Australian Institute of Employment Rights

A NEW WORK RELATIONS ARCHITECTURE

THE AIER MODEL FOR THE FUTURE OF WORK

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Edited by James Fleming

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HARMERS WORKPLACE LAWYERS

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About the Australian Institute of Employment Rights

The Australian Institute of Employment Rights (AIER) is an independent, non-partisan, not-for-profit think tank that works in the public interest to promote the recognition and implementation of the rights of employers and workers in a cooperative work relations framework. Our work and our tripartite structure are inspired by those of the International Labour Organization. Our executive committee is made up of representatives from unions and business as well as independent academics and legal practitioners.

Our approach to work relations is outlined in our Charter of Employment Rights. The Charter identifies the fundamental principles on which fair work laws, policies and relationships should be based. The extent of our work can be viewed on our website: www.aierights.com.au.

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THE HON. PAUL MUNRO AM served from 1986 to 2004 as a senior presidential member of the Australian Industrial Relations Commission and its predecessor tribunals. He has worked as a legal practitioner in New South Wales, Papua New Guinea and Victoria. From 1968 to 1985, he was a national public sector union official and had various roles in government organisations and others. He has been a member of the ACTU executive, of the executive of Public Services International and of the 1974–76 Coombs Royal Commission on Australian Government Administration. He served as deputy chair in the ACTU's landmark Independent Inquiry into Insecure Work in Australia in 2011–12.

Foreword

The ideas put forward in this book are stimulating and challenging, and I strongly recommend that you open your mind to them. The eleven contributors come from academia, the law, the union movement and business, and the ideas they put forward emanate from their many years immersed in the world of labour relations.

When I recommend this book to you, I do so as a business owner and an employer. I have been on the executive of the AIER since its inception, because I believe that we need to – and can – create a better system that respects the shared, as well as different, interests of employers, employees and government.

Over the seventeen years since the AIER was founded, a lot has changed, and this change has only served to highlight the inadequacies of the current work relations system in Australia.

The AIER agrees (as do many others) that we need an entirely new work relations architecture. To create that architecture, we gathered together experts in their fields, held consultation sessions and had hours of discussion. What we present to you is not a fully resolved alternative; but we do propose some key foundations for a new system, as well as some new standards.

As an employer, I find some of the proposed standards – for example, a broad right to work from home – quite challenging. Others, like the right to disconnect or switch off from work, I find irrefutable.

Overhauling an entire system is audacious – and, as Professor Anna Chapman points out, is not without risks. But I was heartened when I read the chapter on transition by Paul Munro and Emeritus Professor David Peetz. They give two examples – of post-war and Hawke/Keating major economic reforms – and make it clear that, with a commitment to consultation and proper processes, it can be done.

Whatever your initial reaction might be, or your more detailed questioning of how this idea might work in practice, I urge you to put aside your caution and to read these ideas with an open mind and in the spirit in which they are offered: to stimulate debate, to encourage dissection and elaboration, and to create a sense not only of urgency but of possibility for change.

Fiona Hardie
Vice President (Employer Representative)
AIER Executive

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Preface

JOELLEN RILEY MUNTON

Like any complex construction project, the Australian Institute of Employment Rights' New Work Architecture project has been a long time in the making and owes its successful completion to cooperation among the many contributors. Planning for this book began in late 2016 after discussions within the AIER about serious problems in Australian workplace culture. These led to an ambitious proposal to imagine a new approach to industrial relations (or 'work relations') in Australia in line with the Institute's Australian Charter of Employment Rights. The work proceeded with the then executive director of the AIER, Clare Ozich, consulting with Professor Ron McCallum and other members of the Institute to develop a project proposal for what would become known as 'The AIER Model for Work Relations' or 'A New Work Architecture'. The object was to model a system that was less complex, avoided the miseries of highly adversarial industrial relations and was better served to meet contemporary societal challenges. James Fleming's introduction to the book elaborates the objectives of the project.

The first task, however, was to scope the project, and to this end, several workshops of interested practitioners and scholars were held in Melbourne and Sydney to thrash out ideas. The AIER is particularly grateful to Professor Keith Ewing for leading discussion at the Melbourne workshop, and to Renée Burns and former vice president Anthony Forsyth for organising these meetings. When James Fleming came on board as executive director of the AIER, we found our project manager. James assembled the team

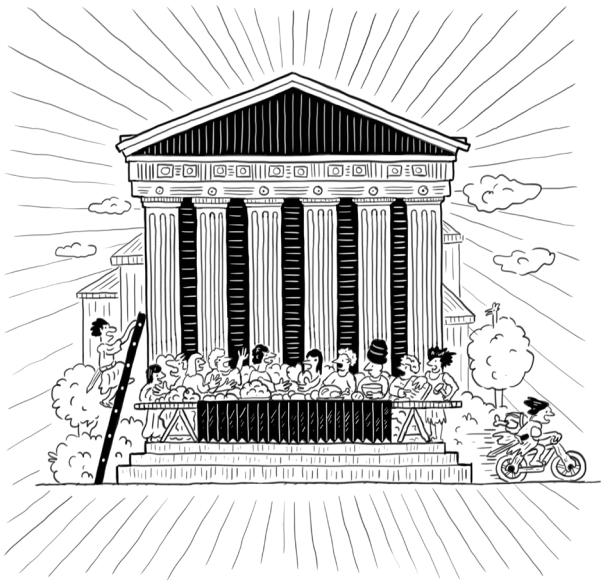
of contributors (see pages vi–x) and marshalled us all through a series of workshops designed to produce a coherent set of chapters, each dealing with an aspect of our imagined structure. Somewhere in these discussions we came up with the metaphor of a building – with its foundations, pillars and roof – to illustrate the essential elements of a new system for the regulation of work relationships. Of course, while we managed (under James's patient guidance) to agree a broad framework that expressed our commitment to the core principles in the Charter, each contributor brought their own particular expertise and experience to the task in elaborating a vision for a new system. We enjoyed some fruitful and sometimes unresolved debate over details of different elements of the system. In the end, this book remains a work of many voices, so readers will see some different perspectives on some of the issues we address.

Some of the most important people to thank in creating this work laboured behind the scenes. The AIER's business manager, Jane Douglas, provided organisational and secretarial support for our many meetings. Other members of the AIER executive contributed ideas and constructive critique of the project and chapter manuscripts. And, of course, our publisher, Hardie Grant, publication manager Courtney Nicholls, copyeditor Sally Moss, illustrator Stephen Mushin and designer George Saad have ensured that our ideas are presented in a handsome tome.

Ultimately, however, our product is itself merely a blueprint. The serious work of building a new system has yet to begin. We hope that many others – employers, workers, unions, government policy advisers and others interested in the wellbeing of our polity – will join us in refining the plans and completing the work of building a work relations system fit to steer Australian society safely through the remainder of the twenty-first century.

Introduction

JAMES FLEMING



This book outlines a new work relations architecture: new rules of the game between workers and business, new rules for a fairer system and a more just society. The themes here are based on the metaphor of an ancient Greek building, each of its components being explained as the book progresses. The building represents a system of Australian work relations that combines the best of the old and the new – one designed to stand the test of time, no matter what the future may bring.

Many industrial relations experts and practitioners have had input into this publication and it is intended to present viable policy options for significant reforms. At the same time, we hope the text also serves as an introduction for the curious general reader to industrial relations and its vital relevance to many of Australia's most significant social

and economic issues – from inequality and labour market insecurity, discrimination and toxic workplace cultures to how power and money are distributed in our society and the health of our democracy. The reforms in these pages are necessary for a fairer Australia, for one better prepared for the challenges on our horizon – growing inequality, climate change, the digital revolution, future pandemics and even changes to our economy brought about by increased geopolitical instability and insecurity.

The new work relations framework we propose is, on one view, revolutionary, but it is also grounded in an earlier transformative vision of the way we think about work: the so-called 'Robens reforms' that revolutionised workplace safety in the United Kingdom in the 1970s and in Australia a little later. The reforms promoted shared responsibility in meeting an overarching objective of safe and healthy workplaces. Just as this approach encouraged a culture of awareness leading to safer workplaces, we propose that establishing shared responsibility to ensure fairness, inclusivity and human and employment rights at work will lead to better workplaces, ensuring a 'fair go all round' for hirers and workers alike. The proposal includes the establishment of a new tribunal with expanded powers and a labour inspectorate better incentivised to serve vulnerable workers. The new system would make for not only a fairer Australia but one that is more economically prosperous and inclusive.

The importance of work relations

What are work relations and why are they important?

For most of us, for much of our lives, work consumes a large proportion of our waking hours. For better or worse, our social status, identity, security, economic wellbeing, and perspective on the world are all influenced by the work we do and the related training we have had.

The work we do plays a large part in defining our social class and vice versa – in short, who we are and our way of being in the world and how we spend our time. Hence, if we want to improve people's lives, it is useful to focus our attention on work, and on where and how that work is conducted. Yet most people give little thought to the relations between the buyers and sellers of labour (that is, hirers and workers) that shape the conditions under which work is performed. That relationship subsists in attitudes, behaviours, cultural practices, legal rules, and institutions (like unions and employer organisations) and the power structures behind these. That relationship, sometimes known as workplace relations, affects how power and money are distributed in the economy between workers and the owners of capital – essentially, who gets a share of what.

In this book we often use the terms 'work relations' or 'industrial relations', instead of 'workplace relations'. We do this to emphasise that, in the age of online working, working from home and disaggregated workplaces, work and work relations have often moved beyond the traditional notion of a fixed and centralised physical place.

Work relations also affect how money is distributed between different kinds of workers; for example, between workers doing different jobs, between men and women, migrants and citizens, and between workers at the centre and periphery of the labour market. Hence, that relationship crucially affects income inequality among people and groups and, over time, wealth inequality. It also affects how much voice and agency workers have and their ability to change society in their interests and so the quality of our democracy.

Why and how we wrote this book

Some of the ideas in this book will be controversial but, as with all work done by the Australian Institute of Employment Rights (AIER), we have been inspired by the International Labour Organization's spirit of cooperative labour market relations, embodied by the ideals of tripartism, and satisfying the genuine needs of all stakeholders, including workers and business owners alike. The book continues to build on the AIER's Charter of Employment Rights[1], which was developed as a moral and legal yardstick by which to assess industrial relations laws and work practices in a similar tripartite fashion.[2]

In 2017 the AIER launched a series of consultations, workshops and exchanges of ideas between leading minds engaged daily in work relations, the aim being to bring together a range of stakeholder perspectives to rethink the system from the ground up. This book is the culmination of that initiative, which spanned several years and involved bringing together academics, business owners and trade unionists who are committed to supporting a system of labour law and industrial relations that promotes a fair and just society. Inevitably, a book with a goal as ambitious as designing a new industrial relations system for the country will be broad and conceptual. Hence, we have sought to capture the proposed system's main features in order to stimulate debate. Over time, the details will need to be elaborated by others. The elements of the proposed system are synergistic but, in many cases, they also constitute reforms that could be implemented individually.

Each chapter is the result of extensive academic research and systematic investigation, but in the interests of readability we have kept sources and references to a minimum. Some references and notes to further sources appear as endnotes (see page 220). Our authors are all experts in their

fields, and have approached their chapters in their own ways; they present a diversity of views, sometimes contrasting but all building on the central organising ideas.

Problems with Australia's industrial relations system

It is widely agreed that the industrial relations system in Australia is deeply flawed. However, the questions of just what is wrong with it and how to fix it are hotly disputed, especially between employer groups and unions. Many of the problems with the current system have been highlighted by recent events. The invasion of Ukraine in February 2022 showed that the world economy and political order are increasingly volatile. Changing geopolitics, climate change, the green energy transition and the digital revolution have brought disruptive structural changes to Australia's economy and to the nature of jobs and work. Debates about automation and the future of work have underscored the current industrial relations system's limited capacity to deal with these challenges.[3] The COVID-19 pandemic that swept the world in 2020, and is ongoing, has exposed inequalities, insecure work and a gender pay gap. The #MeToo movement and allegations of sexual assault and endemic sexual harassment in places of work throughout the world, including in the highest halls of power, have revealed pervasive sexism, sex discrimination and toxic work cultures.

Most will agree that Australia's workplace laws are overly complex and have not kept pace with changes in the economy and ways of managing work. The existing regulations can often be gamed or avoided by adopting particular labour engagement strategies, such as labour hire and contracting. A significant proportion of workers, such as casual employees, gig workers and dependent contractors, suffer increasingly precarious conditions that fall short of the standard rights afforded to

permanent employees. Enforcement of standards is also inadequate, as many underpayment scandals have shown. The unfair competitive advantage such a system hands to opportunistic operators undermines a level playing field for business and erodes productivity. This is unfair to workers and employers and also bad for the economy.

The proposals in this book attempt to address such shortcomings and more. One source of current problems is the long decline in the collective power of workers across Australia's economy. Collective bargaining has all but stalled. Furthermore, prior to the pandemic, wage growth had already been at historically low levels and productivity growth has never returned to the highs of previous decades. Businesses had been struggling with people retention, skills development and the rapid pace of change. The pandemic also highlighted the relatively low pay and conditions of many essential workers, as well as the disadvantages of casual work, multiple job holding and the gender pay gap – together with other inequalities.

