



Your Right to Work: The Employment Policy of a Truly Liberal Government

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FOREWORD

At its heart, industrial relations law is about people, and their ability to earn an income, support a family and take greater responsibility for their own lives.

In other words, employment is not about what we do – but who we are. Through work we build relationships that enrich us, skills which develop us, and ideas that define us. Anything that makes it harder for us to work is a barrier to human flourishing.

As Arthur Brooks of the American Enterprise Institute has argued: ‘There is nothing more important to someone’s self-esteem than feeling like they are of value to others, and there is no better way to achieve that than through paid employment...’

For too long now, the workplace relations policy debate in Australia has been framed by arguments about the rights and privileges of unions, employer organisations, institutions, and even governments.

Australia needs a legal framework that recognises the differences that exist between people, workplaces, forms, hours and locations of work, and that puts the interests of people before the interests of institutions.

Employment law should also seek to provide opportunities to help get unemployed people back into work, be flexible enough to encourage people to stay, and responsive to changing circumstances in businesses and the wider economy. Freedom to Work and Freedom to Hire are concepts not heard often enough in the modern workplace relations context.

Stephen Sasse has had a successful 30 year career in employee relations, human resources and occupational health and safety, at some of Australia’s leading companies.

In his occasional paper: *Your Right to Work: The Employment Policy of a Truly Liberal Government*, he has challenged some of the myths that underpin the current system, summarised its history and evolution, and set out a detailed and thoughtful two-step reform program.

His immediate recommendations address some of the major problems with the current Fair Work Act including encouraging greater agreement flexibility, narrowing the scope for lawful industrial action and union right of entry laws, and allowing employees to take home more of their own pay.

Importantly, his vision for long term reform includes removing the distinction between employment and independent contracting, institutional renewal by abolishing the Fair Work Commission while strengthening the Fair Work Ombudsman, and consolidating existing workplace safety nets by abolishing the award system and removing the ‘social component’ from the minimum wage paid by employers.

Stephen’s paper adds to the considerable body of IPA research in this area over recent years, including on the minimum wage, structure of the workplace system, role of institutions and lack of competition.

The implementation of a truly liberal employment policy should be an urgent priority for Australian policy makers.

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INTRODUCTION

In September 2015, Malcolm Turnbull was elected leader of the Parliamentary Liberal Party, thereby becoming Australia's twenty-ninth Prime Minister. In his first press conference as Prime Minister, Mr Turnbull pledged that 'this will be a thoroughly Liberal Government. It will be a thoroughly Liberal Government committed to freedom, the individual and the market'.¹

The Turnbull Government's Minister for Employment, Michaelia Cash has fatally undermined that part of the Prime Minister's position that relates to labour market policy, limiting her ambition to 'an industrial relations policy that will get through the Senate' of the 44th Parliament.²

In May 2016, the Prime Minister wrote to the Governor General advising that the Senate had twice rejected two parcels of proposed legislation - the *Building and Construction Industry (Improving Productivity) Bill 2013*; the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013*; and the *Fair Work (Registered Organisations) Amendment Bill 2014*.³ The July 2016 election triggered by the subsequent double dissolution was significant in that there was a complete and abject failure by the Coalition to enunciate any clear policy position, let alone provide a convincing narrative dealing with the need for the ABCC and Registered Organisations reforms.

This essay explores how well the liberal tradition has been served by the Australian labour market regulatory system, and outlines some of the changes that need to be considered if we are to truly embrace liberal values in relation to the regulation of relationships between workers and employers. It concludes, contra Ms Cash, that much of the workplace regulatory framework has not served Australia well and that there is a need for a comprehensive and systemic overhaul of the system; one that must be firmly anchored in the liberal tradition and implemented over the lives of several Parliaments.

An essential component of this much-needed reform is the ability for the Coalition to create a clear and persuasive narrative that communicates the need for reform.

This essay is in seven parts.

Part One is a brief explication of what liberalism means in the context of labour market regulation, and provides the philosophical basis by which government should tread more carefully in this area.

Part Two deals with the nature and history of Australia's unique and deeply flawed approach to labour market regulation. Few people are aware of the history of the system, its complexities and its remoteness from the realities of the workplaces of the modern world.

Part Three contains an assessment of the labour market regulatory framework in its various iterations over the last century.

Part Four looks at the changing nature of employment and the workplace, with an emphasis on the implications of digital technologies on the world of work.

Part Five draws together the key conclusions from the foregoing material.

¹ Transcript Of The Hon Malcolm Turnbull MP And The Hon Julie Bishop MP, Press Conference, Parliament House 14 September 2015, <http://www.malcolmturnbull.com.au/media/transcript-vote-on-the-liberal-party-leadership>

² Sky News Australia Sunday 24 April 2016, <https://ministers.employment.gov.au/cash/sky-news-australian-agenda-peter-van-onselen-and-adam-creighton>

³ http://www.aph.gov.au/Parliamentary_Business/Double_dissolution

Part Six canvasses some of the issues that the Coalition parties need to consider if they are to begin the process of delivering ‘hard’ reforms with some level of success.

Part Seven contains two sets of recommendations. The short term changes are intended to redress some of the more egregious overreach of the *Fair Work Act* in its current form. The longer term suggestions are intended to stimulate discussion and debate as part of the development of a truly liberal employment policy in Australia.

PART ONE: WHAT IS LIBERALISM AS IT RELATES TO THE LABOUR MARKET?

What is liberalism, and what are the key principles of the liberal tradition that should underpin the labour market policy debate? The liberal world-view, developed over centuries of both philosophy and political leadership, is characterised by guiding principles. It is not strictly conservative, in that the liberal tradition is explicitly open to change – ‘A state without the means of some change is without the means of its conservation’.⁴ The Australian liberal tradition ‘draws on both the classical liberal and the conservative political traditions. It emphasises the importance of individual freedoms and responsibilities, and the relevance of values and obligations in securing outcomes that are in the national interest’.⁵ With respect to labour market regulation it is particularly important that we add the requirement that policy should be assessed empirically and on the basis of results – too often well-meaning intentions are judged favourably at the expense of a rational assessment of unsatisfactory outcomes.

Private Property

“Every man has a ‘property’ in his own ‘person.’ This nobody has any right to but himself. The ‘labour’ of his body and the ‘work’ of his hands, we may say, are properly his.”

John Locke Two Treatises of Government 1691
Essay 2, Chapter 5, §26

Private property in its broadest sense is the fundamental component of the liberal tradition. This includes the individual’s ownership of himself and the products of his own labour. Inasmuch as this proposition prohibits slavery, so too it suggests that the State should be wary of taking steps that prevent a person from exercising their right to work. In contemplating issues such as the minimum wage and associated mandatory Modern Award conditions – which do in fact prevent workers and employers from entering into particular employment arrangements – this principle is of fundamental importance. The sanctity of private property is also a relevant consideration in considering issues such as union officials’ rights to enter privately owned premises under both industrial and work health and safety laws.

Individual Liberty

“As soon as any part of a person’s conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion. But there is no room for entertaining any such question when a person’s conduct affects the interests of no persons besides himself, or needs not affect them unless they like (all the persons concerned being of full age, and the ordinary amount of understanding). In all such cases there should be perfect freedom, legal and social, to do the action and stand the consequences.”

J.S Mill On Liberty
1859 Chapter IV §3

This principle suggests that the individual should be free to take any decision or action that he wishes subject to the absence of harm to others. This includes the freedom to take actions that

⁴ Burke, Edmund Reflections on the Revolution in France 1790 Harvard Classics Edition p.170

⁵ Howard J. W ‘Australia and Britain; the Contemporary Partnership in a New International Environment’ 23 June 1997

may be deleterious to one's self-interest. Further, this iconic definition of liberty rests on the assumption that the individual is generally best placed to know his own preferences and desires, his appetite for risk, and more likely to make decisions that achieve those ends than any other party such as a bureaucrat or an industrial tribunal. This proposition should act as a cautionary principle when government looks to limit the freedom of workers and employers in entering into mutually acceptable arrangements.

The Dignity of Work

"In all labour there is profit: but the talk of the lips tendeth only to penury"

Proverbs Chapter 14 Verse 23 (KJV)

"...our labour preserves us from three great evils—weariness, vice, and want"

François-Marie Arouet (Voltaire) *Candide*
1759 p.166

"So long as a person consumes more than he creates, whether he is fifteen or fifty, he remains immature. The mature man or woman is one who can hold a job, pay taxes, raise children and put something aside for the future"

Henry C. Link *The Way to Security*
Doubleday NY 1951 p. 153

Work underpins the success of the individual and society, and it is the primary link between them. For the individual citizen; identity, self-worth and independent autonomy start with work – in whatever form that takes; and it is the ability to earn or make money that enables the establishment and support of a family – in turn the most important unit of all successful societies. For society as a whole, it is work and only work that creates the wealth and earnings that can be taxed in order to fund the state.

It is at this point that the intersection between labour market policy and social welfare becomes critical. Where the welfare state is structured to remove, minimise or otherwise corrupt the incentive to work, individuals are deprived of the ability to grow and to learn; self-esteem and character is eroded; public funds are reduced both through increased expenditure and lower income taxation receipts; and an almost unlimited array of social dysfunctions are permitted to flourish.

The unemployment rate in Belgium's Molenbeek, described as 'jihadism's hotbed'⁶ is 30%.⁷ Closer to home, central Australia – characterised by Professor Peter Sutton as a 'Bermuda triangle for domestic violence against Aboriginal women'⁸ – has a participation rate of 43.8% and an unemployment rate of 13.5%;⁹ a stark contrast with the comparable national data of 65.2% and 5.2%.¹⁰ While conceding that both Islamic terror and Indigenous violence are complex social issues, at least part of the solution to both is the establishment of full employment in the communities in which these populations live.

6 <http://www.abc.net.au/news/2015-11-17/molenbeek-the-belgian-suburb-labelled-terrorism-hotbed/6947010>

7 <http://www.statistics.irisnet.be/figures/key-figures-per-municipality/molenbeek-st-jean/molenbeek-figures#.VvWzGPI96Uk>

8 <http://www.news.com.au/national/violence-against-aboriginal-women-80-times-worse/story-e6frfkp9-1226661209335>

9 Australian Bureau of Statistics 6287.0 - Labour Force Characteristics of Aboriginal and Torres Strait Islander Australians, Estimates from the Labour Force Survey, 2011

10 Australian Bureau of Statistics 6202.0 - Labour Force, Australia, Dec 2011

In *The Conservative Heart*,¹¹ Arthur Brooks describes New York's Doe Fund which takes the homeless – including drug users and ex-convicts – and has them clean the streets for 90 days before moving on to other training and skills development. In return for the work, the participants are fed, housed and clothed; and a small sum of money is directed to 'savings'. Any failure to meet the strict behavioural standards of the Fund will result in suspension of the right to work. Brooks goes on to describe in some detail the extraordinary success of the charity in enabling the previously unemployable to transition to self-supporting fully functional lives. Brooks' case studies of the Doe Fund and similar social entrepreneurship ventures fully vindicate the view that with work comes dignity and with dignity comes self-respect and happiness. What is also striking about Brooks' case studies, particularly the Doe Fund is that almost all of the operating principles and practices would constitute manifold breaches of the Fair Work Act and the applicable Modern Awards; and if the enterprise were in Australia it would be the subject of immediate prosecution by the Fair Work Ombudsman.

Equality of Opportunity and Equality of Outcome

"From the fact that people are very different it follows that, if we treat them equally, the result must be inequality in their actual position; and that the only way to place them in an equal position would be to treat them differently. Equality before the law and material equality are therefore not only different but are in conflict with each other; and we can achieve either the one or the other, but not both at the same time. The equality before the law which freedom requires leads to material inequality"

Friedrich von Hayek *The Constitution of Liberty*
Routledge London 1960 pp. 76-7

"We know, and occasionally admit, that there is no uniformity among personalities, or talents, or energy. We have learned that the true rising standards of living are the product of progressive enterprise, the acceptance of risks, the encouragement of adventure, the prospect of rewards. These are all individual matters. There is no government department which can create these things"

R.G Menzies, 'The Independence of Political and Industrial Leadership in the Modern State'
British Institute of Management Baillieu Lecture
London, UK July 6 1964

"We are all unequal. No one, thank heavens, is like anyone else, however much the Socialists may pretend otherwise"

Margaret Thatcher
Speech to Conservative Party Conference
Blackpool, UK October 10 1975

Throughout the liberal tradition, it is accepted that equality of opportunity is morally and economically a far more desirable objective than equality of outcome. Even if the price of the former is significant disparities in wealth or achievement, the benefits outweigh the alternative – because the only way to create equality of outcomes is through totalitarianism – reducing overall wealth, happiness and innovation. We are fortunate that by the late 20th century this is not just a matter of philosophical principle, but we have ample empirical evidence that totalitarian centralised economic planning has been nothing but an economic and humanitarian disaster, no matter where or when it has been imposed.

¹¹ Brooks A C *The Conservative Heart: How to Build a Fairer, Happier and More Prosperous America* Harper Collins 2015

The primary and dominant objective for an employment policy must be about creating opportunities for work – whether that be as an employee or an independent contractor or as a business, large or small. Anything but full acceptance of this principle is antithetical to both the liberal tradition and economic history.

A Note on ‘Unequal Bargaining’

“The best wage rates for labor are not the highest wage rates, but the wage rates that permit full production, full employment and the largest sustained payroll. The best profits, from the standpoint not only of industry but of labor, are not the lowest profits, but the profits that encourage most people to become employers or to provide more employment than before”

Henry Hazlitt
Economics in One Lesson
Three Rivers Press New York 1962 p.158

The immediate progressive response to the principles outlined above will be that the labour market ‘is different’. This is an assumption that is embedded in the labour market policy debate – the most recent *Productivity Commission Review of the Workplace Relations Framework* makes it quite explicit – ‘without regulation, employees are likely to have much less bargaining power than employers, with adverse outcomes for their wages and conditions’.¹² Illustrating the decline in intellectual rigor that once characterised the work of the Productivity Commission, no evidence is adduced to support this statement, and at no point is it tested empirically.

