge. Those differences highlight Australia's interventionist approach, involving arbitration awards, fair social safety nets, and community standards.

Arbitration Awards, Fair Social Safety Nets and Community Standards

As noted earlier in this article, the Australian system, although decentralising, still contains an industrial award system that forms a safety net of basic entitlements. These conditions may sometimes have broad application across an industry. Further, they can sometimes form community standards—that is, basic conditions considered by the Australian public to be so much a part of Australian working life that they “go without saying” if an employee is covered by an award. One such condition is redundancy pay—payment provided to workers when their job is made redundant through no fault of their own, providing a financial safety net so that they can readjust. This was established in the *TCR Case*.¹⁰⁴

102. Corporations Act, 2001, § 556 (Austl.). Robbie Campo notes that employees take before a floating charge. Robbie Campo, *The Protection of Employee Entitlements in the Event of Employer Insolvency: Australian Initiatives in the Light of International Models*, 13 AUSTRALIAN J. LAB. L. 236 (2000).

103. See Campo, *supra* note 102, at 244 (quoting A.S. Bronstein, *The Protection of Workers' Claims in the Event of the Insolvency of Their Employer: From Civil Law to Social Security*, 126 INT'L LAB. R. 715, 723 (1987)).

104. See *supra* note 22.

In the One.Tel insolvency, most of the employees were *not* members of the relevant union, the CPSU. Further, they were employed under individual contracts of employment, which made *no* provision for redundancy pay. There were no agreements and no pre-existing awards. So, on the face of it, the One.Tel employees fell outside the safety nets mentioned above.

Nevertheless, in *CPSU v. One.Tel, Ltd.*,¹⁰⁵ the CPSU applied for an interim award to cover the One.Tel workers, which was to include a provision for redundancy pay as a community standard. The award was granted by the Commission. Although not all the employees were union members, the union had been arguing for months about its eligibility rules with a view towards making an award that would apply to the One.Tel staff.

The Commission made its award in the public interest in these terms:

This is an application for the making of an award to cover employees of One.Tel Limited, (administrator appointed). The proposed award seeks to bind One.Tel Limited, the CPSU . . . its members and those eligible to be members and employees of One.Tel Limited (in administration). The award seeks to create safety net rights in relation to annual leave, redundancy pay and notice and payment of termination of employment.

The award is sought because of the serious circumstances in which both the company and employees find themselves. This is not a happy situation but it is one which, in my view, attracts the public interest and demands action by the Commission. The award seeks to do no more than provide a safety net which the Commission is enjoined to consider pursuant to section 88B(1) and (2) of the Workplace Relations Act 1996.¹⁰⁶

I am prepared to make this award. In making the award I will do so on an interim basis and I am mindful of the need to balance the rights and obligations of both the employer and its employees.

. . . .

. . . I can do no more than wish the administrator well in his task so that employment opportunities may exist with this company. In this sense, a good outcome would be that the award that I now make will have no useful purpose.¹⁰⁷

In the view of this author, the Commissioner's reference to balancing "the rights and obligations of both the employers and its employees" and well wishes to the administrator "so that employment opportunities may exist with [the] company" demonstrates that this jurisdiction is not that of

105. *CPSU v. One.Tel, Ltd.* (2001) Australian Industrial Relations Commission PR 904915. The author is indebted to Mr. Andrew Rich, Lawyer, CPSU, for his time in explaining to her the background to the arguments raised at the One.Tel application. Being an interim order, the reported judgment in *One.Tel* is necessarily brief.

106. Section 88 speaks of "the need to provide fair minimum standards for employees in the context of living standards generally prevailing in the Australian community." Workplace Relations Act, 1996, § 88B(2)(a) (Austl.).

107. *One.Tel*, PR 904915, para. 8.

the “bleeding heart,” but rather one that has struck a fair balance between business efficacy and fairness towards workers.¹⁰⁸ It was an interim award—the administrator always had the option to try resuscitating the company—and was simply a safety net if the administrator chose to wind up the company (the equivalent of Chapter Seven in the United States). The award met the urgency of the situation—the creditors meeting was the following day—the administrator needed to know the potential costs facing him, and the employees needed to know what their potential entitlements might be.