Another challenge is that, as international comparative studies show, the quality of Australia's management culture is often mediocre, especially in the area of people management.[4] This requires widespread cultural change. Access to justice for work-related issues is inadequate too. In many cases, complainants face great risk and expense, pursuing unduly technical court proceedings. Commentators have also noted that the process of appointing members to the Fair Work Commission has become politically partisan and the Commission has lost its traditional balance of members not only from industry backgrounds (and a broad range at that) but from union backgrounds as well.[5]

The purpose of labour regulation

Designing a new system means revisiting the purpose of labour law and

the objective of the industrial relations system. From a radical free-market perspective, any form of labour regulation only inhibits market efficiency. However, there are several justifications for the regulation of work, only some of which can be explored here.

A key raison d'être for labour law can be drawn from the work of the economic historian and anthropologist Karl Polanyi. Polanyi argues that the regulation of work by market forces leads to people being treated like objects and commodities, causing dehumanisation and misery.[6] (This is explored in Chapter 4.) Labour law serves a protective function, helping to shield workers from the vicissitudes of the market, and protecting individual autonomy, agency and basic human dignity. Hence, one of the fundamental principles of the International Labour Organization is that 'labour is not a commodity'.[7] As dehumanisation leads to economic and political instability, these protective measures also help promote the stability and viability of the capitalist economy.

Another reason for labour regulation is the inherent power disparity between individual workers and employers. Freedom of contract and the efficiency of the market are based on a liberal economic and moral ideal in which fully autonomous agents are able to make choices freely, but this ideal is not achievable without remedying the power imbalance between parties. Even in a liberal free-market system, some form of regulation of labour relations is also necessary to support the system. At a minimum, liberal markets require laws for the enforcement of contracts and the recognition and protection of property rights. Labour regulation can also address market failures and aid market operation, and thereby enhance productivity and economic efficiency. As recognised by the economist J K Galbraith, and even the liberal market economist Milton Friedman, trade unions arise inevitably in a market system as market players that

act as collective counterbalances to the monopolistic power of business.[8] Counterbalancing monopolistic power aids competition. As discussed in Chapter 8 on the subject of bargaining, industry-wide wage standards can also focus the forces of competition away from wages to genuine innovation, and minimum wage laws that raise wages above market rates can encourage capital investment and skill development.

Another reason for labour law is to facilitate democracy by ensuring fairness and protecting fundamental human rights. As a matter of practical political reality, in any substantively democratic society, the work relationship will have to meet the needs, aspirations and expectations of the community, both economic and non-economic, something that market forces cannot guarantee, so labour laws will be required to moderate work arrangements. This includes ensuring decent work with adequate security and dignity, as well as arrangements that are sufficiently fair and just to be acceptable to the community. It also includes protecting vulnerable or systematically excluded groups, whether or not this is popular. As pointed out by Michael Kirby, a former justice of the High Court, modern democracy is more complex than simple majoritarian rule; it 'is a sophisticated form of government which involves the general ability of the will of the majority to prevail but in a legal and social context in which the rights of vulnerable minorities are respected and defended…'[9] Labour law thus also bolsters democracy by protecting against discrimination, exploitation and exclusion and by protecting the human rights of women, minorities, migrants, indigenous and LGBTQI+ people, the elderly and the very young.

Fairness

As discussed in Chapter 1, the notion that our labour laws should promote fairness is acknowledged in the objects of our current system. It is

embodied in the notion of a 'fair go all round', a fundamental principle adopted by the *Fair Work Act 2009* (Cth).[10] Promoting fairness is inscribed in the objects of the Act as a whole and also in the procedures and remedies for unfair dismissal, the modern awards objective, the minimum wages objective and the collective bargaining framework that the Fair Work Commission is required to apply.[11] But what is fairness?

The concept is closely associated with justice, equality, impartiality, non-discrimination and reasonableness (as in, 'a fair go', 'fair play' or 'fair share'). It is also captured in the notion that our industrial relations system should aspire to find solutions that accommodate and balance all interests, unlike the adversarial judicial system, which awards all spoils to the one 'winner' in a contest. However, as the following chapters demonstrate, our industrial relations system produces outcomes that most people would consider unfair. It creates divisions and leaves people behind. In various areas, it fails to take adequate account of power disparities and to address structural barriers. It perpetuates gender inequality and the indigenous pay gap. The concept of fairness has been too circumscribed in our system and associated with procedural fairness and formal rather than substantive equality. It has been read down, limited in its application and explained away. How else can we explain the fact that, despite the fairness objective, the injustices that are outlined in this book continue to exist?

It is hoped that discussion about the gaps and injustices in our current system and in proposals to solve them demonstrate what a fair system would look like: one whose outcomes resonate with our common moral intuitions. As you read this book and the plan it outlines, I invite you to see how it resonates with you. The philosopher John Rawls argues that we should develop notions of justice from the 'original position', or 'veil of ignorance'. This means that, when we design rules to govern

society, we should do so assuming that we do not know what position of privilege or disadvantage we would occupy within it.[12] How do our proposals seem to you, given the rights you would have if you were to occupy various jobs and circumstances? How does the current system resonate with you, for example, if you consider you might be a casual on-call personal care assistant without paid leave entitlements, or a food delivery driver engaged as an independent contractor below award rates? We hope readers will agree that the system we propose would lead to greater equality of opportunity, better care of the most vulnerable, and more substantive equity.

It is true that even the most carefully designed labour laws and labour market institutions will prove inadequate if they do not generate broad compliance and cultural change in practice. This leads us to the Robens philosophy and the overlapping concept of 'directed devolution', which are two central concepts behind the new work architecture model that we propose.

The Robens philosophy

As Emeritus Professor Ron McCallum explains further in Chapter 3, the Robens Inquiry of 1970–72 found that the regulation of safety in the United Kingdom was inadequate because – as with the Australian industrial relations system today – the laws were overly complicated, failed to cover all workers, were unable to be comprehensively prescriptive and were quickly outdated, and that there were limits to the capacity of external agencies to enforce compliance.[13] The Robens Inquiry recommended fundamental reform to expand and unify the laws and to place more responsibility and involvement on stakeholders themselves (including employers, workers and unions), based on tripartite consultation and backed by enforcement

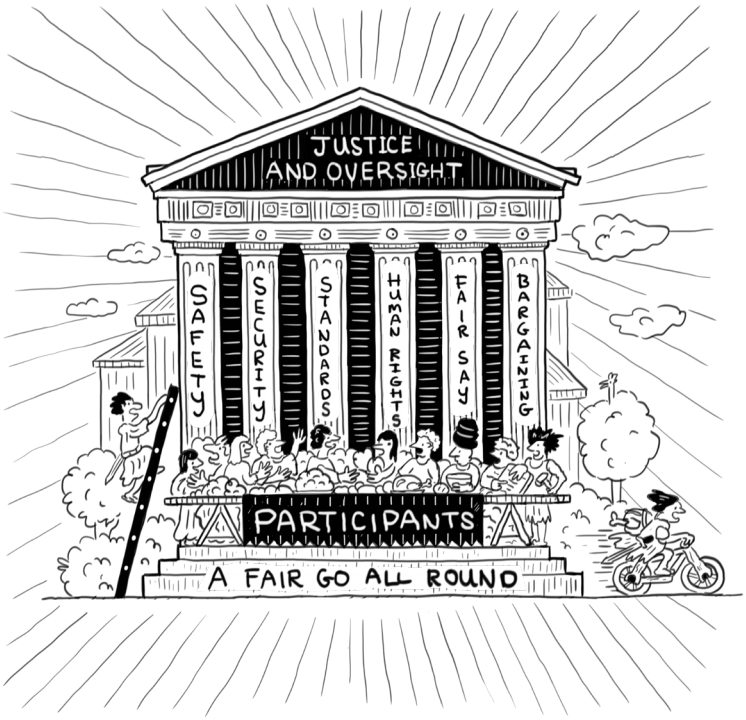
mechanisms. This philosophy proved revolutionary and its focus on outcomes and making every workplace responsible for achieving them has proved highly effective. The philosophy is at the core of Australia's work health and safety regime today, and one we propose borrowing from that system and using in relation to other work rights.

Directed devolution

The challenge of adopting this approach to regulation is to ensure compliance with the broad objectives of regulation wherever people are engaged in work, whatever the business or industry sector. In Chapter 2, Emeritus Professor David Peetz draws on his earlier work to explain the 'directed devolution' approach: that the specific regulations required for particular industries and sectors are best developed by experts in those sectors. Specialist bodies can develop the particular rules and processes that are needed to ensure appropriate implementation of the broad principles developed higher up the chain of regulation in particular contexts. As David Peetz explains, this structure can be used to create a more universalist system that uses the best of both centralisation and decentralisation to include groups currently left aside and ensure a more comprehensive implementation of fundamental standards.

Overview of the new work architecture

The proposed model industrial relations system draws on the Robens philosophy and expands it to other employment rights with the aim of creating a more comprehensive, effective, productive, accessible and fair system of work relations. Like an ancient Greek building, the system has a 'foundation' and a 'roof' supported by 'pillars' delineating spaces inhabited by 'participants'.



A new work relations architecture

The 'foundation' represents the broad objectives of the system and the fundamental rights that the system upholds, encapsulated by a more substantive and more broadly applicable notion of the 'fair go all round'. This is outlined by Michael Harmer of Harmers Workplace Lawyers in Chapter 1, which also presents a business perspective on the current and proposed industrial relations systems.

The 'roof' represents access to justice, oversight, supervision and enforcement, and this is outlined in Chapter 2 by Emeritus Professor David Peetz.

The six 'pillars' represent the categories of specific rights and

objectives at the core of the system that are to be articulated as prescribed outcomes. In chapters 3 to 8, the book's contributors outline their take on each of the pillars as follows:

Pillar I: Work health and safety and the environment (Chapter 3, Ron McCallum)

Pillar II: Work and income security (Chapter 4, James Fleming)

Pillar III: Fair standards and remuneration (Chapter 5, Marilyn Pittard)

Pillar IV: Human rights, discrimination, harassment and bullying protection (Chapter 6, Anna Chapman)

Pillar V: A Fair Say All Round (Chapter 7, Mark Perica)

Pillar VI: Bargaining (Chapter 8, Keith Harvey and Ben Redford).

In Chapter 9, Professor Joellen Riley Munton discusses the workplace 'participants', who represent those stakeholders whose rights are protected and who also share responsibility for upholding those rights in the workplace – for example, employers and employees, but also all kinds of workers, contractors, suppliers and other stakeholders.

In Chapter 10, economist Dr Margaret McKenzie analyses the economic benefits of the system; and in Chapter 11, Paul Munro, former senior deputy president of the Australian Industrial Relations Commission, and Emeritus Professor David Peetz discuss the transition to such a system. Finally, Emeritus Professor McCallum provides a closing summary.

We hope you'll find what follows in these pages thought-provoking and that you will be inspired to help us in developing and implementing practical solutions for a fairer system of work relations and a more just society.

CHAPTER 1 – THE FOUNDATION

Objectives of the New Architecture for a Fairer System

MICHAEL HARMER

I have operated in work relations in Australia for well in excess of forty years, including the last twenty-five years as an owner and manager of a business that has derived the vast bulk of its revenue as a work relations adviser to Australian and international employers, including many of the largest government and corporate employers in this country. In that context, I have experienced and observed the goodwill premium derived from fair treatment towards all stakeholders involved in a business and the benefits a positive workplace culture can deliver in the form of improved morale, productivity, efficiency, attraction, retention and profitability.

I have also experienced and observed the improved ideas and decisions that can be derived from genuine consultation with a workforce and other business stakeholders. As a business owner and manager, I do therefore see considerable potential benefits in a work relations system based on universal fair treatment in a procedural, substantive and genuine sense – one that fosters, educates and supports business in the achievement of fair outcomes.

Where conflicts of interest permit, my current business also acts to address unfairness for individuals, many of whom may not otherwise be able to pursue justice. Our firm has conducted many leading, and sometimes high-profile, cases to redress bullying, sexual harassment, discrimination, and other contraventions of industrial, safety and human rights obligations. In this context I have been struck by the cultural deficiencies in many Australian work settings and by the human carnage

they can inflict, including through serious health impacts and suicide. From this perspective I can again see considerable benefit from a system of work relations centred on genuine fairness.

The current systems of industrial relations, safety and human rights in Australia carry far too many trips, traps and gaps to achieve genuine fairness and significantly improve the above-mentioned cultures. Each heading below states an objective of the new system proposed in this book and is followed by a brief elaboration of that objective. Certain of those objectives are further elaborated in subsequent chapters.