For the purposes of this essay, two points should be noted:

Firstly, as a bare minimum, the ‘unequal bargaining’ assumption is not true in all cases. An unskilled labourer engaged on the widening of the Tullamarine Freeway in Melbourne will earn approximately \$170,000 per annum.¹³ This is comparable to the average annual earnings of Australian General Practitioners.¹⁴ At the local high school, the median salary for teachers will be in the order of \$70,000.¹⁵ It is not apparent that the unskilled or low skilled blue collar worker in this case suffers from any inequality in terms of establishing employment conditions – the only party to have been treated inequitably would appear to be the future customers of the toll road.

The ‘unequal bargaining’ issue is therefore a question of fact – it is not axiomatic.

Secondly, the employer’s power to hire or not hire should be seen as analogous to any other purchasing decision. If the employer chooses not to purchase labour, the issue of ‘unequal bargaining’ cannot arise. Once the decision to purchase labour has been made, it is legitimate to assess the nature of the price setting mechanism and outcomes – but like any other transaction, the primary determinant of price is the balance of supply and demand.

Crucially, insofar as the regulatory framework increases the direct cost, risk and compliance complexity for employers; demand falls, the supply of labour increases, and the price must come

12 Productivity Commission ‘Workplace Relations Framework’ Draft Report August 2015 p.3

13 [2016] FWCA 558 CPB Contractors Pty Ltd CITYLINK TULIA (sic.) WIDENING BULLA ROAD TO POWER STREET GREENFIELDS AGREEMENT 2015

14 Cheng, T, Scott A, Jeon S, Kalb G, Humphreys J, & Joyce C ‘What Factors Influence the Earnings of GPs and Medical Specialists in Australia? Evidence from the MABEL Survey’ Melbourne Institute Working Paper No. 12/10 July 2010

15 http://www.payscale.com/research/AU/Job=High_School_Teacher/Salary/84d643b0/Melbourne

down. In first world countries this is generally manifested in the ‘unobserved economy’, estimated by the Australian Bureau of Statistics at 1.5% of GDP¹⁶ and by the World Bank at 14%¹⁷.

No market is perfect – but we do know that the more markets are regulated, the less effective they become, and the more likely we are to see unintended consequences. The unintended consequences of well-meaning but excessive labour market controls are unemployment, under-investment and off-shoring; and consequent increases in welfare and other social costs. These are not desirable goals.

Principles and Politics

“The problem with the present election cycle is that principles have been abandoned. The left is arguing programs, not principles. And conservatives are now caving in on principles in the mistaken belief that their own versions of single solutions and promises might be the way to garner votes from a desperate electorate. This impoverished approach is the shortcut to ruin”

John Horvat

‘Election 2016: Have Americans Abandoned Their Principles?’

The Imaginative Conservative May 9 2016

The liberal tradition, including the best of its Australian manifestation – the tradition and legacies of Menzies and Howard – demands that the debate about workplace relations be conducted from a position of principle. It is not good enough to limit conservative aspirations as to what may or may not be acceptable to the Senate, particularly its neo-Marxist Greens and Faustian ex-PUPs. As discussed below, the Liberal Party must also understand that the union movement is not the sole representative of working Australians, and has never sought to represent the unemployed or the self-employed.

The Liberal Party has a deep and abiding duty to the nation, to its constituents and to the intellectual and philosophical tradition to which it is heir – that duty requires the party to develop a workplace relations policy that is cognisant of the failings of the past; is explicitly based on liberal principles; creates opportunity for all of society; and which is measured by its results rather than its aspirations – particularly with respect to the lives of the poor and the vulnerable. The fact that political realities may dictate a timeframe of decades rather than years in achieving the result in no way diminishes the validity or desirability of the approach.

¹⁶ Australian Bureau of Statistics 5204.0.55.008 - Information Paper: The Non-Observed Economy and Australia’s GDP, 2012

¹⁷ Scheider F, Buehn A, Montenegro C ‘Shadow Economies All over the World: New Estimates for 162 Countries from 1999 to 2007’ World Bank July 2010

PART TWO: A BRIEF HISTORY OF WAGE FIXATION IN AUSTRALIA

The Australian industrial relations framework was unique at the time of its creation in 1904, and despite the subsequent three broad reiterations of the system, it remains unwieldy, unnecessarily adversarial and operates with little appreciation of economics and even less understanding of business, particularly small business.

The 1904 Act, the Harvester Judgement and the Basic Wage

The Conciliation and Arbitration Act 1904 was the fledgling Commonwealth's exercise of its constitutional power to legislate for 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State'.¹⁸ The Act prohibited strikes and lockouts, established the Commonwealth Court of Conciliation and Arbitration and its powers to make awards and orders, allowed for the registration of associations of employees and employers, and introduced the ability for unions to enter into Industrial Agreements with employers or employer associations.

In 1907, the Court delivered its most seminal decision – *Ex Parte H.V McKay*¹⁹ – known as the Harvester Judgement. Harvester has had a pervasive influence on Australian perceptions of the relationship between employers and employees, and its themes and assumptions can be still be found in contemporary debates about labour market regulation. The economic logic of Harvester was flawed from the outset; and while we have largely dismantled the structures that gave Australia the highest manufacturing tariffs in the world right through to the 1970s;²⁰ the assumptions that underlie the 'basic wage' remain with us.

Hugh Victor McKay had invented a mechanised stripper harvester which dramatically increased the productivity of wheat farms, and the 'Sunshine Harvester' went from production of 12 units in 1895 to almost 2,000 in 1906.²¹ Under the *Excise Tariff Act 1906*, duties were imposed on agricultural implements at rates of 10% to 12.5%. In order to avoid the application of the tariff, McKay had to have the wage rates at the Sunshine Harvester Works 'declared to be fair and reasonable'²² by the President of the Commonwealth Court of Conciliation and Arbitration. The Harvester Judgement was handed down following just such an application. Although the Judgement was successfully appealed on the grounds that the *Excise Tariff Act* was ultra vires,²³ the Harvester Judgement and its concept of the 'basic wage' are embedded in the fabric of wage fixation and labour market regulation in Australia.

Sir Isaac Isaacs, Attorney General, High Court Judge and the first Australian born Governor General is at least partially responsible for the flawed economic logic that a tariff system can somehow create wealth in the form of higher wages, and clearly enunciated the approach: 'Let an excise duty, the equivalent of a tariff on imports, be imposed upon agricultural machines manufactured in Australia; let it be waived when a manufacturer paid wages which conformed to the awards of Wages Boards or Arbitration Courts'.²⁴

18 Commonwealth of Australia Constitution Act 1901 S 51 xxxv

19 (1907) 2 CAR 1

20 Anderson K and Garnaut R *Australian Protectionism: Extent, Causes and Effects* Allen & Unwin, 1987

21 Lack J 'McKay, Hugh Victor (1865–1926)' in *Australian Dictionary of Biography* <http://adb.anu.edu.au/biography/mckay-hugh-victor-699>

22 Excise Tariff Act 1906 S2(d)

23 R v Barger [1908] HCA 43; (1908) 6 CLR 41 (26 June 1908)

24 La Nauze J.A Alfred Deakin – A Biography quoted by Plowman D. H 'A New Province for Law and Order'

Henry Bournes Higgins, President of the Court of Conciliation and Arbitration saw his task very simply – to determine whether the “conditions of remuneration submitted to me ‘are fair and reasonable’”²⁵ and in the absence of any guidance from either the legislature or the parties, he determined that ‘fair and reasonable’ meant ‘the normal needs of the average employee regarded as a human being living in a civilised community’.²⁶ In the latter part of the hearing, Higgins took detailed evidence from workers and housewives as to the cost of living – going through household budgets in painstaking detail.²⁷ On the basis of that evidence, Harvester set out a schedule of wage rates that was intended to allow the worker to support himself and his family in ‘frugal comfort’.²⁸ Thus was the basic wage born.

Post Harvester – The Piddington Royal Commission to the 1981 Wages Conflagration

In Harvester, the basic wage was set at £2 2s for 48 ordinary hours over six days.²⁹ In 1913, the Court began to increase the minimum wage for inflation.³⁰ In 1919, Prime Minister Billy Hughes established the Royal Commission into the Basic Wage. The Commission – led by Albert Piddington (the shortest serving judge in the history of the High Court, appointed from March to April 1913³¹) – was charged with determining how best ‘the minimum wage shall be adjusted automatically, or almost automatically; with the cost of living, so that within the limits of the minimum wage at least the sovereign shall always purchase the same amount of the necessaries of life’.³² In its quest to judicially define ‘reasonable standards of comfort’ the Royal Commission traversed widely - issuing 9,000 forms to households seeking data as to expenditure (of which only 400 were returned³³); visiting numerous metropolitan suburbs to ascertain the cost of renting a house;³⁴ analysed the costs of clothing, right down to determining the number, cost and expected useful life of various garments (it was found that a Wife would require one pair of second best shoes, with an expected life of one year³⁵); and reviewed the latest scientific evidence as to the calories required to sustain male workers, women and children. The Royal Commission recommended that a Bureau of Labour Statistics be established in order to advise the Court of quarterly changes in the cost of living.³⁶

Subsequent reviews of the basic wage added loadings for particular industries and locations in addition to quarterly adjustments based on the cost of living. In 1953, the Commonwealth Conciliation and Arbitration Commission took the view that quarterly indexation of wages was not sustainable in an economy increasingly dominated by global commodity pricing.³⁷ From 1953 until 1964 the Basic Wage was increased through a Commission process of ‘Basic Wage Inquiries’ that assessed the capacity of the economy as a whole to fund an increase in wages. From 1966 until

25 (1907) 2 CAR 1 p.2

26 (1907) 2 CAR 1 p.3

27 Transcript of the Proceedings of the Application of H.V. McKay and in the matter of the Excise Tariff Act, 1906 (‘Harvester Judgement’) Case Tuesday 22 October 1907 p. 437

28 (1907) 2 CAR 1 p.4

29 (1907) 2 CAR 1 p.23

30 (1913) 7 CAR 58

31 Roe, M ‘Piddington, Albert Bathurst (1862 – 1945)’ in Australian Dictionary of Biography <http://adb.anu.edu.au/biography/piddington-albert-bathurst-8043>

32 Commonwealth of Australia Report of the Royal Commission on the Basic Wage 1920 p.7

33 Commonwealth of Australia Report of the Royal Commission on the Basic Wage 1920 p.18

34 Commonwealth of Australia Report of the Royal Commission on the Basic Wage 1920 p.22

35 Commonwealth of Australia Report of the Royal Commission on the Basic Wage 1920 p.30

36 Commonwealth of Australia Report of the Royal Commission on the Basic Wage 1920 p.59

37 (1953) 77 CAR 477

1975, National Wage Cases took place annually, and wage increases were increasingly awarded as percentages rather than flat dollar amounts.

In the 1974 National Wage Case decision, the Bench expressed its continued concern at the prevalence of wage increases occurring outside the national wage case process – including industry wide award and over award increases.³⁸ This concern seems somewhat understated. The annual CPI increase to December 1974 was 16.29%;³⁹ and male average weekly earnings had increased by 28%.⁴⁰ From 1973 to 1976 rates of unemployment had increased rapidly – doubling to 3% for adults, and increasing by a factor of three to 12% for younger workers.⁴¹ ‘Thanks to a Labor Government, the arbitration system and compliant employers, unions had demanded too much and got it. They had priced Australia out of world markets’.⁴²

1975 until 1978 saw the return of quarterly wage indexation based on the CPI, with a mixture of flat dollar increases, percentage increases and the introduction of percentage increases up to a nominated earnings level with a flat dollar increase thereafter; an approach which complicates matters for employers by increasing wage compression.

From 1978 to 1981 wages were increased on a six monthly basis. By this time, the failure of central wage fixation was clear even to the Commission. In the 12 months ending in June 1981, male average weekly earnings increased by 15%⁴³ while the CPI escalated by 8.8%.⁴⁴ Industrial disputation peaked in 1981 with 800 working days lost per thousand employees⁴⁵ – the industrial relations landscape dominated by the AMWU campaign for a 38-hour week and \$39 per week pay rise in the metal industry. In 1981, the metal industry – essentially the manufacturing sector – sustained 2,285 working days lost per thousand employees.⁴⁶

The union movement had adopted a strategy of pursuing wage increases ‘on the ground’ in those industries where it had the requisite muscle, and then used the Commission’s wage fixing processes to flow increases on to sectors where union power was limited: ‘By lifting the base rate of pay in our strategic industries we were able to lift the rates of pay for our members employed in the service industries of cleaning, security and hospitality ... most tradesmen received an increase of at least \$39 per week and non-tradesmen received \$32 per week, flowing from the Federal Metal Trades Award’.⁴⁷ An integral part of this process involved the Commission giving its formal approval to successful ‘on the ground’ campaigns such as its approval of the 35-hour week claim at the Altona Petrochemical Complex in 1981. After a two year campaign the Commission managed to rule in favour of the claim, including the priceless statement that the approval of the 35-hour settlement ‘did not arise from the current campaign for a thirty-five-hour week’.⁴⁸ Such is the dissonant world of industrial relations.

By February 1983 unemployment had peaked at 10%.⁴⁹

38 (1974) 154 CAR 301

39 Australian Bureau of Statistics 6401.0 - Consumer Price Index, Dec 1974

40 Australian Bureau of Statistics 6302.0 - Average Weekly Earnings, Dec 1974

41 Australian Bureau of Statistics 1301.0 - Year Book Australia, 1975-76

42 Carney, Shaun *Australia in Accord – Politics and Industrial Relations Under the Hawke Government* Macmillan 1988 p. 8

43 Australian Bureau of Statistics 6302.0 - Average Weekly Earnings, Australia, Sep 1981

44 Australian Bureau of Statistics 6401.0 - Consumer Price Index, Jun 1981

45 Australian Bureau of Statistics 6101.0 - Labour Statistics, Australia, 1982

46 Australian Bureau of Statistics 6101.0 - Labour Statistics, Australia, 1982

47 Gietzelt R *Worth Fighting For: The Memoirs of Ray Gietzelt*, General Secretary of the Federated Miscellaneous Workers Union of Australia 1955 – 1984 Federation Press 2004 p.78

48 Hill B *Sitting In* Heinemann Melbourne 1991 p. 301

49 Australian Bureau of Statistics 6203.0 - The Labour Force, Australia, 1983

The Accord and Enterprise Bargaining

In 1983, the ALP under Bob Hawke and the ACTU under Bill Kelty negotiated the Prices and Incomes Accord. The Accord⁵⁰ sought to establish a pricing regulator; moderate wage increases while preserving cost of living increases; increased the 'social wage'; contemplated the introduction of universal superannuation; created industry plans – for steel and automotive manufacturing; and established the National Occupational Health and Safety Commission. After the election of the Hawke Government, the Accord went through several iterations, culminating with the Accord Mark VIII in 1995, intended for implementation in 1996. The 1983 National Wage Case decision noted that the Accord was a 'significant development'⁵¹ in handing down a wage increase of 3.8% and facilitating the introduction of a 38-hour week. Wages were increased – largely on the basis of the CPI – every six months until July 1996.