Once the interim award was made, the administrator went to the creditor’s meeting. Lobbied by employees and the union, and knowing that they were supported by the State and Federal Government, the administrator recommended to the creditor’s meeting that the company be wound up and the employees paid. The creditors agreed.¹⁰⁹

The difference between the Australian and American systems is stark. The Enron workers did gain a voice at a creditor’s meeting, but did so by fighting to preserve terms that were already in a severance agreement that applied specifically to them. In contrast, the One.Tel workers, who had freely negotiated contracts of employment that did not contain redundancy provisions, were able to gain redundancy entitlements because they were said to represent Australian community standards and were necessary to provide employees with a fair social safety net.

The result in *One.Tel* was gained by the intervention of trade unions and the actions of the Commission in reliance on community standards. But, it is not a guarantee that all employees in similar situations in the future will be so fortunate. In *One.Tel*, particularly significant was that both State and Federal Governments supported the workers, there were mass rallies at the time of the Commission hearing and the creditor’s meeting, and there was a torrent of public sympathy for humble employees whose bosses’ behaviour had been woeful. There can be no doubt that these events contributed to the Commission’s decision to intervene in the public interest, and particularly to the Commission’s decision at the creditor’s meeting to pay the employees.

*General Employee Entitlements and Redundancy Scheme (GEERS)*¹¹⁰

One.Tel was settled through the tandem operation of the Australian industrial system and the voluntary administration process. At the start of the discussion of how the One.Tel employees gained outstanding wages, the weaknesses of the basic preference to employees in winding up were alluded to.¹¹¹ Such deficiencies have spawned a debate about

108. *Id.*

109. Paid in Full, *supra* note 101.

110. See Campo, *supra* note 102, at 244.

111. See *supra* Part II.B.1.a.

the role of public law in protecting employee entitlements. As noted by Bronstein:

While, therefore, the adequacy of the protection of the service related claim depends partly on the extent of the preference accorded to employees and partly on the ranking of this preference, in actual practice it depends even more on whether there are any assets left. The ranking of the preference and its extent can be determined by the law, but no rule of law can determine in advance what assets—if any—will be available. *In short, while wage protection in the event of employer insolvency comes within the scope of private law, there is no possibility that private law can offer any guarantee of payment. This explains why the prevailing view is that the only adequate way to protect wages is to remove protection from the realm of private law and to bring it within the scope of social legislation.*¹¹²

Further, recouping monies through winding up is a lengthy process and employees may not have substantial cash reserves, although they have pressing debts.¹¹³

For these reasons, the Australian Government has established a further safety net scheme to protect the rights of workers when their employer becomes insolvent, the General Employee Entitlements and Redundancy Scheme (GEERS).¹¹⁴ This scheme provides employees¹¹⁵ with a safety net of entitlements, which includes all (1) unpaid wages, (2) accrued annual leave, (3) accrued pay in lieu of notice, (4) long service leave, and (5) up to eight weeks of redundancy entitlements (acknowledging the community standard).¹¹⁶ These payments are made up to the salary level of \$75,200 (indexed annually) so long as the employees have a legal entitlement to those amounts derived from legislation, an award, a statutory agreement, or a written contract of employment.¹¹⁷

Policy initiatives such as GEERS were initially introduced to address problems in the mining and energy sector. As the once commodities-based Australian economy dealt with the global transition towards technology, many mines closed, eliminating thousands of jobs in the sector

112. Campo, *supra* note 102, at 244 (quoting A.S. Bronstein, *The Protection of Workers' Claims in the Event of the Insolvency of Their Employer: From Civil Law to Social Security*, 126 INT'L LAB. R. 715, 723 (1987) (emphasis added)).

113. Campo, *supra* note 102, at 244.

114. This scheme applies to those who lose their jobs after September 12, 2001. For people who lost their jobs prior to this date, there was a scheme called the Employee Entitlements Support Scheme (EESS). For Ansett employees, there is a special fund called Special Employee Entitlements Scheme for Ansett group employees.

115. Note that the scheme excludes independent contractors, shareholding directors, relatives of shareholding directors, relatives of the former employer, and, in most cases, those who resigned—unless resignation was due to the employer's non-payment of wages. See General Employee Entitlements and Redundancy Scheme Operational Arrangements § 5.1 [hereinafter GEERS Operational Arrangements], at <http://www.workplace.gov.au/Workplace/WPDisplay/0,1280,a3%253D3679%2526a0%253D0%2526a1%253D517%2526a2%253D623,00.html> (last visited Mar. 27, 2003).