1 An aspirational and practically achievable 'peak'

As with any substantial climb, a view of the peak can provide a sense of direction and a calibration of the journey ahead. Thereafter, it is head down and a tough climb through a series of practical steps, risk-managing any trip-ups along the way. This book aims to provide a view of that peak and a practical map of the steps to it as a destination. The hope is that each step towards the peak takes the country closer to an optimal system of work relations and fair work activity. The 'new architecture' of the book's title requires a significant shift away from the scope, perspective and institutional framework of the current system.

2 Stabilise and depoliticise

The Australian industrial relations system has itself been characterised as the ball in a game of political football between the major political and industrial parties. As each party in a primarily two-party political system achieves government, they attempt to kick the system further to the right or the left via legislative reform; stack the courts and tribunals in their favour; and resource or under-resource institutions to achieve their

political ends. This process is destabilising. It also generates a healthy cynicism about the lack of integrity of the system and it involves significant change management expense for all work participants.

Part of the aim of the new architecture is to provide a principled mooring for the system built on fairness (outlined further below). I am confident the proposed system would be better for business and the economy and more stable. There is much in it aimed at shoring up its stability, from a depoliticised tribunal, to measures to ensure workforce participation that encourages consensus and cooperation, to the consensus model of implementing the new system. Central, however, to the new model's stability is that it would be fairer and thus inherently work better for everybody.

3 Make the system genuinely fair

The notion of a 'fair go all round' is a long-standing concept in Australian industrial relations. It can be traced back to the Re Loty case and is enshrined in the objects of the *Fair Work Act 2009* (Cth).[1] It refers to the aspiration that any solution to workplace disagreement must acknowledge and attempt to accommodate the reasonable interests of all parties.

Despite this long-standing aspiration, the authors in this book identify many ways in which Australia's industrial relations system is currently unfair and they provide a range of proposals for how to make it substantively fairer.

The proposed system would recognise the fundamental right of a person in control of a business or undertaking (PCBU) to conduct that business or undertaking (BU) in the manner they see fit. However, this right would be subject to the responsibility to ensure that the BU does not deal unfairly with any person coming within its sphere of influence. Each

PCBU[2] will be required to take all reasonably practicable steps to ensure fairness. Likewise, all others having any influence over the work will be obliged to cooperate in taking all reasonably practicable steps to ensure fairness at that BU. This will require consultation between participants in order to ensure that the broad fairness obligation is met.

Existing workplace relations, safety, human rights and equal opportunity legislation and regulation will operate as prima facie indicators of what is initially fair in the circumstances. These pillars of the system, and others, are outlined in subsequent chapters. Any aspect of business or work not specifically addressed by the pillars would also be subject to scrutiny by a new national tribunal empowered to promote a fair go all round, taking into account the interests of everyone concerned, and the wider public interest. The notion of 'fairness' would be informed not only by existing legislation and regulation, but also by the development of codes of practice and standards of fairness (further discussed below).

The aim is that any person – no matter what their status, whether as employer, entrepreneur, worker, contractor, franchisor, franchisee, employee or otherwise – should be able to perform their work in a safe, supportive, and non-discriminatory environment. All bear entitlements to, and responsibilities for, ensuring fairness at work within their own sphere of influence. This is outlined further in Chapter 9.

Codes of practice would provide additional guidance as to what constitutes fairness in particular circumstances. Standards of fairness would provide model benchmarks to which PCBUs could be accredited – either for purposes of status in the marketplace or for purposes of receipt of incentives such as tax concessions or grants. The standards would be set, following national stakeholder consultation, by the new regulatory body, and accreditation assessed by that regulator's inspectorate. This

regulatory body would also play an educative role, in researching and disseminating information about best practice in business leadership.

An inspectorate would play a role in regularly monitoring the progress of PCBUs towards meeting these standards. The goal of the inspectorate would be to encourage progress towards reasonable proximity to the standards, sustained over time and acknowledging the PCBU's own resources and circumstances.

4 Synchronise

The current system of regulation in Australia is an uncoordinated patchwork quilt of regulation spanning workplace relations, safety, and human rights and equal opportunity. It is proposed that a single unitary system be adopted across those three streams.

5 'Robenise' and 'Futurise'

The prescriptive nature of the current system fails to cater for the rapidly changing nature and modes of business and work. It is proposed that the Robens-style model of legislation, currently existing in the national system of safety adopted by most states and territories in Australia, should be utilised across the three streams of work relations: safety, human rights and equal opportunity. The latter category reasonably extends the scope of the proposed system to human rights issues beyond the work context.

The Robens style of legislation is built on the notion of achieving a broadly stated objective. In this case, it would involve devolution of responsibility to the workplace level for the achievement not just of safety but of fairness. This would serve to keep the system permanently ahead of the rapidly evolving 'future of work' and provide for a universal scope of fair treatment.

The proposed system would embrace the expanded notion of business and workplace participants from our current safety legislation. In the case of business, this is the notion of a PCBU. The aim is that no form of enterprise impacting work, gig economy or otherwise, would escape the scope of the system. It is intended that each PCBU would have responsibility for achieving the stated objective within its sphere of influence – as would all other work participants.

6 Improve business leadership and work culture

While there are many anecdotal examples of great business leadership and entrepreneurial excellence in Australia, our business leadership has regularly failed to reach international benchmark standards and tends on average towards a passive-aggressive model. The business culture inculcated by that leadership produces high levels of sex discrimination, sexual harassment and bullying. That business culture carries a massive cost for the national economy in terms of national personal health (both mental and physical), impaired productivity, efficiency, morale, participation, attraction and retention.

The devolution of responsibility to PCBUs to achieve the 'fair go all round' is aimed at increasing the quality of our business leadership and work culture through thorough and assisted due diligence. The system would assist in this regard by focusing on prevention of unfairness, education, and accreditation towards high standards of fair treatment at work as outlined above.

7 Benefits at the micro and macro levels

Empirical studies demonstrate a high correlation between improved work culture and business morale, productivity, efficiency, attraction, retention

and profitability. Such micro-level benefits can manifest at the macro level through improved preventive health; reduced costs of bullying and discrimination; improved workplace participation rates; reduced absenteeism and presenteeism; and contribution to increased national productivity. The economic benefits of the new system are further discussed in Chapter 10.

The benefits to personal health, and to the health of PCBUs and the national economy, of improved business leadership and work culture warrant the extension of training in fair treatment rights, responsibilities and standards to secondary and tertiary education across all fields of learning for any career in work.

Work can be vital for every individual – regardless of their status – and can be a key to their personal health and the wellbeing of their families. Individuals should be well educated to understand both their right to fairness and also their responsibility to afford fairness to others – including the operator of the PCBU, or any other person in their sphere of influence.

The internal work culture – which has been described as 'the shared values, norms and expectations that govern the way people approach their work and interact with each other' – is critical to micro and macro health and prosperity.[3] That internal environment should also be synergistic with the external environment – in terms of each PCBU operating as a net benefactor to, rather than a net detractor from, the environment and resultant climate change, as a matter of integral business ethics for all work participants.

8 Consultation, engagement and democracy in work settings

Each PCBU would be encouraged to consult with all relevant stakeholders for the achievement of fairness at work, consistent with the productive and profitable operation of that business.

Traditional arbitral principles concerning consultation in Australia have recognised that, no matter how good a business leader you are, and how much you think you can anticipate the impact of particular steps on a workforce, you will never actually know until you receive input from that workforce, until you enjoy the benefit of their cooperation and ideas and until you genuinely factor those considerations in to business decision-making.

Assisted by an improved form of prevention, education, standards and accreditation, each PCBU would be required to engage in consultation with worksite representatives and committees (correlating to the current work health and safety representatives and committees) across all aspects of fair treatment in the context of work relations, safety and human rights and equal opportunity.

Consultation on the achievement of fair treatment would also be required with other participants, such as contractors and suppliers along a supply chain, and any other person whose sphere of influence is capable of impacting, or being impacted by, fair treatment at the PCBU. Workforce participation is discussed further in Chapter 7 and the new system's expanded range of participants is discussed in Chapter 9.

9 A revised institutional framework

The new work architecture requires a revised institutional framework. This would ideally include a new national tribunal and associated bodies; system managers; a business registration requirement; supervision and

enforcement by the courts; and a renewed labour inspectorate. All are detailed below.

A new national tribunal and associated bodies would deal with conciliation and arbitration over the achievement of fairness and the fair go all round and would consist of appropriately qualified and trained members across three streams: work relations, human rights and equal opportunity. As discussed in the next chapter, members of that tribunal would be subject to a genuinely independent appointment process, detached from political influence. Arbitral power of that tribunal would extend to the maximum possible under the Australian Constitution, assisted by a strong encouragement towards private arbitration of differences. Indeed, alternative dispute resolution and private arbitration would form an important part of the standards for fair treatment. The tribunal might include specialist bodies that deal with specific matters of detail, or these might be handled by separate, subsidiary bodies. The existing work health and safety system and institutions would be preserved, with some minor improvements to known issues, as discussed in Chapter 3.

System managers would include a properly resourced inspectorate across all three streams mentioned, as well as an extensive educational function focusing on the development of high standards of fair treatment, and the education, assistance and accreditation of PCBUs to those standards (see also Chapter 2).

There would be a business registration requirement for PCBUs to demonstrate a simple business plan to ensure fairness, with any questionable approach able to be referred to the system regulator and the national tribunal for review.

While the system would carry a heavy focus on informal dispute resolution and private arbitration, the courts would have oversight of the

system, including dealing with any serious issues of unfair treatment, with penalties of the range and nature currently applicable under work safety legislation.

A renewed labour inspectorate would be required to ensure that the standards established in the system are being enforced.

10 Minimum standards and collective bargaining

It is envisaged that the system would continue to carry a number of forms of regulation, as follows.

- A set of legislated national employment standards that preserves the existing NES but expands them, and a process for the tribunal to set and maintain a federal minimum wage updated annually (see Pillar III, Fair standards and remuneration, discussed in Chapter 5).
- Other broadly applicable minimum standards may be established, either by executive regulation or test cases by the tribunal, with the explicit purpose of promoting and prioritising fairness. These standards may apply across the other pillars – that is, work health and safety and environment; work and income security; human rights, discrimination, harassment and bullying protection; workplace participation and representation; and bargaining – and would include the regularly updated level of the minimum wage.
- Modern awards that can be expanded across the areas covered by the pillars and adapted to different industries and areas as part of the safety net.
- Codes of practice, standards, education and a system of accreditation from the national labour inspectorate/regulator across the pillars.
- Where appropriate, separate standards, broadly equivalent to those for employees, where protection is needed but employee-driven

standards are not suitable (for example, for non-employee workers in the gig economy).

- Engagement contracts, policies and procedures operating at the workplace level.
- A system of dispute resolution before the national tribunal, with an emphasis on localised dispute settlement processes, conciliation, mediation, private arbitration and statutory arbitration – providing further guidance and principles as to the achievement of the fair go all round.
- A system of collective bargaining allowing the national tribunal to determine issues of scope and subject matter of bargaining at industry, enterprise, or other level, as part of the determination of fairness and a 'fair go all round'. Bargaining in the new system is discussed in Chapter 8.

This chapter has proposed an integrated holistic system across the three streams of work relations, safety, and human rights and equal opportunity. It is a matter for further debate as to whether a single integrated system, or one of a modular approach based upon a common Robens-style template, is preferred. Even within the confines of this book, there is debate as to whether the relatively successful work health and safety system should be kept separate, intact and a model for replication, as opposed to being integrated into the one whole system (see also chapters 2 and 3). It is part of the aim of this book to foster and encourage such debate as to the optimal system of work relations for this country.

11 Access to justice

The cost of litigation is currently a major barrier to justice in Australia. Workers with limited resources often have no choice but to compromise

their rights. Only the well-resourced can afford to pursue justice.

An independent 'counsel assisting' role should be introduced to assist all parties to present their case in litigation, but should carry high-level obligations to the tribunal and the courts. The parties to litigation would be required to collate material to be presented by the counsel assisting.

Unions are one vital link in access to justice. It is suggested that the existing union structure be given rights to service 'fair go all round' representatives and committees as a means to increased representation (see Chapter 7).

12 Change management to the new system

The existing framework of work relations, safety, and human rights and equal opportunity legislation should continue to operate within the system to the extent of its consistency with the new framework until the latter is phased in. The new legislation would operate to provide broad standards of what constitutes 'fairness' within the system. Workplace participants would decide how to meet these standards.

The system would cover the scope of the existing framework of legislation and would extend beyond 'work', particularly in human rights and equal opportunity. Chapter 11 discusses in more detail how the new system can be implemented. The 'fair go all round' and the Robens approach could also conceivably provide a suitable foundation to amend many other areas of law within the Australian economy, although this is beyond the scope of this book.

CHAPTER 2 – THE ROOF

Administrative Reform and the Institutional Framework

DAVID PEETZ

A new work architecture requires a new set of institutions – but even an old architecture needs institutions that are fit for purpose. This means that institutions should be able to objectively deliver the outcomes promised by the system, for the benefit of the people it is meant to benefit; and that there should be sufficient flexibility and integrity built into the system to enable complex circumstances to be taken into account.