1987 saw the publication of *Australia Reconstructed* – a detailed report based on a union study tour of Sweden, Norway, West Germany, Austria and the UK which was organised by the ACTU and the Trade Development Council, an office within the Department of Trade established by the Hawke Government in 1983. The study tour and the Report were substantially driven by the AMWU, doubtless in part as a response to the disastrous 1981 metal industry campaign.⁵² The Report endorsed the 'Swedish' model including much of what the Accord set out to achieve, and emphasised the need for vocational training and up-skilling of the workforce.⁵³

The concept of enterprise based bargaining was formally born out of the 1987 National Wage Case, when the Commission awarded a 'second tier' increase of 4% in return for 'significant and appreciable improvements in efficiency at the enterprise or plant level'.⁵⁴

In 1988, the *Industrial Relations Act* replaced the *Conciliation and Arbitration Act*. The new Act allowed the Commission, rebadged as the Australian Industrial Relations Commission, to approve 'certified agreements' – in general, agreements specific to a particular enterprise. In 1993 the Keating Government produced the *Industrial Relations Reform Act* which sought to further facilitate enterprise based bargaining, and established a right to take lawful strike action – until that time all forms of industrial action were unlawful (in theory only – over the period 1955 to 1976 an average of .37 days per employee per annum was lost to industrial action⁵⁵). The 1993 legislation introduced the 'No Disadvantage Test' which required the Commission to ensure that in approving enterprise flexibility provisions, employees could not be disadvantaged relative to the applicable award.⁵⁶

Meanwhile, the Commission continued the National Wage Case approach to setting minimum wages. In 1988, the 'restructuring and efficiency' principle of 1987 was replaced with the 'structural efficiency' principle; whereby wage increases were available if the relevant union agreed 'to co-operate positively in a fundamental review of that award with a view to implementing measures to improve the efficiency of industry and provide workers with access to more varied, fulfilling and better paid jobs'.⁵⁷

50 'STATEMENT OF ACCORD BY THE AUSTRALIAN LABOR PARTY AND THE AUSTRALIAN COUNCIL OF TRADE UNIONS REGARDING ECONOMIC POLICY' 1983 <http://parlinfo.aph.gov.au/parlinfo/search/display/display.w3p;query=Id%3A%22library%2Fparty%2F992745%22>

51 ACAC Print F2900 23 September 1983

52 Scott A 'Australia Reconstructed' in *Organise, Educate, Control: The AMWU in Australia, 1852 – 2012* Monash University 2013 p.138

53 ACTU & TDC *Australia Reconstructed* AGPS Canberra 1987

54 ACAC Print G6800 10 March 1987 p.15

55 Rawson D.W *Unions and Unionists in Australia* George Allen and Unwin Sydney 1978 p.131

56 *Industrial Relations Reform Act 1993* S. 113B(3)

57 AIRC Print H4000 12 August 1988 p.9

The October 1991 National Wage Case included further support for enterprise bargaining, requiring employers and unions to demonstrate that wage increases were ‘based on the actual implementation of efficiency measures designed to effect real gains in productivity’.⁵⁸ In 1993, the Commission reviewed its Wage Fixing Principles and continued the trend to the primacy of enterprise bargaining by treating Awards as a safety net ‘which protects lower paid employees, maintains the integrity of the minimum award classification structure but which also does not detract from the trend towards enterprise agreements’.⁵⁹ Various safety net adjustments took effect through to March 1996.

The Workplace Relations Act 1996 and the WorkChoices Act 2006

Following the election of the Howard government, the *Workplace Relations Act* 1996 came into effect. Largely a continuation of the Hawke/Keating approach to labour market deregulation, with the exception of the Accord model; the new Act limited the content of Awards to 20 ‘Allowable Matters’; and introduced the Australian Workplace Agreement, a statutory individual employment contract that was able to override collective agreements. The Act included the objective of ‘ensuring that the primary responsibility for determining employment matters rests with the employer and employees at the workplace or enterprise level’.⁶⁰ The Commission maintained its function of ensuring that a safety net was maintained through the Award system, and the process of determining the safety net increases was substantially the same as the previous century: adversarial debate and adjudication based on the data put forward by the various parties and intervenors.⁶¹

In 1996, Victoria referred its industrial relations powers to the Commonwealth⁶² on the eminently sensible basis that “the regulation of a workforce of 11 million employees by seven industrial relations systems (w) as ‘ludicrous and economically unsustainable’”.⁶³ In 2005 the other states rejected the Howard Government request to similarly refer their powers to the Commonwealth; however by relying on the corporations power in the Constitution, the Commonwealth displaced the state jurisdictions in respect of trading and financial corporations, giving it coverage of 80% of private sector non-managerial employees.⁶⁴

In 2006, the WorkChoices amendments took effect. These included reducing the number of allowable matters in awards, dramatically limiting the scope for unfair dismissal remedies; introduced the concept of ‘prohibited content’, dramatically limiting the content of industrial agreements; and outlawed pattern bargaining. The new framework also established the Australian Fair Pay Commission which became responsible for setting minimum wages. The objective was to introduce ‘a less adversarial approach to wage setting as it will take greater account of the needs of low wage workers and the unemployed and will encourage further employment growth. In this way, the creation of a genuine minima may also help reduce associated welfare costs’.⁶⁵ The other significant change was the abandonment of the ‘No Disadvantage Test’, allowing the creation of individual agreements that were less beneficial to employees than the applicable Award.

58 AIRC Print K0300 30 October 1991 p.10

59 AIRC Print K9700 25 October 1993 p.29

60 Workplace Relations and Other Legislation Amendment Act 1996 S. 3(b)

61 AIRC Print P1997 Safety Net Review – Wages 22 April 1997

62 Commonwealth Powers (Industrial Relations) Act 1996 (Vic)

63 Kollmorgen S ‘Recent Legislation: Towards a Unitary System of Industrial Relations?’, (1997) 10(1) Australian Journal of Labour Law 158.

64 Commonwealth of Australia FAIR WORK AMENDMENT (STATE REFERRALS AND OTHER MEASURES) BILL 2009 EXPLANATORY MEMORANDUM p. v

65 Workplace Relations Amendment (Work Choices) Bill 2005 Explanatory Memorandum p.15

The 2007 election was dominated by the Your Rights at Work campaign carried out by the ACTU. The resources and funding committed to Your Rights at Work were significant. A levy of \$3.85 per member was imposed on affiliated unions⁶⁶ – raising about 20%⁶⁷ of the \$30 million being spent on television advertising alone.⁶⁸ To what degree the campaign swung the election result is unclear. Statistical modelling after the election suggested that those seats targeted by the ACTU delivered an additional swing of 1.3% to 2% against the government.⁶⁹ But the one indubitable effect of the campaign was that the ability of the Australian polity to conduct open and reasoned discussions on workplace regulation was further suffocated. Of particular concern was the failure of employers and business associations to contribute effectively to the public debate – including highlighting the very significant successes of the Howard era labour relations reforms, and warning the community of the ramifications of a re-regulated labour market in the event of an ALP victory. The Coalition remains irrationally fearful of the Your Rights at Work campaign model, and has to date failed to develop and articulate a clear, liberal and economically positive policy position on workplace regulation.

The Fair Work Era

The Rudd Government dramatically re-regulated the industrial relations framework through the ‘Forward with Fairness’ amendments to the *Workplace Relations Act 2008* followed by the *Fair Work Act 2009*. The individual statutory contract was abolished, a set of statutory minimum employment entitlements – the National Employment Standards – were introduced, union officials’ rights to enter workplaces were expanded and good faith bargaining principles were enacted. Collective Enterprise Agreements are the only form of statutory employment instruments available to employers, and restrictions on their content were significantly relaxed. Under the Award Modernisation process, 1,560 state and federal awards were replaced with 122 Modern Awards.⁷⁰ The *Fair Work Act* reinstates the ‘No Disadvantage Test’ with the ‘Better Off Overall Test’, which requires that in order to approve an Enterprise Agreement, the Commission must be satisfied current and prospective employees who will be covered by the Agreement will be better off overall when compared with the otherwise applicable Modern Award.⁷¹

In June 2009, the Workplace Relations Ministers’ Council met and all remaining states, excluding Western Australia agreed in-principle to refer private sector industrial relations powers to the Commonwealth.⁷²

In October 2012, in the midst of the furore over Fair Work Australia’s management of its investigation into the Health Services Union, Workplace Relations Minister Bill Shorten announced that Fair Work Australia would become the Fair Work Commission.⁷³

In September 2013, Tony Abbott won the federal election. The Coalition campaign included assurances that the Fair Work Act would remain largely unchanged, but did undertake that the Productivity Commission would review the operations of the Fair Work system. The Draft Report was issued in August 2015 and the Final Report in December 2015.

66 Muir K Worth Fighting For: Inside the Your Rights at Work Campaign UNSW 2008 p.10

67 Australian Bureau of Statistics 6310.0 - Employee Earnings, Benefits and Trade Union Membership, Australia, Aug 2006

68 Muir K and Peetz D ‘Not Dead Yet: The Australian Union Movement and the Defeat of a Government’

69 Spies-Butcher B & Wilson S ‘Election 2007: Did the Union Campaign Succeed? Australian Review of Public Affairs February 2008 http://www.australianreview.net/digest/2008/02/spies-butcher_wilson.html

70 <https://www.fairwork.gov.au/about-us/legislation/the-fair-work-system/australias-industrial-relations-timeline#current>

71 Fair Work Act 2009 S 193

72 Communiqué from Australian, State, Territory and New Zealand Workplace Relations Ministers’ Council (WRMC) Thursday 11 June 2009

73 Shorten W. R PRESS CONFERENCE - MELBOURNE - FAIR WORK ACT REVIEW Melbourne 15 October 2012

The one significant reform that the Abbott-Turnbull government did achieve was in relation to the making of Greenfield Enterprise Agreements. A Greenfield Agreement is one made by an employer for a new business or project. It can only be made with a union as there are no employees with whom to bargain or who can vote on the agreement. This had created situations where unions withhold their agreement until the employer has no option but to concede the claims. Under the amendments which took effect in November 2015, the employer can now write to the union and if, after a period of six months, no agreement is reached; the employer can apply to have the Fair Work Commission approve the 'agreement'. The Commission will approve the agreement if it 'provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work'.⁷⁴

The Government's key reforms dealing with union governance and the re-establishment of the Australian Building and Construction Commission remain at the forefront of the Canberra debate and formed the basis of the 2016 double dissolution election.

⁷⁴ Fair Work Act 2009 S 187(6)

PART THREE: HOW WELL HAS THE AUSTRALIAN INDUSTRIAL RELATIONS SYSTEM SERVED OUR NATIONAL INTERESTS?

“But I don’t want to go among mad people,” Alice remarked.

“Oh, you can’t help that,” said the Cat: “we’re all mad here. I’m mad. You’re mad.”

“How do you know I’m mad?” said Alice.

“You must be,” said the Cat, “or you wouldn’t have come here.”

Lewis Carroll, Alice in Wonderland

1865

The Australian Model

For almost a century, the Australian wage fixation system was based on two unsustainable fallacies. The first was to determine employee earnings based on the purchasing power of the wage, and the second was that adjustments to the minimum wage would be based on overall economic metrics rather than the performance of firms and their employees.

Under the heading ‘A Head Start Forfeited’, Gary Banks describes the Australian system of the 20th Century as ‘highly regulated, anti-competitive and redistributive: captured nicely by the expression ‘protection all round’.⁷⁵ Banks goes on – ‘until the 1970s Australia was still managing to ‘ride on the sheep’s back’. The terms of trade favoured our primary commodities, and we had benefited from a world-wide expansion in demand following the War. During the 1970s, the prices we received for our commodity exports commenced a long decline, while the costs of imports began to rise’. The underlying poor performance in productivity growth (at 70% of the OECD average⁷⁶) is attributed to four main failings, including ‘indulgent, inflexible work practices, powerful unions and lack-lustre management’.⁷⁷ Banks notes that Australia’s unacceptable productivity performance translates directly into living standards – with Australia’s GDP per person slipping from 5th in the world in 1950 to 15th by the late 1980s.

This trend has continued – Australia’s GDP per capita⁷⁸ – comparable with that of the USA in 1970 – is now significantly lower, despite the USA’s very slow recovery from recession in 2008 and the unprecedented Australian boom of 2000 – 2010.

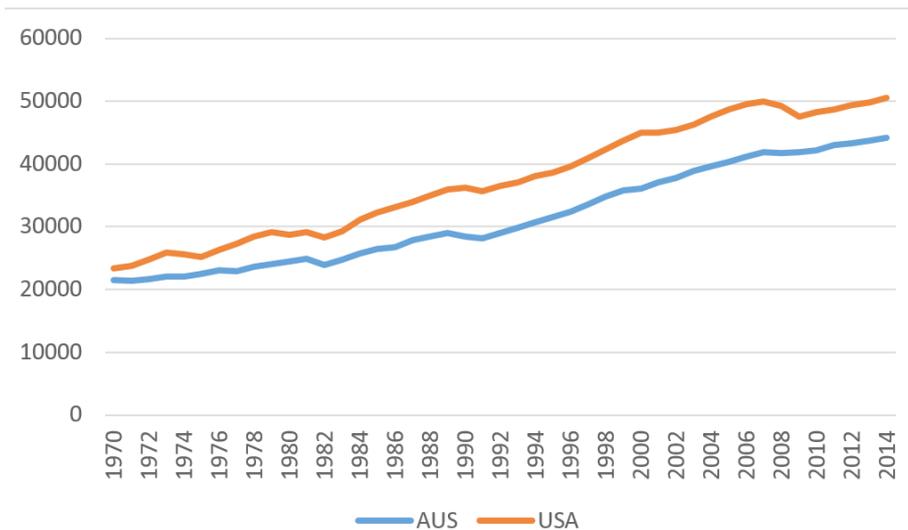
75 Banks G ‘Structural Reform Australian-Style: Lessons for Others? Presentation to the IMF, World Bank and OECD May 2005 p.2

76 Banks G ‘Structural Reform Australian-Style: Lessons for Others? Presentation to the IMF, World Bank and OECD May 2005 p.3

77 Banks G ‘Structural Reform Australian-Style: Lessons for Others? Presentation to the IMF, World Bank and OECD May 2005 p.4

78 https://stats.oecd.org/Index.aspx?DataSetCode=PDB_LV

OECD: Level of GDP Per Capita (USD 2010 Constant Price)



The ‘protection all round’ approach to labour market regulation has been a conspicuous failure.