116. *Id.* § 6.1.

117. *Id.* When the salary is higher than that amount, the employee will still be able to receive benefits up to that amount.

and seeing many adjoining mining towns virtually close down.¹¹⁸ Now the system applies, subject to the above rules, throughout the Australian workforce. For that reason, the *One.Tel* workers may have had access to GEERS had the Commission action failed. However, the important point to note is that the union chose the Commission route so that the company responsible for the employees' losses (not the Australian taxpayer, who funds GEERS) would pay the employees' entitlements, and do so immediately.

GEERS also makes provision for avoiding the socialisation of loss and privatisation of gain. It does not relieve employers of their responsibility to meet employee entitlements, nor does it allow employees to "double dip."¹¹⁹ Under section 560 of the Corporations Act of 2001, once the Government pays monies to the employees, it can seek reimbursement of payments from the insolvency practitioner as funds become realised from the sale of assets or from other proceedings.¹²⁰ Similarly, if an employee who is owed seven weeks' redundancy pay has been paid two weeks' redundancy pay through the insolvency process, then the GEERS payment would cover only five weeks.¹²¹ The point of this approach is that GEERS payments are made without any legal obligation on the part of the Commonwealth—it is a safety net, a creature of policy.¹²²

b. Retirement Benefits

*Australian Superannuation Law*¹²³

Unlike the ongoing proceedings in the aftermath of Enron's collapse, where the crux of the problem is retirement benefits and the alleged unfair inducement of employees to invest in the company, no such allegations were ever made in *One.Tel*. Still, it is worth noting the basic features of the Australian retirement benefits system and asking whether an Enron-like problem could ever develop in Australia.

The Australian retirement benefits system is referred to as superannuation. Essentially, all superannuation funds (defined benefit and defined contribution) are separate from the employer, and the funds are governed by two specialist statutes.

First, the Superannuation Guarantee (Administration) Act of 1992 (SGA Act) mandates that all employers (both public and private) must pay into a complying superannuation fund an amount equal to a set per-

118. Louise W. Floyd, *The Second Wave of Industrial Law Reform (Federal and State): What You Need to Know*, Address at The University of Queensland T.C. Beirne School of Law CLE Programme at Customs House, Brisbane (Oct. 15, 1999) (on file with SMU Law Review).

119. See GEERS Operational Arrangements, *supra* note 115, § 6.5.

120. Corporations Act, 2001, § 560 (Austl.). The government has the rights against the former employer that the employee would have had.

121. GEERS Operational Arrangements, *supra* note 115, § 6.5.

122. *Id.*

123. The author expresses her gratitude to Mr. Peter Skinner, Deputy CEO, COMSUPER, Australian Government, for discussing with her the various aspects of Australian superannuation law.

centage of their employees' salaries (presently 9%).¹²⁴ (Employees will normally match employer contributions with funds taken directly out of their salary. Both amounts are locked away in the fund until the employee reaches the minimum retirement age of fifty-five.) There are some exceptions to the superannuation requirement. For example, no superannuation has to be paid for employees earning less than \$450 gross per calendar month, a worker under eighteen who works less than thirty hours per week, or those over seventy.¹²⁵ However, the scheme reaches about 90% of the Australian workforce (even independent contractors),¹²⁶ and employers failing to meet their responsibility to pay superannuation are liable to pay the superannuation guarantee charge (i.e., the amount owing, plus interest and the administration fee).¹²⁷

In conjunction with the SGA Act is the Superannuation Industry (Supervision) Act of 1993 (SIS Act),¹²⁸ which regulates the operation of the superannuation funds and the trustees who run them, and establishes graduated penalties. The SIS Act also prescribes minimum communication obligations and members' rights. In essence, it is a form of prudential regulation, which has minimum processes and controls to ensure that the risk of members losing their money is minimised.

The specific question of whether an Enron-like problem could develop in Australia was raised by Australian financial adviser, Daryl Dixon. In his article, *Boss of the Loss*, Dixon suggested Enron-style losses could not readily occur in Australia due to the limits Australian laws place on funds investing in the actual employer's stock.¹²⁹ He wrote:

This is a timely lesson for Australian employees about the dangers of giving employers control over their retirement savings. Fortunately, where employers do not grant employees the freedom to choose their superannuation fund, federal government legislation limits the extent of super fund investment in the company sponsoring the fund.