So in this chapter I ask first: What institutional arrangements are necessary to support development and implementation of a wider ambit of protections? This question takes us to imagining new institutional possibilities that build on the successes of the past and of other jurisdictions, and to a discussion of the possibility of directed devolution. Then I consider how existing institutions fail us, and what is to be done about them in a new work architecture. I ask what institutional changes are required to ensure the suitability and credibility of those institutions.

Institutional framework

There are three key types of institution that, together, make up the access by parties to justice and enforcement of minimum standards. These are: the courts that interpret the laws; the tribunal that creates standards as requested of it; and the inspectorate that enforces the standards. The purview of the courts extends well beyond industrial relations, so we do not canvass it here. This chapter therefore considers the second and third of these. None of this is to suggest changes to the institutions governing

workplace health and safety beyond the proposals in Chapter 3, but those governing the rest of the employment relationship are in need of serious renovation. The part of the 'roof' (as discussed in the introduction) relating to workplace health and safety does not require such radical repair.

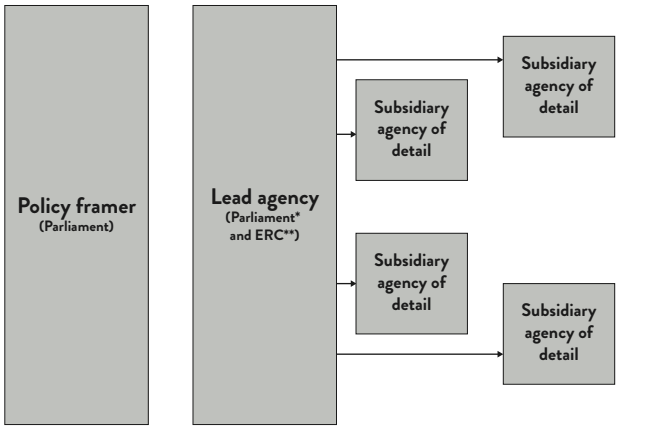
We need to identify what form of institutional arrangement can best enable the lessons of policy experimentation to be learned and disseminated. The employer search for 'flexibility' is most evident in the platform economy – often called the gig economy – where workers are summonsed to work through apps, usually on their phones, linked to digital platforms under control of a corporation. One response of policy-makers to this conundrum may be 'institutional experimentation': changing institutions and how they relate to organisations and the norms of work.[1]

Under the model proposed here, the legal entitlements and obligations would be set at a policy level, and a detailed level, comprising subsidiary bodies or 'agencies of detail', would be required to work out detailed implementation of those standards with a view to protecting the affected workers' interests. For example, after the federal Parliament identifies the nature of the problem, sets some standards and establishes appropriate structures – that is, it is the policy framer – a new federal tribunal may, as the lead agency, set a minimum hourly wage. Then, where it is not immediately obvious how an hourly wage rate may apply, a series of subsidiary bodies might separately determine how the minimum wage should be calculated for specified circumstances (for example, for a specific industry). Hourly wage rates might be easily identifiable for the vast majority of workers – those in an established employment relationship – but less obviously for workers in rideshare, in food delivery or elsewhere

in the platform economy. The broad structures involved are illustrated in the figure below.

This policy level could comprise more than one institution. The federal Parliament would be one. The tribunal (presently the Fair Work Commission) would be another, and it would operate within parameters determined by the Parliament.

The directed devolution model

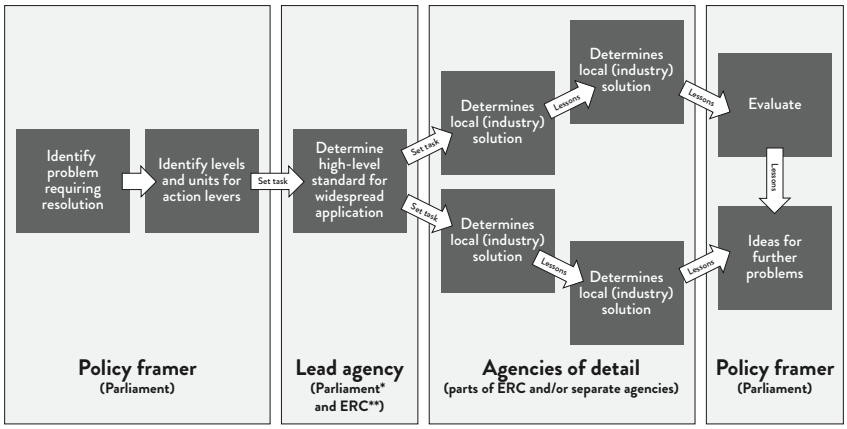


The subsidiary agencies could be part of the tribunal or they could be distinct from it, but either way they would be directed by it, which is why the system is described as 'directed devolution'.[2] The tribunal could be designed to straddle both policy-level and detail-level functions. How ever it is constructed, the subsidiary body would be legally obligated to come up with a method to determine a minimum rate of payment that, for example, most closely approximated the nationally determined minimum hourly wage. The lower level would be given enough time to work out a method that satisfies entitlements determined at the higher level, but it would nonetheless have to work one out. The standard set

at the higher level would be the one that the lower level must achieve. This agency of detail at the lower level might cover specific industries or groups of industries. It may need to be quite innovative. Results would be evaluated and ideas generated. Emphasising flexibility and learning, directed devolution enables actors to learn from the experiments of other actors. One such example is the regulation of the road passenger transport industry in New York in 2019. There, a highly innovative regulator was, after undertaking substantial research and consultation, able to consider a high-level time-based standard (the hourly minimum wage), designed for employees, and convert it into a practical, local solution for bailees and contractors (a minimum flagfall and charge per kilometre applying to taxis and rideshare).[3] It did not gain universal support – inevitably, there are arguments about the distribution of economic value – but it was workable.

The issues that would be most addressed by this directed devolution approach are those raised by the platform economy and other forms of work that might not involve an employment relationship.

Different institutions within the policy level would likely be responsible for different standards. For example, the Parliament may be responsible for what are presently called the National Employment Standards, and general requirements such as for gender pay equity or substantive equality between the sexes (as discussed in Chapter 5); and the tribunal would deal with matters assigned to it by the Parliament, which would sensibly include minimum wages as these would need to vary over time. The figure opposite illustrates the processes involved.



* Parliament responsible for NES and similar requirements
** ERC responsible for standards delegated by the Parliament

Policy development under directed devolution

The system proposed here is a form of multilevel policy-making, with some similarities to the concept of 'subsidiarity', which seems to have many definitions[4] but which at its core is about 'the presumption that action should be taken at the lowest level of governance consistent with the subject matter and the objective to be attained'.[5] However, directed devolution is more tightly integrated than subsidiarity. Other relevant but distinct forms of multilevel bargaining include the International Labour Organization's Fundamental Conventions, the Bangladesh Accord and several forms of regulation deployed in Australia, including work health and safety (WHS) regulation, which built on the Robens model. In essence, WHS legislation imposes obligations on employers to ensure a safe workplace – though, crucially, the relevant concept is actually a 'person conducting a business or undertaking' (PCBU). In other words, contractors have the same protections as employees have, and PCBUs are responsible for the safety of both. That said, in many areas the detailed elucidation of safety standards (How wide should a particular piece of gasket insulation be?

What form of guard must be used on a specific machine?) is too complex for national regulation. Instead, legislation imposes obligations on individual employers to establish certain procedures (health and safety committees or officers) to ensure that appropriate safety standards apply in each work setting. In effect, each organisation is forced to take a risk management approach to safety. The lower level is obliged to design work regulations (practices) to enact the standards set at the state (effectively national) level.

While it is good to experiment, actors and policy-makers need to have long-term strategies, including plans to make mechanisms permanent if appropriate (and to avoid, if possible, the dangers of temporary or fixed-term arrangements). As explained later, they need to be careful in choosing who to serve in such bodies, ensuring they possess both skill and goodwill. They also need to be prepared to deal with powerful opposition, at both higher and lower levels, from well-organised and well-resourced interests if consensus is not achieved.

Crucially, such an approach must be designed to account for power. That is the key aim of the 'directed' in 'directed devolution'. In whatever way the responsibilities are divided between the central agency and the agency of detail, it must be done such that it does not reduce the power of those whom regulation is meant to protect – that is, by allowing their voices to be swamped by those with greater resources or by allowing their interests to be defined off the agenda.[6] Centralisation of decision-making is often seen as a way of increasing the power of labour vis-à-vis capital, and decentralisation as a means of increasing the real power of capital.[7] Regulation of work is typically aimed at protecting the most vulnerable elements of labour. So devolution of decision-making in itself can, if handled poorly, worsen the situation of the people regulation is meant to protect. Directed devolution, by tightly constraining the room to

manoeuvre of those at the more decentralised level, should minimise the likelihood of a power shift against the most vulnerable. At the same time, it should still allow some flexibility to account for differences in situation-specific circumstances. Accounting for power not only means constraining the flexibility of the 'agencies of detail'; it also means an adequate system of enforcement, discussed later in this chapter.

This process (of directed devolution) can be at its most useful when several criteria are satisfied. It is most useful when establishing enforceable general principles is important, and can make a real difference, but there are complications with implementation; when circumstances vary considerably between organisations or industries; when devolution can be achieved without losing enforceability; and when this can be done without shifting power away from those with less power. Directed devolution is not a substitute for specific regulatory interventions in the platform economy – for example, to enable proper classification of workers as employees vis-à-vis contractors. There is nothing in the directed devolution model that would undermine the rationale for reforms that would, for example, widen the definition of 'employee' to encompass some people previously classed as contractors (the main aim of, for example, the AB5 legislation in California). It is a complement, not a substitute, for such reforms. It is, however, a recognition that the latter have limitations and, as such, is an effort to address those limitations. That said, to the extent that a directed devolution approach could make the employee–contractor distinction less important, it would move us closer to the framework, advocated by Contouris and others, of the 'universal work relation' (the idea that labour law should cover not only employees but also others in less visibly subordinate, continuous or formalised personal work relations that are currently excluded from its scope).[8]

Disruption caused by the logic of modern capitalism and the processes of technological development has torn apart the 'web of rules' that protected workers in the past. In its place has arisen a 'patchwork of rules', as actors have engaged in institutional experimentation to try to recover lost ground.[9] This patchwork, by definition, provides uneven coverage, and actors should learn from the successes and failures of various experiments. Sympathetic policy-makers need institutional forms that can respond to the innovation that created the disruption, thus enabling them to protect the interests of the vulnerable who are their putative concern, and making possible innovative policy responses whose lessons will be learned and generalised. Directed devolution is one such form.

The tribunal

In any newly designed system, a key role would likely be played by a central tribunal. That position is presently occupied by the Fair Work Commission (FWC). The role of the tribunal depends in part on the role envisaged for arbitration of pay and conditions in any new system, and that issue is not canvassed in depth in this chapter. Regardless, the tribunal would undertake oversight of the regulatory regime across the board. Such a role, including settling rights pertaining to collective bargaining, and resolving disputes by conciliation and arbitration, would best be done by people equipped for the tasks by experience and disposition.

A key issue will be its impartiality, real and perceived. Historically, appointments to the FWC and its immediate predecessors (the Australian Conciliation and Arbitration Commission and the Australian Industrial Relations Commission) had been balanced, in that a roughly equal number of appointments were made from the employee side and the employer side, including former direct representatives of unions or employer

organisations, or lawyers or consultants who commonly represented them. Some appointments to the tribunal also came from backgrounds in government agencies.

That perception of balance no longer exists. Instead, there is a common view that governments have been disproportionately appointing people sympathetic to, or from, their side of politics.[10] This is particularly important here as the division between capital and labour, which characterises industrial relations, is also the defining difference between the political parties in Australia.[11] This process of politicisation was seen as beginning under the Howard Liberal–National government, with more appointments from capital than labour. The succeeding Rudd and Gillard Labor governments were said to have done the reverse. A preponderance of appointments from the employer side were then seen to have occurred under the Abbott, Turnbull and Morrison Liberal–National governments. One of the most recent, and perhaps extreme, examples of this was the appointment to the FWC in 2021 of Sophie Mirabella, a former Liberal Party MHR who was defeated at the 2016 election. While many appointees seen as 'political' at the time end up being lauded for their balance (former president Geoffrey Giudice being perhaps the most senior example), this is not always the case. One 2016 appointee to the FWC was rebuked by a Supreme Court judge after issuing a 'clarion call' in one of her judgements, with the admonition: 'Political pamphlets have their place but I doubt that the Fair Work Commission is one of them.' [12]

Unilaterally reverting to a system of informally balanced appointments to the Commission would not solve this perceived problem. For one thing, it could not prevent it from happening again. Game theory tells us that if one side continues to cooperate (in this case, by making 'balanced' appointments) while the other side does not cooperate (that is, it keeps

making 'unbalanced' appointments), this merely reinforces the strength of the other side. The only feasible way to avoid 'the suckers' play', as journalist Bernard Keane calls it, is to abandon such cooperation until the other side credibly agrees to cooperate, or until the rules are irrevocably changed.[13] For another thing, balanced appointments would not 'restore balance'; they would just perpetuate any status quo of imbalance.