The Harvester Judgement: A Product of its Time?

It is tempting but inaccurate to dismiss the Harvester world view as merely a product of its time. Much of the rationale for the decision and its legacies are systemic, and much of that system remains.

The ‘New Protection’ – ‘protection against the cheap manufactures of other parts of the world, but also protection for the worker’⁷⁹ is of concern in two respects – both of which dominate debate about labour market regulation to this day. The first is what might be termed ‘the Conceit of the Lawyers’ – that is, the view that any and all social problems can be resolved or ameliorated by regulation or litigation, with scant respect for individual freedom and responsibility or unintended consequence. The second is profound ignorance of economic thought. By 1907, it was established beyond doubt that tariffs and the economics of the ‘New Protection’ were not only destructive of wealth – they are also weapons which are brutally regressive. The writings of Adam Smith (1723 – 1790); David Ricardo (1772 – 1823); Carl Menger (1840 – 1921); and Eugen Böhm von Bawerk (1851 – 1914) must have been unavailable in the library of the Court of Conciliation and Arbitration.

On a more serious note, one of the major defects with the legalistic and adversarial system of conciliation and arbitration is that the Commission is largely limited to the material put before it. Who speaks for small business, for the chronic unemployed or for the self-employed? Who speaks for industries and modes of work that reflect the future rather than the past?

Australia suffers to this day from the Lawyers’ Conceit – in almost every area of social policy; and ignorance of the most basic principles of economics is rife – not least in the various successor tribunals to the Court of Conciliation and Arbitration. Even the recently published *Productivity Commission Report into the Workplace Relations Framework* finds that the Fair Work Commission is in need of broader capabilities – not least in economics.⁸⁰

The legacy of Harvester remains with us – almost any discussion of labour market regulation and wage fixation starts with the concept of the ‘living’ or ‘basic’ wage – that is, the utility of the wage

79 The Advertiser Adelaide 28 April 1905 <http://trove.nla.gov.au/ndp/del/article/5045089>

80 Productivity Commission ‘Workplace Relations Framework – Draft Report’ August 2015 p.11 & p.46

in the hands of the worker. This approach is fundamentally misguided. No employer – large or small – will enter into an employment relationship unless the value of the work done exceeds the cost of the wage. And the cost of the wage is somewhat more than the headline minimum hourly rate. Most Modern Awards require minimum engagements of two or three hours per day – so the headline minimum wage is not \$17.70 per hour⁸¹ but \$35.40 or \$53.10 per engagement. Add the 9.5% mandatory superannuation contribution, and the figures become \$38.76 and \$58.14. In addition, the employer deals with various on-costs such as workers' compensation premiums, leave accruals (or the casual loading of 25%), and in the case of larger companies, payroll tax.

Consider a café owner who wishes to employ a casual waiter on a Saturday. Under the applicable Modern Award⁸² the hourly rate is \$32.12 (including superannuation), and the waiter must be engaged for a minimum of two hours. Before engaging the waiter, the owner needs to be reasonably confident that he will add more than \$64.24 plus on-costs in value – and the employer takes all the risk. The Australian Bureau of Statistics reports that the industry's operating profit before tax is 3.8%,⁸³ so there is very little margin to absorb the fixed cost of labour if things don't go as planned.

The higher the minimum wage, the more value the worker has to produce. As the labour cost increases, the employer faces various alternatives. He can simply not engage labour; he may outsource the activity – to an independent contractor or offshore; he may invest in plant and equipment to reduce the need for labour; or he may go out of business altogether. Even services industries such as the food and beverage sector have options to automate. Eatsa⁸⁴, a newly established San Francisco fast food operation has eliminated all customer facing labour – fully automating order taking, payment and fulfilment. The Chief Executive Officer of CKE Restaurants which operates 3,300 outlets in 28 countries⁸⁵ has publicly stated his interest in the Eatsa model: 'With government driving up the cost of labour, it's driving down the number of jobs. You're going to see automation not just in airports and grocery stores, but in restaurants. Does it really help if Sally makes \$3 more an hour if Suzie has no job?'⁸⁶ Less than two weeks after this observation was made, United Voice, the union which has the right to represent employees in this industry in Australia lodged a submission with the 2016 *Fair Work Commission Annual Wage Review*, requesting that the Commission establish a medium term target for the minimum wage,⁸⁷ with the explicit objective of increasing it relative to average weekly earnings.

The people who suffer the most from the decision not to hire labour are those with the least value to add – they are usually the young, the unskilled, new migrants, or those committed to study or caring and who have limitations on their hours available for work. So the basic or minimum wage simply has the effect of pricing the most vulnerable out of work, often condemning them to a life of welfare dependency, sometimes for generations. This inescapable fact of economic life was made clear during the Harvester hearing – the Managing Director of Austral Otis Engineering pointing out that 'when there is a fixed rate of wages in a shop all men are not alike, they have not the same skill or ability, and where the men have got to get the minimum rate of wage - the

81 <https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/minimum-workplace-entitlements/minimum-wages>

82 Restaurant Industry Award 2010

83 Australian Bureau of Statistics 8655.0 - Cafes, Restaurants and Catering Services, Australia, 2006-07

84 <https://www.eatsa.com/>

85 <http://www.ckorestaurants.com/about.html>

86 Business Insider 17 March 2016 <http://www.businessinsider.com.au/carls-jr-wants-open-automated-location-2016-3?r=US&IR=T>

87 Submission by United Voice To Fair Work Commission Annual Wage Review 2015-2016 30 March 2016

minimum rate of wage is fixed at the average rate prevailing at the time and that is more than the poor man can earn for his employer and it is less than the good man ought to receive'.⁸⁸

Finally, being in receipt of a minimum wage is not necessarily coextensive with poverty. A high school student who babysits for \$10 per hour and lives at home is generally not considered poor. A university student who works as a casual waiter to supplement parental support in order to buy clothing or go to the pub is not necessarily struggling.

The minimum wage needs to be understood in its broadest effect – it includes penalty rates for overtime and work outside ordinary hours; minimum periods of engagement; and the various on-costs identified above. Employers also deal with uncertainties and risks in relation to the cost of labour in relation to capital investment, the risk of industrial action and unfair dismissal costs. Employers, particularly small business people are 'once bitten, twice shy' in relation to employment matters – if they perceive that the labour relations system is too complex, costly or unfair, they are unlikely to reinvest in employment or in capital expenditure unless the capital reduces or eliminates jobs.

Lessons of the Whitlam Era

In 1971, unemployment was at 1.7%.⁸⁹ It increased to 2.4% in November 1973 and to 3.4% over the following twelve months.⁹⁰ The CPI for the year ended December 1971 was 4.9%,⁹¹ and in December 1972 increased by 7%.⁹² It was against this background that the Commonwealth supported the ACTU 1973 National Wage Case claim of \$14.00 (27.5%)⁹³ with its submission that 'it is the Commonwealth's opinion that there is scope in the capacity and the flexibility of the Australian economy for an appreciable increase in wages without undesirable inflationary consequences'.⁹⁴ The Whitlam Government adopted a specific objective of increasing minimum award wages – 'The Commonwealth's concern is that help should be given to the lower income groups who in our view have been disadvantaged by their relative bargaining weakness'.⁹⁵ Minister for Labour, Clyde Cameron put it more bluntly 'Award rates are far too low'.⁹⁶

By 1975, unemployment had reached 5.0%, and it was to nudge 7.5% by early 1978.⁹⁷ From 1950 to 1974, Australia's average unemployment rate was 2%. From 1974 until 1992 it almost quadrupled to 7.3%.⁹⁸ From 1973 until 1991, 254,000 jobs were lost from the manufacturing sector alone.⁹⁹ This decline is often and wrongly blamed on reductions in tariff protection – 'it should be noted that there was no significant reduction in effective protection during this time; indeed, effective assistance actually increased in some cases'.¹⁰⁰

88 Transcript of the Proceedings of the Application of H.V McKay and in the matter of the Excise Tariff Act, 1906 ('Harvester Judgement') Case Tuesday 22 October 1907 p. 279

89 Australian Bureau of Statistics 6101.0 - Labour Report, 1973

90 Australian Bureau of Statistics 6101.0 - Labour Statistics, 1975

91 Australian Bureau of Statistics 6401.0 - Consumer Price Index, 1970

92 Australian Bureau of Statistics 6401.0 - Consumer Price Index, Dec 1972

93 (1973) 149 CAR p.83

94 (1973) 149 CAR p.81

95 Commonwealth Submission to 1973 National Wage Case, quoted in McGavin P.A Wages and Whitlam OUP Melbourne 1987 p. 14

96 House of Representatives Hansard 3 April 1973 QUESTION AVERAGE WEEKLY EARNINGS

97 Australian Bureau of Statistics 6101.0 - Labour Statistics, 1977

98 Fahrer J and Heath A 'The Evolution of Employment and unemployment in Australia' Reserve Bank of Australia December 1992 p.1

99 Fahrer J and Heath A 'The Evolution of Employment and unemployment in Australia' Reserve Bank of Australia December 1992 p.51

100 Fahrer J and Heath A 'The Evolution of Employment and unemployment in Australia' Reserve Bank of Australia December 1992 p.51

*'The experience of 1974 brought the spotlight upon serious deficiencies in Australia's wage fixing principles and practices which exacerbated the undesirable tendencies operating in the economy that year. Based on the assumption, widely accepted in industry, that each wage was entitled to maintain its historical relativity to other wages, the medley of collective bargaining increases and arbitrated increases, operated, in conditions of high inflation, to increase the rate of inflation, to worsen business recession and to increase unemployment.'*¹⁰¹

*'Over the period 1973 to 1979 Australia's total factor productivity growth rate was 0.8 per cent a year compared with an OECD average rate of 0.6 per cent and an OECD Europe average of 1.4 per cent. In the decade since, Australia's growth rate dropped to 0.5 per cent compared with an OECD average of 0.9 per cent and an OECD Europe average of 1.2 per cent. In the period 1973 to 1979, Australia's labour productivity growth was well above the OECD average (2.2 per cent compared to 1.4 per cent) but in the most recent decade (ending 1989) it dropped below the OECD average (1.1 per cent compared to 1.6 per cent).'*¹⁰²

*'The reality of government-induced redistribution in the share of national income towards labour by the instrument of wage is that this contributes to reduced capital formation and to reduced employment and to productivity growth lower than should otherwise be expected..... for 1975, the lagged change in relative wages contributes about minus 1.25 million hours to the aggregate change in Australian male weekly employment.'*¹⁰³

A Commonwealth Government with an explicit agenda of increasing the minimum wage regardless of the economic and business realities faced by employers; a centralist wage fixation system operating without any meaningful appreciation of how business operates; and an adversarial tribunal which was characterised by the lack of an effective advocate for the unemployed, the underemployed and the disadvantaged resulted in the end of 'full' employment and triggered the permanent decline of the manufacturing sector.

1907 to 1983 – 'Personne n'a su ni rien oublier, ni rien apprendre'¹⁰⁴

Paul Kelly argues that the 1974 wages breakout destroyed the Whitlam Government and the 1981 breakout destroyed the Fraser Government.¹⁰⁵ Beyond the well-deserved political consequences, the 75 years up to the election of the Hawke Government in 1983 demonstrate that the uniquely Australian model of 'protection all round' was a complete failure. The use of tariffs to enable centralised, economy-wide wage increases that bore no relationship to individual business needs or employee contribution can only result in failure. The fact that militant, powerful unions were able to secure unsustainable increases in wages and conditions in those industries where they had the requisite muscle; and then rely on the Court of Conciliation and Arbitration and its successor tribunals to flow those increases in to every other sector on the basis of 'comparative wage justice' and the Award system compounds that failure to a degree which beggars belief.

The opportunity cost of 'protection all round' has been incalculable – the absolute minimum that contemporary policy-makers owe themselves and the nation is to thoroughly understand this history. From a philosophical perspective, the model is opposed to every principle of the liberal

101 McGarvie R. E 'Wage Indexation and the Impact of the 1975 National Wage Cases' Seminar on Labour Relations Law Monash University 6th September 1975

102 Commonwealth of Australia Industry Commission Annual Report 1989 – 90 p.38

103 McGavin P. A Wages and Whitlam OUP Melbourne 1987 p.151

104 'Nobody has forgotten anything, nor learned anything' Sayous, A Mémoires et Correspondance de Mallet Du Pan Paris 1851 p.197

105 Kelly P The End of Certainty Allen and Unwin 1992 pp.50 - 51

tradition – indeed in its implicit rejection of markets, competition and individual freedom; and its implicit faith in centralised bureaucratic processes it can be fairly described as Soviet.

1983 to 2007 – A Continuum of Deregulation

Peter Cook, Minister for Industrial Relations from 1990 to 1993 in his assessment of the Accord model quotes Denis Healey – ‘adopting an incomes policy was like jumping out of a second-storey window: nobody in his right mind would do it unless the stairs were on fire’.¹⁰⁶ And indeed the entire neighbourhood was alight.