Under in-house asset rules applying since 1999, employer-sponsored funds cannot invest more than 5% of the current market value of assets in the employer's shares or debt instruments. This is in sharp contrast to the arrangements in the U.S., where the bulk of fund assets can be invested in the employer.¹³⁰

Although the Dixon article focuses its discussion on defined *benefit* plans—as opposed to the Enron 401(k) plan, which was a defined *contribution* plan—it is suggested that Dixon is correct about an Enron-like situation not being likely in Australia. The in-house asset rules found in

124. Superannuation Guarantee (Administration) Act, 1992, § 20 (Austl.).

125. *Id.* § 12.

126. Anecdotal evidence suggests that the reason 10% is not covered, even though the system is compulsory, is because some workers will give false tax records, and at other times smaller employers may go broke before superannuation contributions are banked, etc.

127. Superannuation Guarantee (Administration) Act, 1992, § 16 *et seq.* (Austl.).

128. Superannuation Industry (Supervision) Act, 1993 (Austl.).

129. Daryl Dixon, *Boss of the Loss*, THE BULLETIN, Feb. 12, 2002, at 51.

130. *Id.*

Part Eight of the SIS Act would seem to prevent such a loss. For example, section 83(2) provides that “[i]f the market value ratio of the fund’s in-house assets exceeds 5%, the trustee of the fund must not acquire an in-house asset.”¹³¹ Section 71 defines “in-house asset” as:

an asset . . . that is a loan to, or an investment in, a related party of the fund, an investment in a related trust of the fund, or an asset of the fund subject to a lease or lease arrangement between the trustee of the fund and a related party of the fund.¹³²

Furthermore, section 10 defines a “related party of a superannuation fund” as to include “a standard employer-sponsor of the fund.”¹³³

Of course, the Australian system is not totally risk-free. It is prudential regulation and trustees of funds are not instructed exactly how to invest. If, for example, a trustee invested largely in property and a property downturn occurred, a loss would take place. Likewise, an unforeseen, catastrophic event, could reduce investment values. But, in terms of an Enron-like problem arising, the rules against conflicts (i.e., the in-house asset rules) would tend to suggest Australian workers are guarded.

III. LAW REFORM

A. U.S. LAW REFORM: THE CURRENT DEBATE

Efforts to reform U.S. pension law have been underway ever since the Enron debacle came to light at the end of 2001. The early stages of this reform process—congressional hearings and the development of an assortment of competing bills—were outlined by Marisa Rogoway in her recent comment, *Proposed Reforms to the Regulation of 401(k) Plans in the Wake of the Enron Disaster*.¹³⁴

It is the purpose of the present article to follow on from that discussion and make a contribution to the ongoing law reform process.

The November 2002 elections saw the Republicans regain control of the Senate (from the Democrats), hence gaining the majority in both Houses of Congress. For that reason, it is likely that, of the two bills under consideration before the election, the Republican House Bill (3762), rather than the Democrat-sponsored Senate Bill (1992) will figure prominently in any new retirement benefits law passed in 2003. Nonetheless, both bills are outlined in this commentary as an appraisal of the old Senate Bill enhances a critique of the Republican House Bill.

There are two main bills before Congress,¹³⁵ including the (1) Pension

131. Superannuation Industry (Supervision) Act, 1993, § 83(2) (Austl.). For all funds, see sections 76-80 and, for defined benefit plans, section 83D.

132. *Id.* § 71(1).

133. *Id.* § 10.

134. Rogoway, *supra* note 85, at 427.

135. These bills deal with such Enron-related issues as over-investment in employer stock and the provision of advice for 401(k) plan participants. In addition, there is further legislation providing for a creditor’s committee of employees formed for the protection of pensions. See, e.g., Employee Pension Bankruptcy Protection Act of 2002, S. 3028, 107th