There are two issues regarding the tribunal: restoring the perception of balance in the short term, and ensuring balance is retained over the long term. The two are obviously related. In some circumstances, one could undermine the other. For example, if a new government appointed a disproportionate number of people from one side of the capital–labour divide to restore balance in the tribunal, there would be nothing to stop a future government again appointing a disproportionate number of people from the other side of politics. Doing the former may or may not exacerbate the problem; while it could be argued that it would encourage the other side of politics to 'stack' the tribunal, there is no indication that they would need any encouragement. Indeed, it could be argued that developments in Australia are simply a sign of the 'Americanisation' of the right of politics, given the increase in partisan political voting behaviour and the pattern of judicial appointments in recent years in the USA. One possibility might be to expand the size of the Commission to accommodate new members, but there is a limit to how far a new government could go with expanding the existing Commission while maintaining credibility, and the workload of the Commission might not warrant such a large expansion.

Conversely, if a process of ensuring genuinely balanced appointments were to be instituted, leading to all future appointments being equal between capital and labour, any pre-existing imbalance would be perpetually reproduced. Yet if initial balance was achieved by 'stacking'

the tribunal, any future process purporting to ensure balance would be doomed once a change of government occurred. So it is necessary to start with a balanced tribunal to be able to reproduce balance.

The only plausible way of doing this is to abolish the FWC and replace it with a new body. It could be called the Employment Relations Commission (ERC), though the name is not important. Many, but not all, members of the FWC, especially the president, would plausibly go into the new body. This would be a more extensive restructuring than that in 1987, when the government abolished the Australian Conciliation and Arbitration Commission and replaced it with the Australian Industrial Relations Commission (AIRC), which had identical membership except for one person who was not appointed to the AIRC. Appointments to this new tribunal would be focused on merit and balance.

The second, key, element would be a change to the process of appointments once the new body is established. A much more even-handed, consultative process is required. In New Zealand, the same problems with appointments to the Employment Relations Authority (ERA), the closest equivalent, do not arise. The president of the ERA is informally consulted on any new appointments. But informal consultation through a convention followed by one party does not guarantee it will be followed into the indefinite future by the other party.

The solution would be to establish a bipartisan body, to be set up through legislation, to control future appointments. This ERC Advisory Board (ERCAB) could include, for example, two people nominated by the Minister and two by the Leader of the Opposition, the president of the ERC, maybe the head of the Australian Council of Trade Unions and the head of the Australian Chamber of Commerce and Industry (this would make the ERCAB a bit like the National Labour Consultative Committee in the

sense of being legislatively established and having formal representation from those bodies). An alternative, or additional, requirement could be recommendation by a parliamentary committee (as per the auditor-general's appointment), or perhaps representation on the ERCAB from the relevant parliamentary committee. Appointments would need to be by a 'super-majority' of the committee – say, two-thirds of members – so that an appointee would be recognised as legitimate by both sides but no single member could hold out to prevent any appointments.

Left–right balance, however, is not enough. The tribunal needs a cross-section of the diversity in the community, and it is important that members should have a commitment and openness to learning about issues such as gendered pay, sexual harassment and racialised bullying. Experience with implementing gender equity tells us that, while the wording of legislation is important, it is critical that arbitrators understand the relevant issues and are attuned to the community demand for equality.

In short, appointments to this new tribunal would be the result of a merit-based selection process, with the emphasis on balanced representation of all interests, not just of established actors.

The inspectorate[14]

A different set of problems is presented by the labour inspectorate in Australia, presently named the Fair Work Ombudsman (FWO).

Non-compliance with minimum standards (often referred to as 'wage theft') has implications not just for those workers directly affected. If one group of workers can be paid well below the legal minimums, that opens opportunities for employers to apply pressure to other workers, using the implicit or explicit threat of replacing them with lower-paid workers. It increases pressure on 'good' employers to cut pay and conditions.

Some groups of employees are disproportionately likely to be exploited. Those most vulnerable are those most likely to be afraid or tolerant of mistreatment, and least likely to complain. They include workers with temporary migration visas, where the employer has the upper hand in making it not worthwhile to complain. Some examples include reports indicating underpayment to international students in Melbourne cafes and restaurants;[15] underpaying employers near the University of Wollongong;[16] and underpayments to Vietnamese students and migrants,[17] sponsored Indian migrants[18] and Korean backpacking farmworkers.[19] It is so common among restaurateurs that the claimed perception, when caught, is that underpayment is 'normal',[20] while a tour operator would say it happened 'not because businesses up here are greedy capitalist pigs but because it's necessary to survive in this socialist Australian economy'.[21] Some treat wage theft as legitimate business practice, with the chief executive of one major employer body reportedly admitting (or perhaps proclaiming) that thousands of retailers and restaurants were undercutting award minimums. [22]

Temporary migrant workers lack power. Due to language limitations, many do not know their rights or lack the confidence to enforce them. In industries in which they are employed, workers are easily replaced, unfair dismissal is hard to prove or has few meaningful remedies, and collective organisation of workers is difficult. Visa conditions give employers power. Even when they know their rights – and many recognise they are paid below the minimum wage [23]– the important thing is the imbalance of power. For franchisees of 7-Eleven, the business model of the head firm effectively presented franchisees with a simple choice: underpay staff or close.[24] After being similarly uncovered for underpayments to its franchisees' staff, oil company Caltex set up a $20 million compensation

scheme for workers, described by someone with experience in such schemes as a 'public relations stunt'.[25] Wage minimisation is the logic of franchising in the 'not there' employment system.[26]

Yet, notwithstanding the cases brought against employers, underpaying workers remains a viable part of the business model of many other employers. Prosecutions are rare in the context of the number of underpayment cases that come to the inspectorate's attention. They are even rarer if, after getting caught, the employer offers back pay (or at least commits to an 'enforceable undertaking' to do so), even if other of its employees are being underpaid. Sometimes exploited workers are told by the FWO to take their issue elsewhere – to a small claims court, where the employer can often be confident the aggrieved worker will not follow through.[27]

The FWO has been heavily criticised for inaction on enforcement of breaches of minimum standards. For example, Robert Corr, a former prosecutor with the DPP, has spoken about the Fair Work Ombudsman. He discussed how enforceable undertakings are used as a means of getting an easy resolution, but it is one that means the penalties are light – so light that sometimes the companies will offend again.[28] A case study of breaches of the law by a resort in Far North Queensland, and the lack of action by the FWO in response, highlights the nature of the problems. [29]

The embedded problems that promote inaction are illustrated in *The Chickenshit Club*, a book about a different institution in a different country. Author Jesse Eisinger describes the first staff meeting held by James Comey when he came to run the New York Southern District prosecutor's office.[30] Comey asked those there to reveal who had never lost a case. A significant number of very proud lawyers put up their hands, somewhat boastfully. Comey said, to their great surprise, 'You're all chickenshit!' He

explained that, if all prosecutors do is take on the cases they know they will win, then they are not doing their job. He told them that prosecutors needed to take on the complex cases, which they would sometimes win and sometimes lose. Otherwise, the worst lawbreakers were going to get away with it, as they would know how to do it. They would just keep on breaking the law and would set the example for the rest who are tempted to break the law. The first message from only taking on the cases that would be won is that, if a potential lawbreaker knows that they can do things that would raise doubts as to whether a prosecution would succeed, they will very likely get away with it. If they were not too blatant, with too cut-and-dried an issue, they would be fine.

That in some ways summed up the problems with the FWO as the enforcer of workplace rights. A lot of effort goes into demonstrating that it is doing its job, gets prosecutions and forces sometimes big, recalcitrant employers to pay up or else. Media hits are positive. Yet widespread underpayment persists.

The problems with the FWO are deep-seated and historical. They go back through its predecessors, which were ultimately a branch of the federal Department of Industrial Relations and before that a separate agency. The FWO as an organisation, and its senior staff, face the wrong incentives: to demonstrate the legitimacy of the organisation and, in the case of the senior staff, to prove their effectiveness as functionaries, with a view to their next appointment which, in the case of those at the top, is by the political masters. The wrong incentives create the wrong culture. Out of those incentives and that culture comes a willingness to focus on education rather than enforcement, and to make compromises that allow lawbreaking actors to get away with enforceable undertakings, sometimes more than once, instead of facing a damaging penalty for transgressions.

Avoiding the tough cases is not the only problem arising from the wrong incentive structure. Because the organisation and its senior officials look to government for security, they tend to take on a government view of the world, as illustrated by the head of the FWO telling a Senate Estimates Committee hearing that 'we don't judge [casual employees] as being insecure', since 'being a casual is completely acceptable under the Fair Work Act'.[31] The point is not about whether she gave the right answer; it is that, when an organisation's incentive is to secure the approval of government, it takes on a government view of the world – including, in this case, its view of the world of work, what makes for a vulnerable worker, what constitutes exploitation and the appropriate way to deal with it.

The incentive the organisation and its staff should face is to serve the interests of vulnerable employees. How can that be achieved? First, it can be done by abolishing the FWO. Second, at least two new bodies should be created. One would be a new regulator committed to ensuring that no worker fails to receive their legal entitlements. That enforcer would need to be made accountable to – that is, run by – a board of people for whom that is the driving interest. There is a fair chance they would be representatives of employees. Likewise, when appointing the CEO, experience in running a public service function or comparable body would not rule a candidate out – it would likely be a plus – but the critical aspect would be that the person had the right motivation.

There may also be need for a more informal body for petty enforcement matters, whereas the more complex and serious cases of breach of obligations to pay would be handled by an agency with both investigative competence for forensic purposes and prosecutorial acumen.

The other crucial new body should be an education-focused agency. Critically, there should be a separation of the bodies responsible for

education and enforcement, so that the objectives of the enforcement agency are unambiguous, simple and clear. Prosecution success rates would not be a key performance indicator (KPI). If there were KPIs, they would measure the rate of compliance – for example, through some independent audit or survey. The organisational culture that defines normal behaviour is not just a function of structures or of the individuals in positions of power; culture is also influenced by the individuals actually doing the work. However, over the long run those structures have the biggest impact and, even in the short run, when combined with the choices about individuals, structures can be critical.

Not all solutions to compliance issues relate to the structure of administration. They can also relate to the framing of legislation, such as the way obligations to franchisors are framed[32] or the criminalisation of wage theft. However, regarding the latter, the biggest problem is not that the maximum penalty is too low. Already the maximum is rarely used, and many offences are ignored. Not many are caught, and punishments are light. An employer would have to be not only malevolent but also stupid to be ensnared by these wage theft laws. True, increasing the threatened punishment for the most egregious offences might provide a demonstration effect that discourages wage theft. But the assertiveness of administrative action seems to be the main factor shaping employer behaviour. If someone thinks they will not be caught, let alone punished, they will keep on doing what they are doing.

What is more, the FWO does not pursue criminal prosecutions – at the moment anyway. It treats these as a problem for the Federal Police. The Federal Government's 2021 'omnibus' industrial relations bill would have made a step towards improving the situation with wage theft, by making access to the small claims court easier. However, those provisions in that

bill were inexplicably withdrawn after much of the rest of that bill (dealing with issues like enterprise bargaining, greenfields agreements and award simplification) was rejected by the Senate.[33] Unions usually cannot take action on underpayments because the workers affected are not members. They have less power in contemporary times, due to changes in labour and product markets, legislation and declining membership. Under earlier legislative regimes, unions could inspect workplace records to seek out underpayments, but that is no longer permitted in Australia. A reversal of that situation would increase enforcement capacity.

So administrative reform should be seen as only part of the response to the problem of non-compliance with industrial law, but it is nonetheless an important part.

This chapter has focused on institutions that are, or at least should be, independent of government. There are other questions of administrative reform – such as how to maximise gender equity or workplace fairness within government agencies and in their policies and programs – that are beyond the scope of this chapter, but which also demand consideration.

Conclusion

Improving the work architecture is not just a matter of getting the rules of the system right; it is also a matter of getting the institutions right. In many countries, the rules are very pro-worker but administration is too rigid, too lax or unsuited. Once, when working on a report on minimum wages for a country receiving technical assistance from the International Labour Organization, I was taken by the inspectorate to meet employers, one of whom, they told me well in advance, was not paying the minimum wage – and there was no sign he would be facing any penalty. Setting rules for the minimum wage did not seem to matter so much once I realised that

enforcement had an optional quality to it. Getting institutional design and practice right is as important as getting the rules themselves right.

Many of the issues here go beyond the particular system design advanced in this book or elsewhere. For example, the genuine independence of the independent tribunal is crucial, regardless of whether policy-makers pursue a policy that relies less or more on arbitration by an independent tribunal, and regardless of whether public policy focuses on the determination of wages for a single employer or for multiple employers. Without that, the policy and the system fall into disrepute. This now requires reconstitution of the tribunal into a genuinely independent body (possibly containing subsidiary agencies of detail) with an appointment process that guarantees independence into the future, along with a new inspectorate that will be dedicated to enforcement of the rules that the tribunal, and the parties themselves, lay down. The conventions that held the system together in the past must be formalised and protected through a new set of rules, and the institutions themselves renewed. Through this we can rebalance the scales of justice and sharpen the sword of enforcement.