‘The economy-busting deal came in late 1981 in the metals industry, with a collective bargaining agreement ratified by the full bench (of the Arbitration Commission). It meant an average rise in hourly wages of 24 per cent for 400,000 metalworkers or 9 per cent of the workforce. In 1982, wages rose across the workforce by 16 per cent, with a resulting squeeze on profits’¹⁰⁷

Unemployment rose rapidly as the wages blowout took effect in the economy:



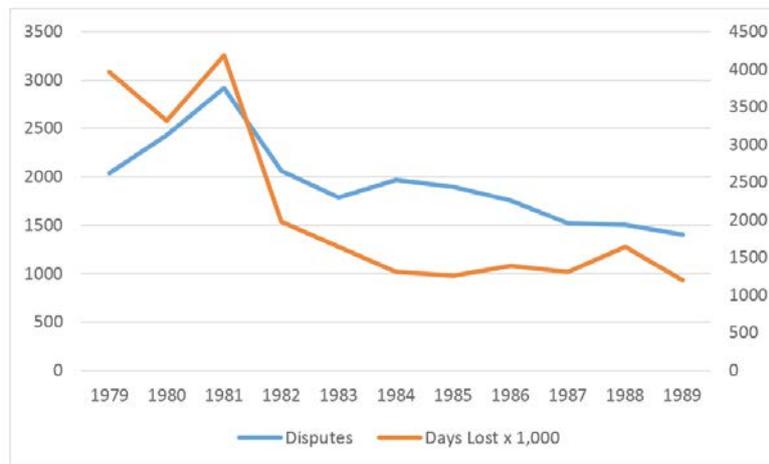
On one level, the Accord was a success – it is beyond argument that overall real wage costs reduced over the Hawke–Keating era. The wages share of national income declined from 63.3% in 1983 to 56.4% in 1989.¹⁰⁸ Secondly, it acted as a circuit breaker – industrial disputes declined by frequency and severity:

¹⁰⁶ Cook P ‘THE ACCORD: AN ECONOMIC AND SOCIAL SUCCESS STORY’ Centre For Economic Performance Occasional Paper No. 1 December 1991 p.1

¹⁰⁷ Kelly P The End of Certainty Allen and Unwin 1992 p.51

¹⁰⁸ Mitchell W. F ‘Macroeconomic Policy in Australia 1983-1996’ Centre of Full Employment and Equity Working paper No. 98-03 February 1998 p. 9

Industrial Disputes Australia
ABS 6101.0 Labour Statistics, Australia 1989



If nothing else, the reduction in industrial disputation enabled a number of important ends. The improved industrial environment facilitated the slow devolution of wage setting from the Commission to become increasingly the domain of the enterprise. Management began to experiment with more innovative organisational models, including annualised salaries and ‘unlimited’ sick leave (notably at ICI Botany¹⁰⁹) and the use of incentive schemes and efforts to formalise and improve employee involvement and ownership of decisions.¹¹⁰ Even the construction industry was the subject of an attempt to apply the Accord style tri-partite consultative model to achieve productivity improvement. The Construction Industry Development Agency was established in 1992 with the objective ‘to promote and facilitate the development and reform of the construction industry in Australia’¹¹¹ but it had no meaningful effect on the industry’s industrial relations or productivity.¹¹²

Somewhat perversely from the unions’ perspective, the Accord era was also the period where a number of employers moved to reduce union influence in their workplaces. In 1985 The South East Queensland Electricity Board was able to effectively remove the ETU from its operations.¹¹³ The most far-reaching and strategic example of this thinking was CRA (now Rio Tinto ASX:RIO) which began the process of systematically engaging with its workforce through its line management and supervisory structures, to the exclusion of the unions and largely the Commission’s processes. Having established the overall policy direction by 1986,¹¹⁴ by 1995,¹¹⁵ CRA’s iron ore operations in the Pilbara had established a productivity advantage over BHP (now BHP Billiton ASX:BHP) that remains in place. In the paint industry, plagued by entrenched demarcations, the NUW was completely excluded from the sector following the Paint Industry Demarcation Order of 1990.¹¹⁶

109 Mealor T ICI Botany: A Decade of Change AGSM UNSW 1997

110 Lansbury L and MacDonald D (eds) Workplace Industrial Relations: Australian Case Studies OUP Melbourne 1992

111 Construction Industry Reform and Development Act 1992

112 Jaafari, A. ‘Human Factors in the Australian Construction Industry’ Australian Journal of Management Volume 21 No.2 pp 159 – 186 p.177.)

113 Gilbert W.L ‘The Queensland Power Dispute’ in Arbitration in Contempt H R Nicholls Society Melbourne 1986 pp. 29 - 68

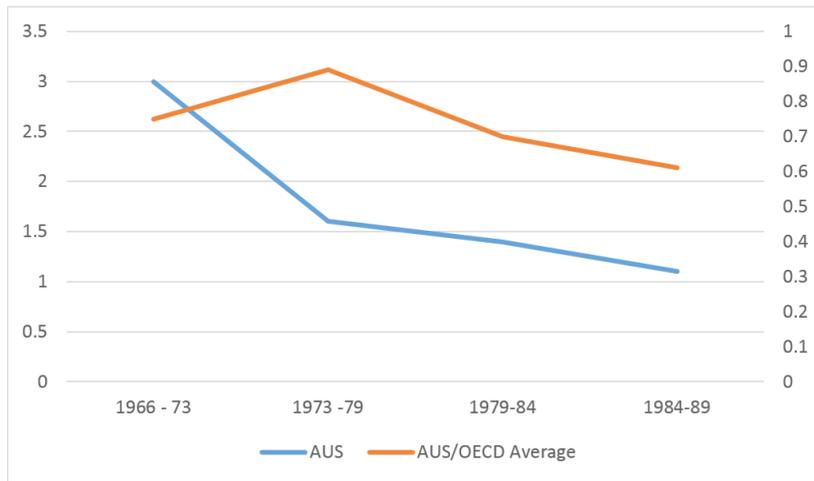
114 Ludeke J.T The Line in the Sand: The Long Road to Staff Employment in Comalco Wilkinson Melbourne 1996

115 Swain P Strategic Choices: A Study of the Interaction of Industrial Relations & Corporate Strategy in the Pilbara Iron Ore Industry Curtin University WA 1995

116 AIRC AP792470 - The Paint Industry Sites Demarcation Order 1990

Thus the Accord, as it succeeded in establishing the union movement as a key influence over Commonwealth Government policy was also witness to the rise of enterprise bargaining and a preparedness on the part of some employers to take relatively radical steps to exclude or minimise union influence at the operational level. That is, as the union movement, primarily through the ACTU grew in influence at the national policy level, its presence, capacities and influence ‘on the ground’ declined. Secondly, the Accord period had no discernible effect on Australia’s continuing decline in productivity:¹¹⁷

**Annual Rates of Growth of Labour Productivity
Australia and Australia & OECD Average**



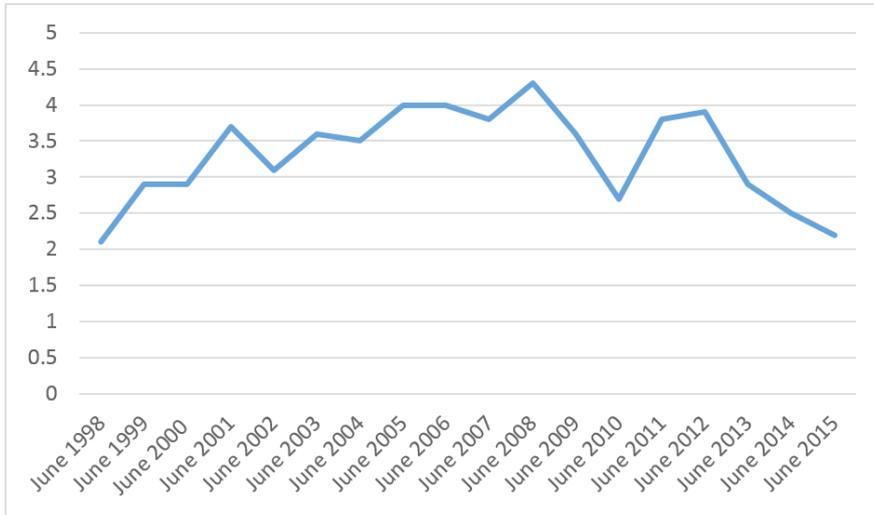
The devolution of industrial bargaining from the hearing rooms of the Commission to individual enterprises and to individual employees had slowly evolved from 1987 National Wage Case through the Hawke/Keating legislative changes and reached its high point during the short life of the WorkChoices regime.

We know that real wages fell during the Accord era. What happened under the Howard Government?

117 Costa M and Duffy M Labor, Prosperity and the Nineties: Beyond the Bonsai Economy p.92

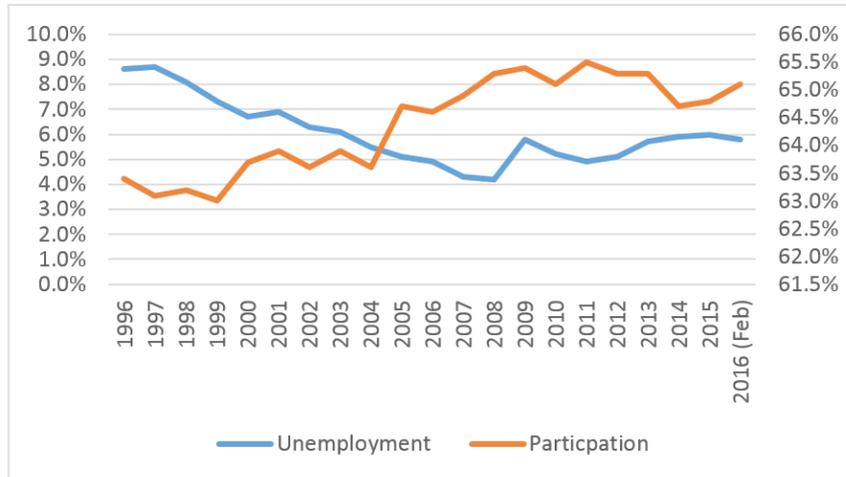
Firstly, real wages increased:

ABS 6345.0 Wage Price Index, Australia 1998 – 2015 (Private Sector)



Secondly, there was significant growth in employment – unemployment declined significantly and the participation rate increased:

ABS 6202.0 Labour Force, Australia 1996 – 2016 (June)



Arguably the most important achievement of the Reith–Abbott–Andrews era of Workplace Relations Ministers (1996 – 2007) was that the rapid escalation in wages that accompanied the construction boom in the resources sector was largely contained to that sector. In the first decade of the 21st Century, investment spending in the mining sector increased from 2% to 8% of GDP¹¹⁸. In every comparable super-cycle, the centralised wage fixation system has intentionally flowed on wage increases to sectors which could not afford them; resulting in the economy wide ‘bust’ at the

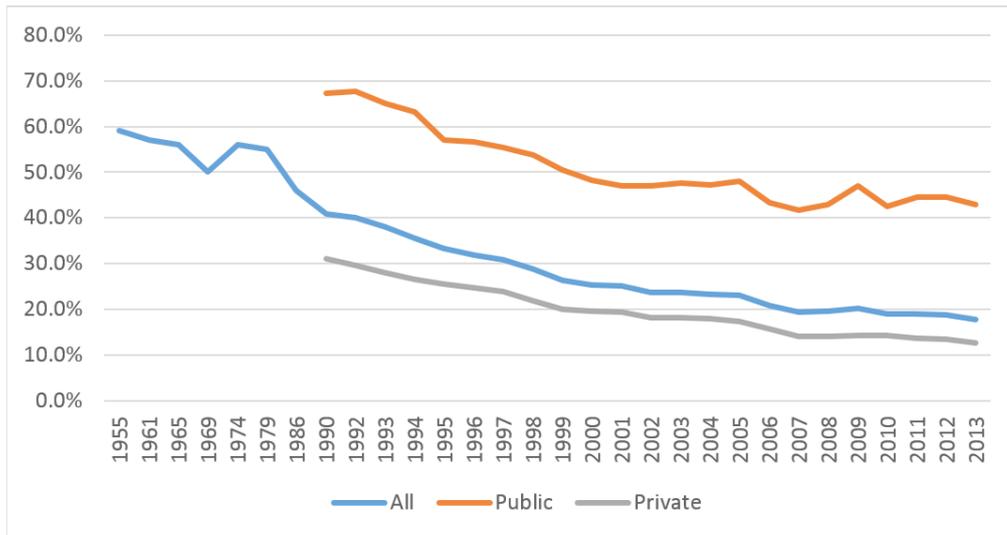
118 Downes D, Hanslow K & Tulip P ‘The Effect of the Mining Boom on the Australian Economy’ Reserve Bank of Australia August 2014

end of the cycle. One of the primary reasons why this did not occur in this case is that the wage fixation system had been partially decentralised and deregulated.¹¹⁹

The Fair Work Era: The Institutionalisation of Relevance

The energy and resources that the ACTU and its affiliates invested in Your Rights at Work need to be understood in the context of a continuous decline in union membership over a long period of time.

ABS 1301.0 Year Book Australia (1955, 61, 65, 69, 74, 79, 86)
ABS 6310.0 Employee Earnings, Benefits and Trade Union Membership, Australia



Of the 1.7 million members of the workforce who are trade union members, only a little over 1 million are employed in the private sector. This should be contrasted with the more than 2 million independent contractors and self-employed.¹²⁰ In 1990, 30% of workers under 25 were members of a union, in 2013 that proportion had declined to 9%.¹²¹ The most recent ABS data (October 2015) indicates that the rate of decline in union membership continues unchanged.¹²² The union movement is well aware that it faces an existential crisis. The AMWU – which brought the country to its knees in 1981, recently engaged Greg Combet to lead a review of its governance framework – Combet’s Report notes that the AMWU membership is forecast to fall to 30,000 members by 2025, down from 200,000 in 1995 and he concludes ‘this membership trajectory will ensure that the Union loses its power to effectively represent members. It will also lose its influence in the economy, in politics and the labour movement’.¹²³

Two key points emerge here – firstly, the union movement on arithmetic grounds alone, cannot claim to be the sole representative of employees in Australia; and it is even further removed from the growth sector of the workforce – the self-employed. Critically, its largest single area of decline

119 Bishop J, Kent C, Plumb M & Rayner V ‘The Resources Boom and the Australian Economy: A Sectoral Analysis’ Reserve Bank of Australia Bulletin March 2013 p.46

120 Australian Bureau of Statistics 6359.0 - Forms of Employment, Australia, November 2013

121 Australian Bureau of Statistics 6310.0 - Employee Earnings, Benefits and Trade Union Membership, Australia, August 2013

122 ABS 6333.0 - Characteristics of Employment, Australia, August 2014

123 Combet G & Whittaker A ‘AMWU – Review of Governance, Finances, Budget and Resource Allocation’ 30 November 2015

is new workforce entrants. Secondly, its political positioning and campaigning, including Your Rights at Work and its submissions to the Fair Work Commission need to be understood in the context of an organisational model that is facing extinction.