Security Act of 2002 (House Bill 3762),¹³⁶ which passed the House of Representatives on April 11, 2002, containing many of the provisions of an earlier Republican version introduced by Representative Boehner;¹³⁷ and (2) the Protecting America's Pensions Act of 2002 (Senate Bill 1992),¹³⁸ the Senate legislation dealing with retirement benefit issues. The bills differ not only in the way they facilitate the giving of advice to plan beneficiaries and the manner in which that advice is given, but also in the way they deal with the diversification of plan assets, particularly limits on investment in employer stock. Issues such as notification of lockdown periods and bars on insider trading during lockdowns have also been addressed in the Sarbanes-Oxley Act of 2002.¹³⁹

On the question of advice, House Bill 3762 allows the plan fiduciary to earn fees and compensation from the giving of advice so long as the fees are revealed to plan participants at a time reasonably contemporaneous to the giving of that advice.¹⁴⁰ Senate Bill 1992 bars the giving of advice by plan fiduciaries.¹⁴¹

As to diversification and employer stock, House Bill 3762 allows employees to divest themselves of employer stock, but only after a three-year threshold period has elapsed for each parcel of employer stock given to the employee by the employer.¹⁴² In terms of over-concentration in employer stock, House Bill 3762 provides for the giving of general educational material to investors that discusses the risk of holding more than 25% of a portfolio in any one stock, including stock issued by the employer.¹⁴³ In contrast, Senate Bill 1992 provides for specific warnings to be included in account statements if an investment in employer stock exceeds 20%.¹⁴⁴ The waiting period for the selling of employer stock is a one-off, three-year period—it is not a waiting period for each allotment that the employer gives.¹⁴⁵

1. Advice

In his analysis of the Senate advice proposal, Representative Boehner suggests that such legislation will lessen the availability of investment advice, limiting it to a few providers on the internet.¹⁴⁶ Certainly, the Sen-

Cong. (2002). It is interesting to note that the U.S. debate does not include any plans to adopt a system like Australia's GEERS.

136. Pension Security Act of 2002, H.R. 3762, 107th Cong. (2002).

137. Retirement Security Act of 2001, H.R. 2269, 107th Cong. (2001).

138. Protecting America's Pensions Act of 2002, S. 1992, 107th Cong. (2002).

139. Sarbanes-Oxley Act of 2002 § 306, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 U.S.C.).

140. H.R. 3762 § 105(g)(1).

141. S. 1992 § 103.

142. H.R. 3762 § 104(a).

143. *Id.* § 101(a)(2).

144. S. 1992 § 201.

145. *Id.* § 101.

146. U.S. REP. JOHN BOEHNER, WIDENING THE RETIREMENT SECURITY ADVICE GAP: WHY THE SENATE DEMOCRAT PENSION REFORM BILL IS TOO WEAK TO PROTECT U.S. WORKERS 8 (2002). The Congressman actually refers to Senate Bill 1677 in this document.

ate proposal does centre on internet advice, but it is conducted by email, so there is some tailoring of advice—it is not simply a series of fact sheets. As noted by authors like Stabile, there may, in fact, be a problem with House Bill 3762; namely, the potential for conflicted advice.¹⁴⁷

In the view of this author, House Bill 3762 seems to rely on full and honest disclosure by advisers, and, perhaps, on the effectiveness of so-called “Chinese Walls” to ensure that those who give advice within a firm are not covertly profiting from a trade. One can only hope those walls are thick. Enron was rife with alleged conflicts of interests, which can be difficult to detect, even for Wall Street and the Securities and Exchange Commission.¹⁴⁸ Looking at the alternative Senate proposal, it may limit the advisers available, but one may well wonder whether, in a country the size of the United States, one could ever completely debar every good investment advisor simply through high standards on conflicts of interest.

2. *Diversification*

As to diversification from employer stock, education is a wonderful tool and freedom is often noble, but one may question why House Bill 3762 favours the mere sending of educational material to employee-investors as opposed to the provision of specific warnings in account statements if investment in their employer is too high.