CHAPTER 3 – PILLAR I

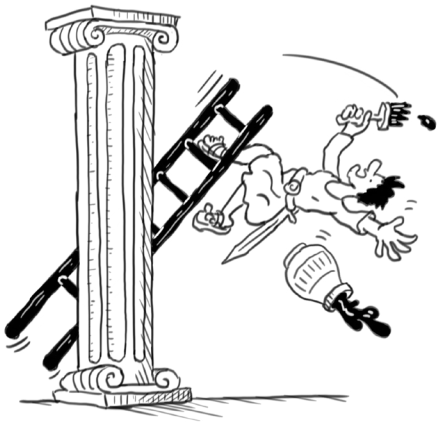
Health and Safety and the Environment

RON MCCALLUM AO

The reform proposal outlined in this book envisages that the primary responsibility for the day-to-day operations of work settings should be in the hands of the participants. They include employers and employees, of course, but also extend to other workers, like contractors and those workers bound by labour hire arrangements, as well as entrepreneurs who are conducting business undertakings (PCBUs), as is elaborated in Chapter 9. Such a shift requires various forms of managed decentralism that focus on places of work.

The new work architecture, or Robens style of health and safety regulation in work settings, has operated throughout Australia for about four decades. It is a prime example of a partial form of managed decentralism that regulates all of the actors in settings where remunerative work is undertaken. However, the full benefits of this partial devolution operate unevenly because very many work settings neither establish nor encourage elected health and safety representatives or health and safety committees.

The purpose of this chapter is to briefly outline the Robens model of workplace health and safety as it operates in Australia, some emerging problems, and how workplace health and safety should be dealt with in the new system.



The Robens model

In 1970, the Government of the United Kingdom commissioned an inquiry into workplace health and safety. Its report, which became known as the Robens Report, was published in 1972.[1] The Robens Report made the pertinent observation that:

> Our present system encourages rather too much reliance on state regulation, and rather too little on personal responsibility, and voluntary, self-generating effort. This imbalance must be redressed. A start should be made by reducing the sheer weight of the legislation. There is a role in this field for regulatory law and a role for government action. But these roles should be predominantly concerned not with detailed prescriptions for innumerable day-to-day circumstances, but with influencing attitudes and with creating a framework for better safety and health [or workplace relations] organisation and action by industry itself.[2]

Put another way, in the field of workplace relations, the Robens philosophy asserts that the primary responsibility lies with all persons in the workplace. This leaves broadly scoped legislation to enhance consultation and collaboration and, to use a colloquial term, ensure 'a fair go' all round for all workplace participants.[3]

For Robens, the responsibility for workplace health and safety should be with employers, employees and contractors upon whom broadly based duties would be placed, by statute, to require them to ensure workplace health and safety so far as is reasonably practicable. These performance-based duties would apply to all places of work and not just to factories and shops regulated by factory statutes. The day-to-day operations of workplace health and safety should be a cooperative process, with employers working hand in hand with health and safety representatives and health and safety committees. Government inspectors would assist by proffering advice, and industry-wide regulations and codes of practice would be developed. Enforcement in the courts by the application of the criminal law would be as a last resort – where death or injury had occurred or where regulation had failed. In 1974, the Government of the United Kingdom enacted this philosophy into law.[4]

Robens in Australia

There were various measures attempting to enact portions of the Robens philosophy in Australia.[5] However, the first full-blown Robens statutes were passed in 1983 and 1985, by the New South Wales and Victorian parliaments respectively.[6] In the succeeding years, the other states and territories enacted similar legislation.

On 3 July 2008, an intergovernmental agreement was signed by the Commonwealth Government and all of Australia's state and territory

governments.[7] It committed the signatories to reforming workplace health and safety law. An inquiry into Australia's health and safety laws was commissioned and it reported back in October 2008 and in January 2009.[8] These two reports eventually led to the drafting of a Model Work Health and Safety Bill.[9] In 2011 and in 2012, the Commonwealth Parliament and the parliaments of all the states and territories, save Victoria[10] and Western Australia, enacted the bill.[11] In November 2020, the Western Australian Parliament passed the *Workplace Health And Safety Act 2020*, which came into force in March 2022 when its accompanying regulations were gazetted.

The parliaments in several Australian jurisdictions have altered some of the provisions of the model statute; however, its main features are uniform in all of the jurisdictions where it has been enacted.[12]

The broadening of the scope of the work setting

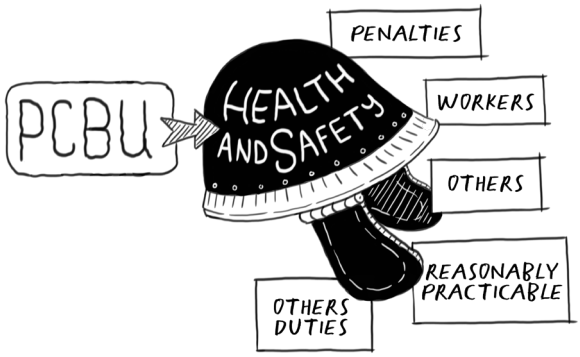
The model statute no longer places duties upon employers. Instead, it adopts the broader expression of a person conducting a business or undertaking, known as a PCBU. This expression covers all businesses or undertakings regardless of whether they are carried out for profit, or whether they are run by sole traders, by corporations, as joint ventures or by partnerships or unincorporated associations.[13] Earlier Australian statutes had broadened the meaning of 'employee' to cover many categories of persons who were not employees at common law. The model statute uses the term *worker*, which is defined as a person who carries out work in any capacity for a PCBU. This includes independent contractors, those governed by labour hire arrangements, and even students undertaking work experience.[14] 'Workplace' is similarly broadly defined to include any place where work is carried out for a PCBU, and it includes any place a worker is likely to go or be when at work.[15] The model statute jettisons the employer–

employee nexus; instead it recognises that various categories of people undertake work and seeks to encompass everyone who does so as part of the operations of a PCBU.

The primary duty

The primary performance duties are set out in Part 2 of the model statute. The breach of a performance duty is a criminal offence.[16] Section 19 of the model statute sets out the primary duty on PCBUs. It says that a PCBU 'must ensure, so far as is reasonably practicable, the health and safety of…workers who are engaged or are influenced by the [PCBU]… while the workers are at work in the business or undertaking'.[17] A PCBU must also ensure, so far as is reasonably practicable, 'that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking'.[18] The expression 'reasonably practicable' is defined to include 'that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters'.[19] The onus of proving that a PCBU has not done all that was reasonably practicable lies upon the prosecution.

Ensuring the health and safety of workers and other persons at the workplace so far as is reasonably practicable obviously includes preventing bodily injuries. However, it also covers the taking of practical steps to prevent or to minimise the contraction of diseases, including COVID-19. It is further suggested that the safeguarding of the health and safety of workers, and especially of women, extends to taking reasonable steps to prevent sexual harassment.



The other duties

The other performance-based duties are set out in Part 2 of the model statute.[20] The following group of duties is expressed as requiring persons to undertake duties so far as is reasonably practicable. These duties are placed upon persons with management or control over workplaces;[21] upon persons with management or control of fittings, fixtures or plant at workplaces;[22] and on designers, manufacturers, suppliers and installers of plant, substances or structures.[23]

Section 27 of the model statute places obligations upon officers of PCBUs. The word *officer* is defined to include directors of companies.[24] An officer of a PCBU is required to 'exercise due diligence to ensure that the person conducting the business or undertaking complies with that duty or obligation'. The expression 'due diligence' is described in some detail. For present purposes, due diligence 'includes taking reasonable steps' to keep up to date with work health and safety matters; and to understand the nature and operations of the business, including its hazards and risks.[25]

Finally, duties are placed upon workers while they are at work and also upon other persons at the workplace. Each worker and other person must

'take reasonable care for his or her own health and safety' and also 'take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons'.[26]

Penalties

As noted above, breaches of these duties are criminal offences. The model statute sets out three categories of offence. Put briefly, Category 1 offences require proof that reckless conduct is being engaged in, without reasonable excuse, which 'exposes an individual to whom that duty is owed to a risk of death or serious injury or illness'.[27]

In 2020, in response to several jurisdictions enacting industrial manslaughter laws, the New South Wales Parliament amended section 31 of its Workplace Health and Safety Act and expanded the category 1 offence by adding conduct amounting to gross negligence.[28] In New South Wales, a category 1 offence will be committed where a person who has a health and safety duty 'without reasonable excuse, engages in conduct that exposes an individual to whom that duty is owed to a risk of death or serious injury or illness', either with gross negligence, or is 'reckless as to the risk to an individual of death or serious injury or illness'.

A category 2 offence[29] is the same as a category 1 offence, except that the proof of reckless conduct is not required. A category 3 offence[30] is concerned with minor infractions. It simply requires proof that the relevant duty has been breached.

The penalties for these offences in the eight Australian jurisdictions that have adopted the model statute are a moving feast. Suffice to write here that the maximum penalties for category 1 and category 2 offences are substantial fines and/or terms of imprisonment. Category 3 offences give rise to monetary penalties.

Enforceable undertakings

Part 11 of the model statute concerns enforceable undertakings. This process has become more popular in recent years, with the primary example of its operation being regulation by the Australian Competition and Consumer Commission. In relation to breaches giving rise to the commission of category 2 and category 3 offences, a person or corporation may give a written undertaking to the regulator[31] without being required to admit guilt.[32] Where the regulator has accepted an enforceable undertaking, the person giving the undertaking cannot be prosecuted for the relevant offence. Enforceable undertakings often concern the rectification of workplace risks and hazards, as well as the implementation of improved health and safety systems, which are independently audited. Where a regulator is of the view that an enforceable undertaking has been breached, the regulator may institute curial proceedings. As well as ordering the payment of monetary penalties, the court may issue an injunctive order requiring compliance with the enforceable undertaking.[33]

Industrial manslaughter

Where a person causes the death of another person at a workplace, it is always open for the perpetrator to be prosecuted for manslaughter.[34] However, in the field of workplace deaths there are difficulties in proving this offence. Community outrage increases when those responsible for such deaths neither receive significant penalties nor attract the disapproval brought by a conviction for manslaughter. As noted by work health and safety law practitioner Michael Tooma, the Canberra Hospital implosion led to the Australian Capital Territory amending its *Crimes Act 1900*[35] by creating the offence of industrial manslaughter in 2004.[36] In Queensland, there was community outrage at the deaths at the Dreamworld amusement

park and at the Eagle Farm racecourse. In 2017, the Queensland Parliament amended its *Work Health and Safety Act 2011* by including industrial manslaughter.[37] In 2020, the Northern Territory and Victoria also inserted manslaughter offences into their statutes.[38] The new Western Australian *Work Health And Safety Act 2020* also contains an industrial manslaughter provision.[39] It does seem likely that the remaining states of New South Wales and South Australia will enact industrial manslaughter offences in the near future.

Workplace participation in health and safety

Part 5 of the model statute sets out how workplace participation is to be accomplished. However, its requirements are detailed; they can be best understood by reading Part 5 in its entirety.[40] For present purposes, the following points are salient.

First, where there is more than one duty holder at a workplace, such as a PCBU, and another person with management or control of fittings, fixtures or plant, the duty holders 'must, so far as is reasonably practicable, consult, co-operate and co-ordinate activities with all other persons who have a duty in relation to the same matter'.[41]

Second, a PCBU has a duty to consult with the workers 'who carry out work for the business or undertaking who are, or are likely to be, directly affected by a matter relating to work health or safety'.[42] The model statute details procedures for worker consultation[43] that may be varied with the agreement of the workers and the PCBU, provided that any variations are not inconsistent with the procedures.[44] As the model statute has increased the number of categories of workers at workplaces, a PCBU must clearly ascertain all of the workers to be consulted with. This includes consultants and workers who are employed by labour hire agencies.