PART FOUR: LABOUR MARKET REGULATION FOR A DIGITAL WORLD

“Higher workforce participation can reduce the fiscal pressures associated with providing welfare support and serve social inclusion and equity goals. The Government believes that assistance to the unemployed should help them move into employment rather than encouraging them to remain on welfare”

Commonwealth of Australia
'2015 Intergenerational Report: Australia in 2055' March 2015 p.96

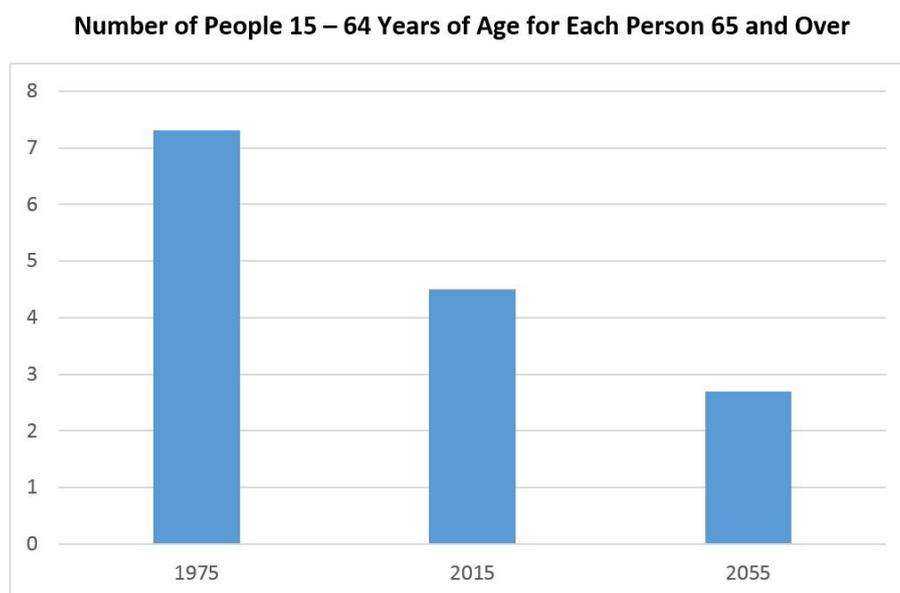
“Fifty years ago, you went to a job and remained until you retired. You left with a gold watch and a pension. Twenty-five years ago, you started your career, hopped from job to job, maybe took a break for additional schooling, had no expectation of a defined-benefit pension, and had a relatively weak relationship with any individual employer. Twenty-five years from now, the workplace will still exist in some industries but will be a distant memory in others.”

Kevin Hassett and Michael Strain
'Monthly Labor Review' March 2016
US Bureau of Labor Statistics

The Macro-Economic Background

The 2015 *Intergenerational Report* paints a disturbing picture of the Australian economy over the next 40 years. No discussion of the labour market regulatory framework can be held without recognising the very significant changes that are in play.

Firstly, the number of working age people as proportion of the total population is decreasing alarmingly:¹²⁴



124 Commonwealth of Australia '2015 Intergenerational Report Australia in 2055' March 2015 p.v

Secondly, welfare payments are expected to increase by at least 10%, from 14.5% to 16% of GDP.¹²⁵ Government spending as a proportion of GDP will reach 25.9% this year – almost the highest level since World War II, while nominal GDP growth is the lowest it has been for 50 years.¹²⁶ There is an urgent requirement to reshape the labour market framework to facilitate and incentivise workers to find and remain in employment – whether as employees or as self-employed; and to remove all possible barriers to employers of all sizes engaging workers.

The blunt reality is that if welfare spend is to be reduced and the tax take increased, employment must rise.

The Shape of the Workforce

The workforce in 21st Century Australia is fundamentally different to any previous period. From 1980 until now, women's participation rate has increased from 44% to 60%. Over the same period, the male participation rate has declined from 78% to 71%.¹²⁷ The manufacturing sector, which employed 16% of the workforce in 1985 is now 8%.¹²⁸ The Services sector has added 4.6 million workers since 1985.¹²⁹ The self-employed now represent 17% of the workforce.¹³⁰ 38% of students work part time.¹³¹ 18% of employment engagements are less than 12 months in duration, and over 37% are less than five years.¹³² 6% of the workforce hold multiple jobs, and of those, 42% were self-employed in the second job.¹³³

In the US, 17% of the workforce (27 million workers) are independent contractors.¹³⁴ In Australia, the proportion of independent contractors (compared to employees) providing services to private sector employers has increased from 25% in 2011 to 31% in 2015 and is forecast to reach 40% in 2018.¹³⁵

This is not a labour market that sits easily with the notion that all workers are full time male employees who are looking to support a family in 'frugal comfort'.

Anomalies in the Current System – Casual Loadings and Superannuation as Theft

Under the current system, an employee is either 'casual' or 'permanent'. A casual employment relationship means that the employee is hired by the hour with no guarantee of regular hours, no leave benefits, and the contract can be terminated without notice. The permanent employee (full-time or part-time) works regular hours and is entitled to accrued leave and termination benefits such as notice. This distinction is honoured in the breach now, and it is increasingly incongruent with expected employer needs. Many employees – principally young and/or itinerant workers and labour hire employees are paid as casuals despite the fact that they are working regular hours. These employees are often younger workers, backpackers or students who are working for relatively short durations. For example, a university student who works part-time is more likely to want cash than leave. The arrangement generally suits both employer and employee, as the

125 Commonwealth of Australia '2015 Intergenerational Report Australia in 2055' Chapter 2

126 Fraser J 'The Australian Budget – Some Context' Speech to the Sydney Institute 28 January 2016

127 Australian Bureau of Statistics 6202.0 - Labour Force, Australia, Feb 2016

128 Productivity Commission 'Workplace Relations Framework' Draft Report August 2015 p.93

129 Productivity Commission 'Workplace Relations Framework' Draft Report August 2015 p.93

130 Australian Bureau of Statistics 6359.0 - Forms of Employment, Australia, November 2013

131 Productivity Commission 'Workplace Relations Framework' Draft Report August 2015 p.106

132 Productivity Commission 'Workplace Relations Framework' Draft Report August 2015 p.109

133 Australian Bureau of Statistics 4102.0 - Australian Social Trends, Sep 2009

134 Workmarket '2016 Corporate On-Demand Talent Report'

135 Expert 360 'Getting Trendy – Hiring and Working Trends 2015'

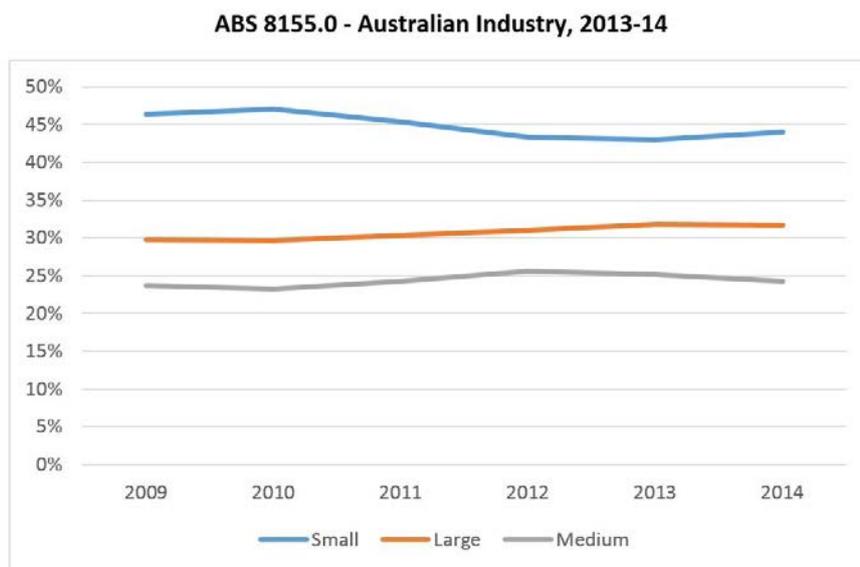
former has reduced administration and less balance sheet pressure, and the latter receives more income immediately.

The system needs to recognise that it is the interests of certain classes of workers and employers to be able to pay those classes on a flat rate rather than either accrue leave or operate in breach of the relevant Modern Award or the National Employment Standards.

Similarly, the requirement to pay superannuation contributions to short term, high turnover workers often leads to the unacceptable and immoral outcome whereby employees' balances are eroded or eliminated due to fees and charges imposed by superannuation funds where there is no regular contribution. In considering the ethics of this situation, note that in the two-year period ending in December 2015, 'industry' superannuation funds paid in excess of \$5.4 million in directors' fees to unions and union officials.¹³⁶ Superannuation should not be compulsory where the net position of the worker deteriorates compared to receiving the contribution as a wage.

Small Business is Big

As at 2013, Australia had over 2 million small businesses – defined as any business with less than 20 employees. The small business sector is the dominant employer in Australia, representing almost half of the private sector workforce:



Small business does not generally participate in the Enterprise Agreement (EA) process – only 8.8%¹³⁷ of small businesses are subject to EAs. If this figure is corrected for the Construction industry,¹³⁸ where small sub-contractors are forced into pattern and/or project agreements by principal contractors, the penetration of EAs in the small business sector is negligible. It is therefore critical that the small business sector, the single largest employment sector in Australia is provided with a simple, flexible and low-risk employment framework.

The average small business employs 2.3 workers. Businesses of this size are simply not catered for or adequately recognised by the current workplace relations framework. The system itself

¹³⁶ The Australian 14 December 2015 <http://www.theaustralian.com.au/national-affairs/industrial-relations/board-fees-for-unionists-cost-super-funds-54m/news-story/1f2974ca678570bd928aa8c83ac31779>

¹³⁷ FWC 'General Manager's report into developments in making enterprise agreements under the Fair Work Act 2009 (Cth) 2012 - 2015' p.35

¹³⁸ FWC 'General Manager's report into developments in making enterprise agreements under the Fair Work Act 2009 (Cth) 2012 - 2015' p.33

is too complex; the results of the system – principally Modern Awards – are overly complex, and crucially, small businesses are not catered for in the adversarial model that is embedded in tribunals such as the Fair Work Commission. This is perfectly illustrated by the suite of applications to vary the *Contractor Driver Minimum Payments Road Safety Remuneration Order* 2016.¹³⁹ The Road Safety Remuneration Tribunal (RSRT) is a case study of how the labour relations framework is systemically unrepresentative of many of those whose lives and livelihoods it seeks to regulate. Every participant in the industrial relations system is playing with someone else's money, and it is a safe assumption that no member of the Fair Work Commission or the RSRT would recognise a BAS let alone complete it without assistance. The system and its denizens are neither representative nor informed of the small business world.

Digital Technologies and Digital Platforms

In 1972 the first modern ATM was installed in Essex in the UK,¹⁴⁰ and there are now over 3 million in operation.¹⁴¹ For Australians born after the mid-1970s, the concept of queuing at a bank branch before 3:00pm on a Friday to obtain cash for the weekend is quite incomprehensible. There are over 131 driverless train systems in operation around the world.¹⁴² By 2015, Rio Tinto's fleet of driverless trucks in the Pilbara had moved 200 million tonnes of ore and represented 25% of the fleet.¹⁴³ On 31 March 2016, the State of South Australia legalised on-road trials of driverless cars.¹⁴⁴ The rapid development of these technologies has and will continue to disrupt the nature of work and employment.

On 29 January 2016, Freelancer (ASX:FLN) announced that its Q4 2015 revenue was \$11.9 million, an annual increase of 62%.¹⁴⁵ As at the end of March 2016, Airtasker – launched in 2011 – was turning over \$3.3 million per month.¹⁴⁶ Combined, these figures equate to over \$80 million of work annually that is sourced and executed on an entirely unprecedented platform – one that operates completely outside the Fair Work system. More importantly, the rates of growth are exponential compared to the rate at which new jobs appear in the traditional employment market, and they include whole new 'professions' – such as picking up and assembling Ikea furniture; an immediate home delivered haircut; or selling unwanted jewellery online – as well as more traditional activities such as cleaning and moving furniture.

Of most importance is that the digital platforms form a truly free, totally unregulated labour market. The best example of this phenomenon is Airtasker – the vast bulk of the work sought by its 'employers' is low level skilled labour. There is no minimum wage; no casual loading; and no minimum number of hours. The 'employer' can offer as little remuneration as he wishes – it is the worker, entirely free of coercion or pressure, who decides whether that level of reward is an acceptable exchange for his labour, skill and in some cases his equipment. If a job is posted with a proposed payment level that is below market, the feedback to that effect is immediate. The entire process is completely transparent, and unlike the traditional labour market, both parties can publicly rate each other as to performance, reliability, efficiency and even personality¹⁴⁷

139 PR350441

140 https://en.wikipedia.org/wiki/Cash_machine

141 <http://www.statisticbrain.com/atm-machine-statistics/>

142 https://en.wikipedia.org/wiki/List_of_automated_urban_metro_subway_systems#Grade_of_Automation_4_Systems

143 <https://www.engineersaustralia.org.au/portal/news/rio-re-engineers-future-mining-0>

144 Mullighan S News Release 'SA becomes first Australian jurisdiction to allow on-road driverless car trials' March 31, 2016

145 <http://www.asx.com.au/asxpdf/20160129/pdf/434nfjt9pnxt0v.pdf>

146 <https://www.airtasker.com/about/>

147 Stephen Sasse Airtasker Profile <https://www.airtasker.com/users/stephen-s-155917/>

– the worker has as much of a right and an equal ability to assess his prospective employer as the employer has with the worker. Here we have empirical evidence that belies the widely accepted assumption that there must be an inequality of bargaining power between workers and employers.