As noted above, the Enron scandal involved many previously-revered accounting firms, such as Arthur Andersen, and fooled many well-educated, well-connected Wall Street analysts. The workers who contribute to these funds often have neither, and are busy holding together some semblance of family life, while paying the bills and working.¹⁴⁹ In testifying before the Senate Committee on Health, Education, Labor and Pensions, Alicia Munnell of the Carroll School of Management, Boston College, asked why workers should not be able to invest safely without having to understand the complexities of maintaining a diverse account

Senate Bill 1677 is in similar terms to Senate Bill 1992, which became the key Democrat-sponsored Senate Bill. *See also* HOUSE EDUCATION & THE WORKFORCE COMMITTEE, FACT SHEET ON H.R. 2269—RETIREMENT SECURITY ADVICE ACT at <http://edworkforce.house.gov/issues/107th/workforce/erisa/onepagefs.htm> (last visited Mar. 8, 2003); HOUSE EDUCATION & THE WORKFORCE COMMITTEE, BILL SUMMARY OF H.R. 2269—RETIREMENT SECURITY ADVICE ACT at <http://edworkforce.house.gov/issues/107th/workforce/erisa/summary.htm> (last visited Mar. 8, 2003).

147. *See* Stabile, *supra* note 85, at 383-85.

148. These alleged conflicts have been detailed in the earlier pages of this article. *See supra* Part II.A.1. Further, there were concerns as to whether investment advisers who relied on so-called “Chinese Walls” in their firms had breached standards and committed conflicts of interest. *See* Tittle Complaint, *supra* note 43, paras. 603, 634-635. News reports have revealed that some analysts question why the SEC did not raise questions about Enron’s accounting at an earlier time. *See, e.g., NBC Nightly News* (NBC television broadcast, Oct. 7, 2002).

149. Rogoway, *supra* note 85, at 430 (citing *Pension and Retirement Issues in Enron Collapse: Hearing Before the Senate Comm. on Health, Education, Labor and Pensions*, 107th Cong. (2002) (statement of Alicia H. Munnell, Professor, Boston College Carroll School of Management)).

portfolio.¹⁵⁰ Why did they have to become investment experts instead of being able to “coach their kid’s soccer team, play tennis or read a book”?¹⁵¹ Likewise, Stabile has warned of the problems associated with over-investment by employees in their employer and whether employees ever really control 401(k) plans.¹⁵²

In the view of this author, it is baffling why there cannot be direct warnings to employees. Such warnings do not mandate the selling of employer stock. Even if they did, it may not be a bad thing. While some employers clearly are a tremendous investment (e.g., Wal-Mart), is it ever the case that there is only one good stock on the market at any given time? Further, supervening external events can damage even the most honest and well-run business.

As alluded to in the opening portions of this article, the only other reform to follow in the wake of the Enron scandal is corporate law reform.¹⁵³ The Secretary of Labor, Elaine Chow, noted that such reform could be viewed as a type of labour reform as it could deter the type of corporate misconduct that may threaten jobs and employee entitlements in the future.¹⁵⁴ Clearly, corporate law reform is necessary and desirable, but there are always difficulties with the prosecution of white collar crime—proving offences, finding assets that have been hidden.¹⁵⁵ For that reason, this author urges a robust approach to positively regulating for employee protection.

B. AUSTRALIAN LAW REFORM

Australia’s treatment of employee entitlements is under review by the Parliamentary Joint Committee on Corporations and Financial Services. While the Committee’s deliberations are ongoing, suggestions as to reform have been put forward in the wake of the One.Tel collapse.

Possible reforms include enhancing directors’ duties so that employees become part of the interests of the company and, therefore, a group whose interests the directors must consider in the making of decisions.¹⁵⁶

150. *Pension and Retirement Issues in Enron Collapse: Hearing Before the Senate Comm. on Health, Education, Labor and Pensions*, 107th Cong. (2002) (statement of Alicia H. Munnell, Professor, Boston College Carroll School of Management).

151. *Id.* Professor Munnell actually proposed providing workers with a limited array of investment options with varying degrees of risk and making the Department of Labor responsible for deeming the option to be prudent. That would also protect employers because the plans would be pre-approved.

152. See Stabile, *supra* note 87; Stabile, *supra* note 85, at 382 (arguing for thorough pension reform and relying on a consideration of jurisprudential theories, human behavioral studies, and domestic considerations to advance her case).

153. See *supra* notes 1-3 and accompanying text.

154. *Good Morning America* (ABC television broadcast, Sept. 2, 2002).

155. White collar crime laws have sometimes been referred to as possible “paper tigers.” See Campo, *supra* note 102, at 245 (noting the difficulty of proving an employer’s intent to do wrong under Australia’s Corporations Act of 2002).