Third, Part 5 Division 3 of the model statute details procedures for the election of health and safety representatives who are elected by work groups. Any worker who carries out work for a business or undertaking may request that a PCBU facilitate the election of at least one health and safety representative.[45] Once elected, health and safety representatives serve three-year terms.[46] A PCBU must facilitate safety and health representatives to undertake appropriate training.[47]

Health and safety representatives are given significant powers under the model statute. Put briefly, health and safety representatives are empowered to represent the workers in safety and health matters, to monitor the actions taken by the PCBU, to investigate complaints, and to inquire into risks to safety and health.[48]

At common law, a worker can cease working where there is a significant risk to health and safety. The model statute restates this right.[49] However, health and safety representatives are empowered to direct that workers cease working if the health and safety representative '…has a reasonable concern that to carry out the work would expose the worker to a serious risk to the worker's health or safety, emanating from an immediate or imminent exposure to a hazard.'[50] Before giving a direction, a health and safety representative must consult with the PCBU,[51] unless 'the risk is so serious and immediate or imminent that it is not reasonable to consult before giving the direction'.[52]

Health and safety representatives are also empowered to issue provisional improvement notices where there is a reasonable belief that a person is contravening or has contravened the model statute.[53] The provisional improvement notice may require the person to remedy the breach,[54] however, it cannot be issued until there has been consultation with that person.[55]

Finally, Part 5 Division 4 of the model statute is concerned with the establishment and operation of health and safety committees. A PCBU must establish a health and safety committee if requested to do so by a health and safety representative or by at least five of the workers,[56] with at least half of its members being workers who are not nominated by the PCBU.[57] The functions of health and safety committees are to facilitate cooperation in the workplace[58] and, importantly, 'to assist in developing standards, rules and procedures relating to health and safety that are to be followed or complied with at the workplace'.[59]

Workplace health and safety committees in the new system

Workplace health and safety committees and workplace health and safety representatives play a central role in the applicable Australian laws, which are broadly based on the Robens philosophy. How should these laws be expanded or integrated into the new system? The model health and safety statute which has been enacted in most Australian jurisdictions represents a success story in Australian cooperative federalism. These laws jettison the narrow classifications of 'employers' and 'employees' and instead bring into their orbit all workers undertaking work for the PCBU. The enactment in most jurisdictions of industrial manslaughter laws shows that these laws can respond to changes in attitudes and to new and emerging social problems.

It is suggested that the new system should build on these laws by enhancing the role and scope of workplace health and safety committees. For example, the various sets of workplace health and safety regulations[60] could be amended to specify further requirements and more detailed training for members of workplace health and safety committees. Their roles could be enhanced to meet the changing nature of work and of workplaces which we shall now turn to. (Chapter 7 discusses further how

safety committees could be expanded or interface with fairness committees in the new system.)

The changing nature of work and of workplaces

The Robens Report was published fifty years ago, in an era when large employers were pre-eminent. Then, workforces were stable and union membership was high. Writing in 2012, Richard Johnstone and Michael Tooma explained that 'the approach institutionalised in the Model Act was developed for a centralised model of consultation based on a permanent workplace with a stable workforce, and is still best suited to those kinds of work arrangements and relationships'.[61]

Workplaces have since changed, often beyond recognition. In this time of supply chains, smaller employers predominate, their workforces expand and contract having regard to the needs of the PCBU, and trade union density has declined. The so-called COVID-19 pandemic has shifted much work from the office to the home, and it is clear that home working will remain to some extent in the coming years. Online shopping has spawned an increased number of delivery drivers whose employment arrangements are often precarious. It is fair to conclude that, in Australia, no health and safety representatives or health and safety committees exist in many small businesses.

The changes in the nature of work and workplaces are occurring throughout the developed world.[62] In some European countries, machinery has been set up to facilitate the operation of roving health and safety representatives to cover groups of PCBUs. For the worker participation measures to operate throughout the jurisdictions that have embraced the model statute, PCBUs and workers need to be encouraged to fully adopt this model of worker participation.

Workplace health and safety, the environment, pandemics and climate change

In his book *Safety, Security, Health and Environment Law*, Michael Tooma explores the synergies between the laws governing workplace health and safety, security and the environment.[63] After all, these three areas of law are concerned with the assessment and elimination of risks. It is clear that the duties set forth in the model statute do cover environmental issues relevant to workplace health and safety. The two most significant environmental issues at the present time are the COVID-19 pandemic and climate change.

The SARS-CoV-2 virus, first identified in 2019, spread around the world in early 2020 and became a pandemic of epic proportions, causing the deaths of more than two million people. In 2021, the Delta and Omicron variants of COVID-19 brought new challenges. Although vaccines have proven to be effective, with most Australian adults being vaccinated, a small minority of the population have refused vaccinations. The 2020 and 2021 lockdowns by state and territory governments have altered the ways in which much work is now performed. Many workers have been able to work from home, and the delivery of food and other items to dwellings has become commonplace. As the home is now the workplace for many workers, ensuring the health and safety of workers at home is a new challenge for the model statute.

Keeping workers safe from contracting COVID-19 in workplaces is clearly a workplace health and safety duty imposed on PCBUs.[64] For example, in September 2021, WorkSafe Victoria laid fifty-eight charges against the Victorian Health Department for exposing workers to death or serious illness in the first stage of its quarantine hotel program.[65] It is also clear that state and territory governments may utilise their health statutes

to order changes in the manner and location concerning the performance of work. For example, in October 2021, the New South Wales Supreme Court upheld orders[66] made under that state's health statute.[67] These orders included preventing authorised workers from leaving an affected residential area and prohibiting some workers who had not been vaccinated from working in the construction, aged care and education sectors. The applicants appealed to the New South Wales Court of Appeal, but in December 2021 the court dismissed the appeal.[68]

The issue of whether employers may order employees to be vaccinated in order to continue working has created some controversy. Put briefly, where the provisions of neither an award nor an enterprise agreement are relevant, employers may require employees to obey orders, provided those orders are both lawful and reasonable.[69] In December 2021, a Full Bench of the Fair Work Commission held that an order for its employees to be vaccinated by Mt Arthur Coal Pty Ltd, which is part of the BHP group of companies, was invalid because it was both unlawful and unreasonable.[70] The order was invalid because of the failure of the employer to fully consult its employees pursuant to the New South Wales Workplace Health And Safety Act.[71] However, where employers fully consult their employees, orders for employees to undergo vaccination are likely to be lawful and reasonable where vaccinations are necessary to prevent infections at workplaces.

This is probably not the last pandemic Australia and the world will face – because climate change, and continued deforestation, will likely expose humans to more exotic wildlife and pathogens.[72] We need to take steps to ensure that Australia's grid of workplace health and safety laws is better able to deal with pandemics and with vaccination requirements.

Climate change is a challenge for the entire globe. Alterations in

Australia's climate do affect the health and safety of workers in many industries and occupations. For example, as Australia's temperatures rise, especially in tropical areas, many workers will be exposed to heat stress conditions.[73] PCBUs have a duty to protect workers from unsafe working conditions caused by heat stress under Australia's network of workplace health and safety statutes. This duty will require the modification of some work practices, and even changes in working hours, as a means of combatting the effects of heat. The transition from fossil fuel–extractive industries to green-energy sources will require careful managing by governments and also by PCBUs.

Conclusion

The Robens philosophy that underpins the model work health and safety statute is a type of managed decentralism that has operated in Australia for more than three decades. It places primary responsibility for health and safety upon all persons and bodies concerned with the performance of work at workplaces. The burden of this chapter has been to recount the adoption of the Robens philosophy in Australia and to discuss the breadth of its scope and how to overcome its current limitations in the new proposed system. As this book sets out, a new system that promotes not only safety but fairness can be built on the Robens model of managed decentralism, including its approach to workplace participation, inspection and enforcement.

At the same time, the new system ought to address the series of workplace health and safety challenges before us. First, there is the fragmentation of work processes caused by outsourcing and supply chains. Coupled with these changes is the increased precarity of work brought about by the use of contractor labour and casual employment. Put

simply, these changes have led to the scaling back of the large employer and an increase of much smaller PCBUs. Many work settings no longer have health and safety representatives or health and safety committees. Working from home has thrown up another challenge to this managed form of decentralism, with the need to determine appropriate levels of regulation at the homes of workers. Finally, both the COVID-19 pandemic and climate change have placed further pressures on regulators, on PCBUs and, of course, on workers. These problems are not insolvable if all parties recognise the benefits to both PCBUs and workers of worker participation. If this form of managed decentralism is to survive and be expanded, it will require governments, employers and trade unions to cooperate to ensure that workplace participation and consultation operate in all facets of the performance of work.

CHAPTER 4 – PILLAR II

Work and Income Security

JAMES FLEMING

This chapter discusses work and income security: what that security is, why it is important, and how to address it in a new and fairer system. It does so from a labour law and broader political economy perspective, describing the rise and fall of basic work and income security in recent decades and reflecting on the deeper causes. Explored within the chapter is the role of the new work architecture in ensuring basic security, as well as some practical reforms to both Australia's industrial relations and social security systems. This includes using directed devolution to extend standard protections to non-standard workers, Sweden-inspired social security schemes that would help iron out the differences between forms of engagement, and the security-promoting benefits of full and equal employment. Finally, the chapter briefly discusses some universal basic income and universal basic capital proposals and their potential to universalise basic work and income security.

Conceptualising security and insecurity

Labour market economist Guy Standing argues that the good society is one in which 'everybody, regardless of gender, age, race, religion, disability, and work status, has equal basic security'.[1] Human dignity demands no less. Basic security Standing defines in terms of various forms of work and income security – from security of income, security of leisure time, protections against working unsociable hours, job and employment security, protection against arbitrary dismissal and access to job opportunities and advancement, to representation and bargaining power.[2] We could say the quality of a country's democracy, especially that of a wealthy country like Australia, can be measured by the degree to which the State is responsive enough to the needs of its constituents to provide such basic security. It follows that the fairness and adequacy of

our industrial relations system, together with our social security system and our government spending and employment policies, can be judged by the same standard.

Despite the fact that fairness is an objective of Australia's industrial relations system, a divide has nevertheless emerged between, on the one hand, workers at the core of the labour market who have the basic security of standard employment protections and, on the other, a significant periphery without them. Some workers, such as casual employees, have lesser protections within the system and some, such as non-employee gig workers, have none at all, as they are left outside of it. The unequal distribution of security is a common pattern around the world but a particularly acute problem in Australia. The OECD estimates that more than 40 per cent of employment in Australia is now non-standard, without standard labour protections – the third-highest level in the OECD.[3] It is also concerning that gig work, one of the most precarious forms of work, is growing rapidly and emerging in a wide range of Australian industries.[4]

Modern employment law protections are built on the model of full-time employment. Non-standard employment, as noted by Laß and Wooden, is 'a term that is usually used to describe any form of employment other than

permanent full-time dependent jobs' and 'is typically seen as "precarious", with adverse consequences for workers flowing from greater economic insecurity'.[5] This includes casual, part-time and fixed-term employment, and independent contracting. It includes labour hire and gig workers on such arrangements. The term 'insecure work' is often used interchangeably but sometimes to refer to only the most precarious workers on those arrangements. The related term 'contingent work' is often used to refer to workers less tied to the workplace on tentative arrangements, such as agency (labour hire) workers, day labourers, outsourced workers and on-call workers.[6]

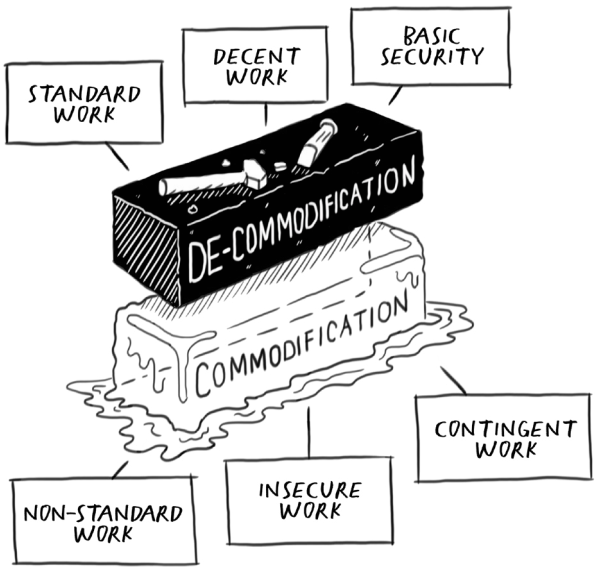
As we saw during the global financial crisis and the COVID-19 pandemic, casual and other non-standard workers are the hardest hit and the first to lose work and income in downturns. Non-standard work perpetuates inequalities, affecting women and disadvantaged groups most. As wealth is related to income, the economic disadvantages of insecure work can compound over time in the form of wealth inequality.

Non-standard, contingent and insecure work can be contrasted with the International Labour Organization's notion of 'decent work', which can be described as 'the aspirations of people in their working lives – their aspirations for opportunity and income; rights, voice and recognition; family stability and personal development; and fairness and gender equality'.[7]

Decent work involves 'not just the creation of jobs, but the creation of jobs of acceptable quality...It could relate to different forms of work, and also to different conditions of work, as well as feelings of value and satisfaction.'[8] The importance of decent work is highlighted by the fact that the Decent Work Agenda is now the ILO's primary goal; namely, to 'promote opportunities for women and men to obtain decent and

productive work, in conditions of freedom, equity, security and human dignity'.[9]

Another way to think about the axis of insecure work versus basic security/decent work is in terms of the notion of labour commodification described by economic historian and anthropologist Karl Polanyi, and labour law's role in 'de-commodifying' labour, a role acknowledged in the ILO epithet that 'labour is not a commodity'.[10] The various forms of work-related insecurity can be seen as forms of commodification caused by exposing people to market forces. Labour protections and the broader welfare state are necessary to 'de-commodify' labour to preserve human dignity and autonomy and to serve basic human need.