The Work of the Future

It would be foolhardy to predict the nature of work over the next generation. However it would seem prudent that in designing a regulatory framework, one should assume that most people will work in many different roles, sometimes simultaneously; and that their engagement may be as an employee, as a contractor or as a business owner – and quite possibly at least two of these at the same time. Several issues arise from this model. Much of the traditional suite of employment benefits are premised on the assumption that workers are employed by the same employer for an extended period of time. Typical of this model are accrued leave provisions, including annual, long service and personal (sick) leave.

Once a worker is engaged with multiple employers, the logic of the employer holding the workers' leave balances weakens, and the regulatory response may be to allow leave benefits to be managed by the worker rather than the employer. This may include converting leave to wages, or it may include the use of a third party fund.

Our worker is also more likely to be engaged more often by small businesses than large corporations, particularly if that person is relatively disadvantaged by education, work history or has limitations arising from family responsibilities.

The Obsolescence of Awards

For over 100 years, the Award system has seen itself as the primary mechanism governing the conditions of work. There are a number reasons why the Award model is simply out of date.

Firstly, the regulatory framework of Modern Awards is increasingly selective in relation to what sectors it regulates and what it does not. One of the most common services sought on Airtasker in Sydney is waiting and bar staff for private parties. A review of completed tasks¹⁴⁸ indicates that the average hourly rate on Saturday is \$20.00. The applicable Modern Award¹⁴⁹ provides for an hourly rate of \$27.70. Similarly, how many neighbourhood sixteen-year-old babysitters are paid less than the applicable Modern Award¹⁵⁰ hourly rate of \$16.45?

These situations exemplify outcomes where the same activity is very tightly regulated in one mode of delivery, and largely unregulated in another. It is analogous to having one set of motor traffic rules for owner drivers, and another for vehicles on hire. This inconsistency in regulation is a challenge to the basic principles underlying the Rule of Law - *'Lex rejicit superflua, pugnata, incongrua'*.¹⁵¹

Secondly, the Modern Award system is too complex. The recent Fair Work Ombudsman audit of the fast food sector found that only one third of employers were in compliance with the Act, the Regulations and the applicable Modern Award.¹⁵² This compliance level is probably higher than other small business sectors due to the high presence of franchise distribution channels. The key

148 <https://www.airtasker.com/tasks/2-x-waiter-barman-1493904/> Accessed 5 April 2016

149 Hospitality Industry (General) Award 2010

150 Children's Services Award 2010

151 'The law rejects superfluous, contradictory and incongruous things'

152 Fair Work Ombudsman 'National Hospitality Industry Campaign 2012-15 Takeaway Foods (Wave 3)' A report by the Fair Work Ombudsman under the Fair Work Act (2009) March 2016

conclusion that the FWO Report has missed is that the primary cause of the issue is simply the recondite nature of the almost 2,000 pages that comprise the Act, the Regulations and the Award.

Thirdly, the Modern Awards assume a world that is far simpler than is the case. Sydney's Fish Market has many vendors who prepare and sell raw fish, and cook and serve take away and sit-down meals. Those activities that deal with the preparation and selling of fish fall under the General Retail Industry Award – with the exception of crocodile meat, which would bring in the Meat Industry Award.¹⁵³ Where those vendors are engaged in the preparation of meals that are intended to 'be consumed elsewhere should the customer so decide'¹⁵⁴ the Fast Food Industry Award applies. However if the vendors provide table service, the Restaurant Industry Award will have effect. What might appear to be a relatively simple business model presents an unacceptable level of complexity and compliance risk from the perspective of workplace regulation.

153 Meat Industry Award 2010 Clause 3.1

154 Fast Food Industry Award 2010 Clause 3.1

PART FIVE: CONCLUSIONS

Firstly, it is suggested that work is an absolute good, whether it be undertaken as an employee or an independent contractor, and that the maximisation of opportunities for work is essential for the well-being of individuals, families and society as a whole. Any policy or action that reduces the opportunity for work – whether by driving up the price and risk of labour or by corruption of the incentive to work through social welfare – must in the first instance be rejected as inconsistent with the liberal tradition and damaging to the fabric and sustainability of society.

Secondly, it must be recognised that the laws of economics apply as much to the labour market as to any other proposed exchange. Therefore the higher the cost of labour, the less will be consumed. In the labour market this means that there will be fewer jobs, less hours will be worked, and the prevalence of automation and offshoring will increase. The first sector of the labour market that will not be engaged or will be retrenched are those workers who offer the least value to employers – these people are also the most vulnerable – the young, the inexperienced, the illiterate and those who are disadvantaged by disability, mental illness, cultural background or criminal record. It should also be noted that the employer, particularly the small business owner assesses his employment decision based not just on expected cost, but also on expected risk. In this context ‘risk’ includes the possibility of an unfair dismissal claim; and union interference in the business – through right of entry or through the initiation of formal representation and bargaining processes. Small businesses operate on the ‘once bitten, twice shy’ principle, and once ‘bitten’ by involvement in the machinery of the workplace regulatory framework, many small to medium employers avoid the system by minimising the size and growth of their workforces as much as possible.

Thirdly, it must be recognised that it is the individual who is best placed to judge their preferences and priorities. Any policy or institutionalised intervention into the individual’s right to decide how and for what recompense they deploy their time, intellect, energy and resources should be treated with the utmost seriousness. The simple but egregious example of the superannuation system which mandates employer contributions that are then entirely appropriated by the fund illustrates this point.

Fourthly, the Australian model of centralised wage fixation does not and has never served the national interest. The conciliation and arbitration system, together with its state jurisdiction predecessors, is based on flawed economic logic and a gross level of interference into both individual freedoms and market forces. Its relevance and application to the emerging world of work is no longer negligible, but damaging – ‘for too long, government has been fixing things that aren’t broken and inventing miracle cures for unknown diseases’.¹⁵⁵

Fifthly, insofar as the minimum wage caters for the needs of workers rather than the value generated for the employer, it is misplaced and can only have the effect of reducing employment.

Sixthly, the Australian economy is changing - an aging population, unsustainable debt underpinned by profligate and irresponsible spending and excessive social welfare all suggest that we must take every possible step to maximise employment opportunities – producing the dual benefits of reduced welfare and increased government revenue. This challenge is compounded by globalisation, by automation and by the new modes of engaging and deploying workers. These challenges can only be met by a labour market framework which is flexible, simple and promotes agility.

155 President Ronald Reagan ‘Address at Commencement Exercises at the University of Notre Dame’ 17 May 1981

Seventhly, the Award system is archaic. Despite the process of ‘award modernisation’ carried out by the Fair Work Commission and its predecessors¹⁵⁶ the Award system is complex, unwieldy and creates an unsustainable compliance burden on employers of all sizes. Of particular concern is that the system of Modern Awards applies only to those workers in traditional employment relationships; and from a practical perspective, there is widespread anecdotal evidence that small business often operates in breach of the applicable Modern Award requirements.¹⁵⁷ Independent contractors, the self-employed and the workers and employers in the cash economy – particularly those who obtain work through digital platforms operate outside the Modern Award system. Increasingly, the Modern Award system is becoming irrelevant to much of the contemporary economy. This becomes a disincentive for traditional employment relationships and both highlights and accelerates the increasing inefficiency and irrelevance of the Fair Work Commission and its Awards.

Finally, the union movement is not the sole representative of working Australians. Other voices and interest groups are entitled to contribute to policy and process. The conservative political parties need to actively contest the view that the ALP and its affiliate unions are fully or even significantly representative of Australian workers – the numbers indicate conclusively that they are not. Further, the natural home of the self-employed and for employers of all sizes is the Liberal Party – its statement of beliefs includes the uncontroversial truth that ‘businesses and individuals - not government - are the true creators of wealth and employment’.¹⁵⁸ The current Liberal Party needs to take far greater heed of this, one of its foundation principles, and show far more courage, understanding and adroitness in its pursuit and prosecution.

156 Workplace Relations Act 1996 Part 10A, Fair Work Act 2009 S 156

157 The Australian 18 May 2016 <http://www.theaustralian.com.au/business/in-depth/perpetual/allan-fels-says-7eleven-wage-scam-is-tip-of-the-iceberg/news-story/8e4128510dfe3086fe51098ee36663a9>

158 Liberal Party of Australia – Our Beliefs <https://www.liberal.org.au/our-beliefs>

PART SIX: SOME OBSERVATIONS ON THE POLITICS OF CHANGE

“Parliament is not a Congress of Ambassadors from different and hostile interests; which interests each must maintain, as an Agent and Advocate, against other Agents and Advocates; but Parliament is a deliberative Assembly of one Nation, with one Interest, that of the whole; where, not local Purposes, not local Prejudices ought to guide, but the general Good, resulting from the general Reason of the whole. You chuse a Member indeed; but when you have chosen him, he is not Member of Bristol, but he is a Member of Parliament. If the local Constituent should have an Interest, or should form an hasty Opinion, evidently opposite to the real good of the rest of the Community, the Member for that place ought to be as far, as any other, from any endeavour to give it Effect.”

Edmund Burke
Speech to the Electors of Bristol
Thursday 3rd November, 1774

“Over recent times, a new constituency has galvanised around new issues and in support of Liberal priorities. It includes many of the ‘battlers’ and families struggling hard to get ahead. It includes Australians, young and old, who want Australia to break free of the legacy of debt and deficits. It includes small business people who want to expand, invest and employ more Australians. It includes all those who want the talents of Australians to be liberated so that Australia can achieve its full potential. It includes all those who do not want their national government to respond to the loudest clamour of the noisiest minority. This new constituency does not represent a permanent realignment in Australian politics. Its continued support for Liberal priorities cannot be taken for granted - it must be earned through keeping faith, through staying in touch, and through continuing to be humbled by the privilege of governing a great country like Australia in the interests of all Australians. Liberalism now has an opportunity, unparalleled for almost fifty years, to consolidate a new coalition of support among the broad cross-section of the Australian people. It will only prove enduring if Liberalism continues to relate its fundamental values and principles to the concerns and aspirations of the Australian mainstream, rather than the narrower agendas of elites and special interests. That means building a genuinely shared sense of national purpose rather than an amalgamation of special interests.”

John Howard
‘THE LIBERAL TRADITION: The Beliefs and Values Which Guide the Federal Government’
Menzies Lecture 1996

Under the reformist leadership of the ALP’s Bob Hawke and Paul Keating (1983 – 1996), and the Liberals’ Howard and Costello (1996 – 2007), Australia successfully navigated through a number of fundamental reforms, including the floating of the dollar; the dismantling of tariffs; financial sector deregulation; privatisations; tax reforms including the introduction of the GST; gun control; the liberalisation of the industrial relations system; and the remarkably effective reforms to the construction industry. All Commonwealth Parliaments since the 41st have conspicuously failed to meet the standards set by these leadership teams – in terms of philosophy, vision, reform and also in being incapable of establishing an adult dialogue with the electorate. This criticism applies equally to oppositions as well as governments – particularly the ALP over the period 2013 – 2016 which is unrecognisable as the party of Hawke and Keating, Walsh and Johns, Button and Beazley.

So we know that the Australian population is not incapable of accepting the need for and adopting major structural and systemic change. It is not the electorate that has changed, but the calibre of the political class. The conservative parties have become closer to the progressive left in their preparedness to adopt populist and politically correct programs at the expense of what might be described as the Howard approach – a consistent set of principles overlaid with a pragmatic approach to getting things done. This situation has not been helped by the continued inability of employer and business associations to counter the anti-investment, anti-growth and anti-employment agendas of the unions and their fellow-travellers such as GetUp. It is rather pointless for the business lobby to bleat about the excesses and overreach of the Fair Work regime when they were completely absent from the political debate that led to it – that being the 2007 Federal Election campaign. If we are to build the support necessary for serious labour market regulatory reform, political and business leaders need to become far more effective at explaining the perspectives of employers and the myriad economic and social costs of under and unemployment and excessive welfare.

As noted in the introduction, it is the Liberal Party which has the obligation to pursue labour market reform. The ALP in its current form remains hostage to the union movement and cannot debate these issues with any semblance of good faith given the deep organisational and interpersonal connections and patronage that characterises that relationship. This is also a criticism that can be levelled at the Greens and at Senator Lambie. In this context, it must also be recognised that the union movement itself is simply not representative of Australian workers. As noted in Part Three, the declining level of union membership and the complete absence of union representation in small and medium size businesses suggest that the unions really only speak for the employees of very large companies and industries such as construction, a sector where the CFMEU was recently described as ‘the worst recidivist in the history of the common law’.¹⁵⁹ The institutional rights and the claims of the unions to take a dominant position in the representation of workers’ interests in setting employment conditions are no longer valid.

By contrast, the natural constituency of the Liberal Party – small businesses, the self-employed and independent contractors are a far higher proportion of the working population than are union members. And it is the liberal tradition which encapsulates both the principles of freedom to work and freedom to hire; and also suggests how those objectives might be achieved – deregulation, far greater faith in the ability of the individual to know his own interests over the well-meaning bureaucrat or industrial tribunal; and an implacable belief in liberty – ‘but it ought be the constant aim of every wise public counsel to find out by cautious experiments and rational, cool endeavours, with how little, not how much, of this restraint the community can subsist; for liberty is a good to be improved, and not an evil to be lessened’.¹⁶⁰

So it is the Liberal Party that must initiate and led the debate. How should this be done?

Firstly, the shape and content of the narrative must be changed. The Coalition should frame its policy position on the need to slowly and systematically transition the community away from debating industrial relations to discussing why it is so important that we maximise opportunities for work in all its forms, and how the changing world of work can be turned to the advantage of the nation and its citizens. The policy must be based on solid liberal principles which can be easily enunciated and explained.

Secondly, the costs, disincentives, limitations and anomalies of the current labour market framework need to be clearly identified and enunciated. The issue, viewed holistically

159 Director of the Fair Work Building and Construction Inspectorate v CFMEU (No 2)[2015] FCA 1462

160 Burke, Edmund ‘Letter to the Sheriffs of the City of Bristol’ April 3rd 1777

incorporates not just the nuts and bolts of the industrial relations system, but includes the nature and design of the social welfare system and is the key determinate of taxation receipts – the more people who are working, the lower the cost of welfare and the higher the revenue generated by income tax.