156. Tom Bostock, *To Whom Are the Duties of a Company Director Owed?*, Address at the Australian Institute of Company Directors and Centre for Corporate Law and Securities Regulation Conference 1 (Nov. 8, 2000) (on file with SMU Law Review) (discussing Prof. Robert Baxt, *Do Directors Owe a Duty to Employees?*, Address at the Law

(In a similar vein, some trade unions are already taking action to acquire employer stock and, therefore, have a voice at corporate meetings.)¹⁵⁷

Some have suggested the creation of a so-called “super preference,” which would give employees preference over even secured creditors in a winding up. Those that support such a preference argue that it would not discourage investment in Australia. They suggest that if the only thing preventing investment was a fear by secured creditors that they would lose money on employee entitlements, then the investment was so uncertain that no sound investor would have made it in the first place.¹⁵⁸ Despite those sentiments, it is this author’s view that a super preference is not commercially viable and would jeopardise investment in developing Australian businesses. It is a small country in a competitive world and investment is its future.

IV. CONCLUSION

Paul Barry ended his commentary of the One.Tel collapse by noting the behaviour of its directors in concealing corporate losses made while they were receiving millions in bonuses. He lamented that “[t]o many, it seemed like the 1980s were back, and greed was good all over again.”¹⁵⁹ This echoes the words of the mythical Gordon Gekko in the 1980s movie, *Wall Street*, in which the magnate suggested to stock holders that “Greed . . . is good. Greed is right. Greed works.”¹⁶⁰

From a law reform perspective, it may well be that the words at the end of that movie were even more compelling. Gekko’s protégé, Bud Fox, had distanced himself from his working class background to “insider trade” his way to the top. After he was caught and faced jail, Fox’s unionist father expressed to his son: “In some kind of screwed up way, it’s the best thing that could have happened to you. Stop going for the easy buck and start producing something with your life. Create, instead of living off the buying and selling of others.”¹⁶¹ Surely it is the creation of things to foster a better life that resonates with the American dream. Yet, as recent events demonstrate, it is sometimes the very people pursuing that dream who are exploited. Such exploitation is, sadly, a global phenomenon.

Council of Australia’s Annual Corporate Law Workshop (July 2000)). Bostock takes the view that the law has not yet reached this stage, but is changing fast.

157. John Maitland, Shareholders and the Non-Financial Agenda, Address at The Politics of Shareholder Activism: A Centre for Corporate Public Affairs Conference, available at http://www.cfmeu.asn.au/national/int_issues/20011203_Activism.html (last visited Mar. 8, 2003). To a degree, this type of approach may be developing within the American labour movement as well. See *UNIONS @ WORK: THE CHALLENGE FOR UNIONS IN CREATING A Just and Fair Society*, Australian Council of Trade Unions Overseas Delegation (1999).

158. This idea was discussed in Craig Cameron, Paper on Employee Entitlement Protection—A Multi-faceted Approach (Dec. 2001) (unpublished manuscript presented at the Australian Labour Lawyers Conference, Dec. 2001).

159. BARRY, *supra* note 91, at 212.

160. *WALL STREET* (Twentieth Century Fox 1987).

161. *Id.*

The purpose of this article is to offer some contribution to the current U.S. law reform debate in the hope that a robust stance is adopted towards the protection of the rights and entitlements of working people.¹⁶² As noted throughout, such a stance has been adopted in Australia. Strong protection also exists for employees in the European Union, Great Britain, and Canada.¹⁶³ While the U.S. inclination in labour law is to emphasise private contract and individual freedom; there is ample justification for government intervention on this question. The “victims” of corporate insolvency are often blameless and least able to absorb a loss. In contrast, those who cause insolvency may be plausible enough that business dynasties, like the Murdochs, lose millions and emerge not “the brightest crayons in the box.”¹⁶⁴ It may well be that this is a new sort of “crime,” and the question should not be whether robust regulation is antithetical to U.S. legal tradition, but whether recent, alleged, white collar crime is consistent with free enterprise or something more sinister.

162. As alluded to, it is submitted that there should be greater regulation of U.S. pension law in order to provide stronger guidance to 401(k) plan participants. The author accepts that intervention of the type arising in the One.Tel application is probably outside the scope of the U.S. system. However, the author argues that payments similar to those made under GEERS should at least be considered by the U.S. Government in cases such as Enron.

163. Campo, *supra* note 102, at 247.

164. BARRY, *supra* note 91, at 329.