Thirdly, employers of all sizes need to understand that the ability of a politician to successfully promote ‘hard’ reforms is made immeasurably easier if the business community is able to explain why and how these reforms are so crucial to their stakeholders. Far more shareholder value has been destroyed by the Fair Work system than by the inability of gay couples to marry, but it is the latter issue that appears to be of more interest to corporate Australia. Employer associations and businesses need to understand that in order to flourish they need an environment of fiscal prudence, lower government spending and a flexible labour market. No shareholders’ interests are well-served if the private sector stands idly by while the core foundations and pre-requisites of a successful market led economy are whittled away.

Fourthly, the reliance on the traditional metrics of unemployment and employment should be lessened, and enhanced with a metric that captures the number of Australians who would seek work if they felt it was worthwhile and those who are working but who would like to work additional hours. This would provide a far more accurate picture of the degree to which the talents and energies of the nation’s citizens are being underutilised.

Fifthly, the current and forecast costs of the entire social welfare system need to be properly communicated to the electorate. Properly expressed, these data will make it abundantly clear that the system is unsustainable, and that to continue saddling our children with massive levels of debt is morally reprehensible. Fittingly, it is again Edmund Burke who captures the ethical duty owed by the political classes to society – ‘a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born’.¹⁶¹

161 Burke, Edmund Reflections on the French Revolution para 166

PART SEVEN: SPECIFIC REFORMS – A THOROUGHLY LIBERAL EMPLOYMENT POLICY

“A rooted disease must be stroked away, rather than kicked away”

George Savile
The Complete Works of George Savile, First Marquess of Halifax
‘Miscellaneous Thoughts and Reflections, 1750’
Augustus M. Kelley New York p. 244

“A basic wage as it appears to us is not really a wage earned by the employee as reward for work done, but an allowance for suggested requisites of living, to be paid by the employer to the employee”

Commonwealth of Australia
‘Minority Report of the Royal Commission on the Basic Wage’ 1920 p.61
E.E Keep & W.D Gilfillan

Labour Market Regulation and The Liberal Tradition

There is a well-founded line of argument which would suggest that the liberal tradition is best served by no labour market regulation whatsoever. It is not the purpose of this essay to prosecute that argument. The Australian community is poorly equipped to debate labour market policy at the best of times, and any proponent of a fully or largely deregulated system would merely attract ad hominem attack and not succeed in furthering the debate in any practical way. These issues are of such urgency that pragmatic and achievable reform must be discussed now, even if it is to be over the next 10–15 years that we see the development and progressive implementation of policy.

There are two sets of recommendations that are suggested as the foundation of liberal policy.

The Short Term Recommendations deal with relatively simple, easily implemented modifications to the *Fair Work Act* which will remove some of its more egregious overreaches and add immediately to the productivity of Australian workplaces. Most of these suggestions are not new.

The Long Term Recommendations are intended to form part of the strategic, long term policy debate – in the first instance for the Coalition parties, but also with a view to prompting a more strategic and consistent contribution from employers and their associations and from other stakeholders.

Recommendations – Immediate

1. Individual Flexibility Agreements (IFAs)

The IFA is a mandatory provision in Modern Awards which enables individual employees to enter into arrangements which vary conditions of the Award, but which requires that the employee is better off overall.¹⁶² Employers should be permitted to offer employment on the basis of an IFA being in place, and termination of the IFA should give either party the right to terminate the overall employment contract.

¹⁶² Fair Work Act (2009) S 144

2. Lawful Industrial Action

Lawful action should be permitted only in respect of matters which directly relate to a set of nominated terms and conditions of employment – these should be limited to as narrow a scope as possible. Collective agreements should therefore not be capable of containing terms that attempt to limit or proscribe managerial authority. There is a long line of industrial case law dealing with ‘matters pertaining to the employment relationship’ that can illuminate this issue.

3. Right of Entry (RoE)

Unions’ statutory rights to enter workplaces should be limited to situations where the union has members on the site; and is party to an industrial instrument – preferably limited to an Enterprise Agreement – that applies to that site. Where right of entry events are of such frequency that the employer’s business is unreasonably disrupted, the employer should be able to have RoE permit amended to exclude that workplace for a period of time. The onus should be on the union to show why a particular workplace requires frequent RoE events.

4. Superannuation

Workers under the age of 25 should be free to elect to have superannuation contributions paid as wages.

5. Leave

Employees who work part time or on fixed term full time contracts of less than one year’s duration should have the right to choose whether to accrue leave benefits or whether to have them incorporated in the wage.

6. Automatic Termination of Collective Agreements

The current system provides that the expiry of an Enterprise Agreement (EA) has the effect of permitting lawful action in respect of its renewal. The EA itself continues to have legal effect until it is replaced or terminated. All collective agreements should cease to have legal effect at the date of expiry without the need to have them terminated. This has the effect of levelling the bargaining relationship and makes it easier to modify employment conditions that may have been justified but are no longer sustainable. An example would be the coal industry in the Bowen Basin, where falls in commodity prices have made many mines unsustainable under current conditions, including both direct labour costs and unsustainable limitations on managerial prerogative.

7. Modify Transfer of Business Provisions

The existing transfer of business provisions are complex and do not serve the national economic interest. Where a business has failed or come close to failure, an incoming employer should have the ability to modify unsustainable employment conditions. This issue is particularly germane to the outsourcing of State or Commonwealth public sector work, where the opportunities to engender competition, improve service and reduce costs are severely constrained.

Recommendations – Long Term

1. Change the Timeframe

Many of these recommendations are significant in magnitude. It is unreasonable to suggest that they could be implemented in any way other than progressively and over a five to ten-year timeframe. However the overall vision of ‘freedom to work, freedom to hire’ should be developed and widely promulgated.

2. Remove the ‘Social Component’ of the Minimum Wage from Employers

The dissenting Minority Report of the 1920 Royal Commission on the Basic Wage is a masterpiece of astute economic thinking:

*‘The suggestion that the rate of wages depends solely on the amount which the worker is paying for rent, clothing, food, and miscellaneous items is of doubtful economic value. A basic wage as it appears to us is not really a wage earned by the employee as reward for work done, but an allowance for suggested requisites of living, to be paid by the employer to the employee. But we feel that we should be neglecting the interests of employers, and indeed of the community generally, on this Commission, if in this our Minority Report we did not call attention to them. **But we are pressed by the consideration that, if a basic wage was fixed to correspond exactly with the ascertained cost of living, however that may vary, this would operate as a burden on existing industries, and be a deterrent to new industries in Australia.**’¹⁶³*

There are many compelling reasons why a modern, civilised society might wish its citizens to live on a minimum level of income and amenity – but that should not automatically require that employers pay more than the value that the worker can create; nor should they require that the most vulnerable are priced out of work. A far better outcome – in terms of equity, economic competitiveness and incentives to work is to have the minimum wage (including penalty rates and loadings) set as low as is feasible, and top up the earnings of the low paid through the social welfare system – including housing benefits, tax credits and direct income supplements. Ideally the system should be designed to link welfare benefits to work, and to maximise the incentives to increase earned income and reduce the welfare component. This approach would fall somewhere on the continuum between Milton Friedman’s ‘negative income tax’ and the existing concept of an Earned Income Credit.

3. The Minimum Wage or Safety Net

In light of Recommendation 2, above, the minimum wage should be reduced to as low a level as is politically feasible. As at 2015, Australia has the fourth highest minimum wage in the OECD, 13% below Germany and comparable to Holland. If the minimum wage was, for example, reduced from the current 150% of the OECD average to 125%, it would reduce from \$17.92 to \$14.75 per hour.¹⁶⁴ Further, by adopting a formula based approach, the need for the Fair Work Commission to determine the minimum wage is obviated, saving the resources of the taxpayer, union members and employers.

¹⁶³ Commonwealth of Australia Report of the Royal Commission on the Basic Wage 1920 – Minority Report p.61

¹⁶⁴ <https://stats.oecd.org/Index.aspx?DataSetCode=RMW> NB. These data are deliberately limited to 2015 and exclude the effect of the 2016 increase to the minimum wage.

4. Remove the Distinction between Employment and Independent Contracting

The changes to our demographics and the effects of technology – including digital engagement platforms, suggest that many workers will work as employees or independent contractors – possibly at the same time. The distinction between employee and independent contractor is complex and there are serious ramifications for employers who engage in sham contracting. Given the preponderance of small businesses and self-employed and the increasing lack of definition between a casual employee and an independent contractor, the distinction should be abolished up to nominated threshold. For example, any engagement that is less than say \$5,000 or 4 weeks' work, would automatically become a 'Statutory Engagement' – under this arrangement the minimum wage would apply based on the actual or estimated hours. The arrangement would be given legal effect using a pro-forma contract that would be created using an online service provided by the regulator. Once made, the contract would be automatically enforceable by the regulator. Employers and principals operating under this structure would be immune from sham contracting claims and unfair dismissal applications.

5. Abolition of Modern Awards

The Modern Award framework should be dismantled. The existing National Employment Standards (NES¹⁶⁵) should be reviewed and if necessary modified to provide a statutory set of minimum conditions that replace the Modern Award framework. Employers and employees should be free to negotiate all aspects of the employment relationship including hours of work, rostering, classification structures and wage relativities without the limitations or assumptions of Modern Awards. Where employees are engaged without the use of a collective agreement, the employee's classification and remuneration should be the subject of mutual agreement, provided that the statutory minimum conditions are met. This means that penalty rates and loadings would be by negotiation, or if politically necessary, specified in the NES, ideally in a simpler and less costly form.

6. Abolition of Fair Work Australia

The Commission in its current form should be abolished. It should be replaced with a simpler, less legalistic and less costly tribunal based on the UK Employment Tribunal. Its functions would be limited to unfair dismissals, facilitation of collective agreements (including the administration of lawful action ballots) and conciliation of industrial disputes. It should be predominately, or at the very least equally staffed by people with managerial experience; and legal practitioners – whether in-house or external solicitors – should not be permitted to appear or be otherwise involved in proceedings.

7. Expand the Role of the Fair Work Ombudsman (FWO)

FWO should become responsible for:

- investigation and enforcement of breaches of employment law, including adverse action (refer item (8) below)
- monitoring and acting on unacceptable union conduct as well as unlawful employer conduct
- facilitating the documentation of individual employment and Statutory Engagement contracts (refer item (4), above) based on the New Zealand Employment Agreement

165 Fair Work Act (2009) Part 2-2

Builder.¹⁶⁶ Once made, these instruments would become automatically enforceable by FWO

- ensure that collective bargaining processes and collective agreements are properly carried out (for example enforcing the requirement that such agreements directly relate to matters that pertain directly to the employment relationship)
- act as the registration authority for the approval of collective agreements – but with the only test being that the agreement does not undermine the statutory minimum conditions (items (3) and (5), above)
- facilitate the ability of eligible workers to cash out leave entitlements and have them paid as a component of the wage (refer item (5), above)

8. Extend the Adverse Action Provisions

The existing Adverse Action Provisions and associated General Protections¹⁶⁷ should be extended to include an overall ‘unconscionable conduct’ protection. This would be designed to capture conduct by employers, principals, unions, employees and contractors which was manifestly unreasonable. The objective would be to have the weight of the reverse onus and unlimited damages act as a constraint on extreme and unfair conduct by all parties to employment, contractual and industrial relationships.

9. Remove Right Of Entry

There two grounds under which union officials are given the statutory right to enter premises. The first is to meet with workers who are or are eligible to be members of their union, and the second to investigate suspected breaches of industrial or work health and safety laws. These rights are a significant affront to the employer’s private property rights – and while they may have had some justification when most workers were union members and the only way to meet and recruit members was face to face, the world has changed significantly. Unions have many channels available to them to market their products and services, and there is no defensible rationale for the right to enter private property without invitation. Secondly, the proper agency for the investigation and prosecution of breaches of employment and work health and safety laws is the regulator. We do not expect to see employer associations investigating union malfeasance and we should not have unions investigating employer breaches.

10. Commonwealth and State Government Procurement Codes

The use of procurement codes by government has been a powerful tool in driving productivity and value for money in construction.¹⁶⁸ The success of the Commonwealth’s *National Code of Practice for the Building and Construction Industry 2006* and the State of Victoria’s *Code of Practice for the Building and Construction Industry 2014* both demonstrated how quickly labour productivity and value for money can be improved by astute procurement policy. The Commonwealth and State Governments should adopt a ‘Code’ approach to all aspects of their procurement activity, requiring all suppliers to demonstrate how they will deliver ongoing improvements in labour productivity and ensuring that the associated management plans form a term of the procurement contract and are properly enforced.

¹⁶⁶ <http://employment.govt.nz/er/starting/relationships/agreements/builder.asp>

¹⁶⁷ Fair Work Act (2009) Part 3-1

¹⁶⁸ Sasse, S M ‘LABOUR PRODUCTIVITY IN THE AUSTRALIAN CONSTRUCTION INDUSTRY – WHY IT’S BROKEN AND HOW TO FIX IT or ‘LA CONSTRUCTION! C’EST UNE CHOSE TROP GRAVE POUR LA CONFIER À DES CONSTRUCTEURS’ H R Nicholls Society 24 November 2014 <http://hrnicholls.com.au/hr-nicholls-annual-dinner-report/>

About the Author:

Stephen Sasse has worked in strategy, industrial relations, human resources and workplace health and safety for over 30 years.

His roles have included Industrial Relations Officer at Shell Clyde Refinery, Employee Relations Manager for ICI Dulux and Head of Human Resources for National Dairies. In 2001 he was appointed General Manager of Human Resources, Industrial Relations and Safety at Transfield Construction, and following its acquisition by John Holland Group he was appointed to the same role. He joined Leighton Holdings in 2010 as General Manager Organisational Strategy.

Since 2011, Stephen has been consulting to the construction, mining, manufacturing, services and public sectors, with an emphasis on labour productivity, cost reduction and strategy. He sits on several Boards, including a number of start-ups.

In 2002 he wrote the first public employer submission to the Royal Commission into the Building and Construction Industry. He is the author of Companion Notes to *The Aunt's Story* by Patrick White.

Stephen holds a BA (First Class Hons) from the University of Melbourne and various construction and mining tickets, including Demolition Supervision (Unrestricted).