The emergence of insecurity

According to Polanyi, there is an inherent conflict between market processes and human need, and hence there's a cyclical pattern of social embedding and disembedding of the economy.[11] Market processes help create wealth but also tend towards greater and greater inequality and economic instability.[12] Polanyi argues that, when society is subordinated to markets through deregulation and liberalisation, the economy becomes 'disembedded' from the protective social institutions that it simultaneously destroys, leaving people exposed to commodification and dehumanisation. The resulting dehumanisation triggers 'double movements' – counter movements in the form of political and social movements and institutions that are formed to 're-embed' the economy in protective social relations. A new wave of economic liberalisation then arises, and so the cycle continues.

Polanyi saw the mass unemployment and world wars of the first half of the twentieth century as caused by the instability of laissez-faire (free market) capitalism. The rise of fascism and totalitarian socialism he saw as double movements in response to the extreme inequality and instability and mass unemployment that arose from market liberalisation in the preceding years. Writing in 1944, he saw the emerging signs of state intervention to promote full employment, unions and proto welfare-state policies as positive double movements and alternatives to, and protection from, the double movements of fascism and totalitarian communism.[13]

The Keynesian era post World War II, in which welfare states and the model of standard employment protections and full employment were constructed, can be seen in terms of re-embedding double movements that were then dismantled by the wave of market liberalisation that followed during the neoliberal turn in the 1980s. A new round of liberalisation is occurring in the current era of digitalisation and hyper globalisation.

Hence, applying the Polanyian lens, the return of authoritarian ethno-nationalist movements around the world can be seen as double movements in reaction to market exposure caused by the dismantling of social institutions such as the welfare state, unions and labour protections.

The rise of standard employment protections and security in the Keynesian era

The standard model of employment protections based on full employment and full-time work is a product of the Keynesian era.[14] This period from the end of World War II up until the mid-1970s is sometimes also called the 'golden age of capitalism', in which there was rising economic equality, low unemployment and a relatively stable economy. As welfare states around the world were constructed in developed nations in response to the Great Depression and World War II, the situation in which workers found themselves improved dramatically. The wars and depressions of the early twentieth century served to undermine the legitimacy of economic liberalism (faith in markets and a laissez-faire fair approach to the economy that abhors government intervention) and ushered in a Keynesian revolution in economic thinking. The economist Maynard Keynes had argued that the mass unemployment of the early twentieth century and cycles of boom and bust showed the inherent instability of laissez-faire capitalism and that markets were not capable of mobilising all labour resources to ensure full employment. Instead, government should play a role in guiding the economy, particularly 'counter cyclical spending' to raise workers' spending power during downturns, to offset and shorten recessions and ease off on spending during booms.[15] The emerging Keynesian macro-economic consensus saw a greater role for government to promote full employment and manage the economy.

In Australia and in many other countries, full employment was successfully achieved from the period of World War II and into the 1970s. Unemployment averaged 2 per cent in Australia[16] between 1945 and 1975, within the realm of what economists term mere 'frictional' levels; that is, temporary unemployment caused by changing jobs. In this period, the Australian Government pursued full employment as a policy goal, and full-time permanent jobs were the standard. High economic growth, wage rises, strong unions and centralised collective bargaining were the norm. Workers obtained a steadily growing share of national output. Social rights expanded, funded by state investment and redistributive taxes on the wealthy and corporations. For the first time in history, in Australia and across the western world, workers began to enjoy university education, a high standard of free or affordable healthcare, expanded leave rights, decent pensions and unemployment pay. Backed also by rising union membership and growing collective worker power, there was a great improvement in pay and working conditions and an unprecedented reduction of inequality around the developed world. For the first time in modern history, the creation of an expansive middle class emerged from the Dickensian early capitalist period of extreme levels of inequality and poverty.

The picture was not all rosy, of course. In Australia and many other countries, there was slow progress on gender equality and the inclusion of indigenous and other groups. The Keynesian era was dominated in Australia by a male bread-winner model and entrenched gender-based economic divisions. However, this was not an essential feature of Keynesianism. The Nordic countries followed largely Keynesian models, and women's workforce participation rates in Sweden, for example, were twenty years ahead of Australia's in this period.[17] Late progress on gender equality and other promising trends in expanding social rights to women

and other groups in Australia postwar were cut short, however, by a neoliberal paradigm shift in the late 1970s and the 1980s.

Famously, Keynes predicted in 1930 that, with rising productivity, by the time his grandchildren were grown up we would all be living in material luxury and working fifteen hours per week.[18] In the late 1960s the trends must have looked like we were headed in that direction. Keynes's prediction, however, was never realised.

The neoliberal turn and the return of insecurity

In the 1970s, the global economy fell into economic crisis: unemployment returned and inflation skyrocketed. Keynesian economists blamed global events, America's inordinately expensive Vietnam War and OPEC-led oil crises, as well as governments' departure from Keynesian solutions such as state investment programs. Conservative economists who were committed to free markets – such as Friedrich Hayek and Chicago University economists like Milton Friedman, who had always remained defenders of the pre-existing class-based order and were critics of Keynesianism, unions and an expansive public sector – gained influence in a changed political environment.[19] Cockett describes how these and other conservative thinkers, backed by well-funded think tanks, promoted a new neoliberal, 'trickle-down' economic ideology that had its foundations in the old order.[20] The postwar consensus on macro-economic policy of high government spending and full employment that underpinned this Keynesian position was slowly dismantled. Led by Margaret Thatcher in the United Kingdom and Ronald Reagan in the United States, state spending and public services were reduced, unions were disenfranchised, workers' collective power was curtailed, redistributive policies were reversed and there was a return to a more laissez-faire free-market model.

Kalleberg and Vallas have argued that this global rise in insecure work and increased segmentation of the labour market into standard and non-standard work in the neoliberal era is driven by four main factors: de-unionisation, financialisation, globalisation and digitisation.[21] According to the anthropologist Tejaswini Ganti, neoliberalism favours the deregulation of the economy, the privatisation of state-owned enterprises, the liberalisation of trade and industry, and drastically altered political roles for labour, capital and the state relative to prior models.[22] It entails the idea that society and the government should be governed by the self-regulating free market, with its related values of competition and self-interest;[23] that is, essentially the return of economic liberalism in a new form.

Coinciding with increasing use of neoliberal approaches, the economic crises of the 1970s passed and the neoliberals took the credit. By the 1990s, neoliberalism had become the new dominant political and economic orthodoxy around the world.[24] Since this paradigm shift in the late 1970s and early 1980s, welfare states, union membership and workers' rights have been in retreat. There have been periodic economic crises, with cycles of boom and recession, and the return of persistent, permanent unemployment. In many countries, economic growth and productivity growth never returned to Keynesian-era levels and, in terms of national income, business has steadily clawed back a bigger share of a more slowly rising pie.[25]

The level of non-standard work in Australia rose from 24 per cent in 1971 to 47 per cent in 2000 – extremely high by international standards[26] – and it has remained at persistently high levels since. There is a mismatch between the level of permanent, decent work on offer and the amount desired by workers. And the flexibility on offer is often on employers' terms rather than employees' terms.[27] Standing argues that a new class of

vulnerable people left behind has emerged that he terms the 'precariat',[28] consisting of 'millions of people in every advanced industrial country and in emerging market economies as well'; people in precarious patterns of work, with uncertain income and/or citizenship, often locked out of the union representation and the standard social rights and security traditionally linked to work.[29] Similarly, the sociologist Ulrich Beck notes a profound shift in the neoliberal era from the 'work regime' – or the 'full employment society' – to the 'risk regime' or 'risk society', where workers individually bear various risks formerly borne by employers and the state.[30]

Fragmentation of the labour market and the rising inequality attached to it is a profound social transformation with potentially dire political consequences. Polanyi warned us of the authoritarian and totalitarian reactionary forces that can result from market exposure. We live in times of great political instability and a growing backlash against perceived elites and fundamental institutions. This threatens democracy and the possibility of a shared society.

Australian trade unions' attempts to restore standard protections and reduce the incidence of casual and insecure work have generally been resisted by employer organisations. One proximate reason for this is that businesses seek to engage a proportion of their workforce on flexible arrangements so that they can manage the risk of fluctuating market demand. Flexible work can be used as a way for business to shift costs and risks onto workers – the cost of gaps in customer demand (workers can be rostered off or sent home early on quiet days), the cost of leave and sickness, and the cost of severance pay if the business's workforce size is reduced and redundancies are necessary. Casual workers are also cheaper because casual loadings often do not fully compensate for the lack of redundancy and leave entitlements[31] and casual workers are more alienated

from the workplace and less able to organise for better pay and conditions.

In terms of how far we have fallen and how far we have to go to de-commodify labour, it is useful to compare Australia with other countries. Australia's social and labour protections are often favourably compared with those of the United States, the United Kingdom and Canada, but it is important to remember that these are also liberal welfare states; that is, it is a low bar. In 1990, the sociologist Esping-Andersen published a study of the progress of welfare states in de-commodifying labour, dividing them into three clusters, and the comparison still likely holds true today.[32] Australia is listed in the bottom category: that of the liberal welfare state, amongst those with a miserly 'targeted' welfare system (minimal and aimed primarily at the poor) where the welfare is thus stigmatised and vulnerable to class-based opposition. Although not the focus of Esping-Andersen's study, industrial relations in these welfare states are generally also least centralised. The middle category includes European countries such as France and Germany, which have conservative welfare regimes that provide a medium level of social and employment protection, but where welfare is aimed at preserving traditional social hierarchies. These also tend to have a mid range of centralisation of industrial relations arrangements. In the top category of welfare states are the universalist welfare regimes typical in the Nordic countries, which achieved the most universalist social rights with a high level of social and employment protections aimed at individual emancipation. These countries have more highly centralised industrial relations arrangements, as well as high levels of union membership and collective bargaining coverage.

Solutions for more universal security in the new system

Where do we go from here? Since the global financial crisis, neoliberal

fiscal policies of austerity that prevent the state from spending to promote full employment and smooth out the business cycle have increasingly been brought into question, but only really in times of crisis. 'I guess everyone is a Keynesian in the foxhole,' quipped Bob Lucas, a Chicago University economist and previously one of Keynes's harshest critics.[33] In response to both the GFC and the COVID-19 pandemic, governments around the globe used fiscal spending to keep up employment. But in Australia this has not yet translated into a return to full-employment policies generally or a recentralisation of labour markets. The neoliberal era is not yet over, and the way digitalisation is proceeding, it could be accelerating.

Hence, there are significant institutional and ideological challenges to restoring basic security. How can we provide basic security while facilitating the contradictory demands of business for flexibility and workers for security and decent work? If we are to accept non-standard work, how can we nevertheless extend security to all workers, irrespective of the nature of their engagement? How can we ensure universal work and income security given that the attraction to business and some workers is a lack of commitment about working hours and even an ongoing employment relationship? How can we ensure that the flexibility is more balanced between the preferences of workers and those of business? These are questions to be examined in the remainder of this chapter.

Basic security in the new work architecture

There is much in the new work architecture that would aid de-commodification and help universalise basic security, at least that linked to work. As is explained in Chapter 2, following a directed devolution approach, universal standards can be set at a high level – for example, in statute and/or maintained by the labour tribunal. Subordinate bodies

within the tribunal can be created to translate minimum wage rates and conditions for employees into equivalent binding minimum piece rates or hourly rates and conditions for contractors. Those bodies can ensure the national standards applying to full-time employees are translated into meaningful equivalents for other non-standard workers such as casual employees.

In the realm of health and safety, the coverage of state schemes can be extended to cover non-employees – for example, in the gig economy – by deeming these workers as employees for that purpose.[34] Removing practical barriers to unions organising workers would also do much to raise workers' bargaining power, pay and conditions, as discussed in chapters 7 and 8, and the industry and sector bargaining measures discussed in Chapter 8 would aid de-commodification by reducing or eliminating wage competition. The measures to enhance workplace participation and representation, as discussed in Chapter 7, and extending the category of those with rights and responsibilities within the industrial relations system beyond employers and employees to all participants with economic influence, as discussed in Chapter 9, would help reduce the alienation of contingent and non-standard workers.

The new work relations architecture can futureproof workers in Australia against commodification by being more responsive and adaptive to changes in the economy and ensuring adequate social protection. An independent tribunal is less able to be captured than the state bipartisan political interests that might erode standards and is more likely to be responsive than the parliamentary legislative process. A responsive industrial system can be an ongoing double movement in Polanyian terms, counteracting commodification as it arises and protecting society from reactionary forces. It is limited, however, to the extent of its interface

with the social security system and welfare provision. Where the former is limited, the latter will have more work to do to ensure basic security.

Social insurance fees

A practical measure that could help universalise standards and interface with social security draws on the Swedish system of social insurance fees, which operates between industrial relations and welfare arrangements. In Sweden, the problem of agency/independent contracting and temporary work is less acute because of social fee arrangements that help reduce social dumping by ironing out the differences between forms of engagement. In Australia, employers pay directly to their employees the costs of leave, redundancy and other entitlements linked to permanent employment. As individual employers pay these directly, this incentivises employers to use casual employment or independent contracting in order to avoid them (recall that the casual loading is less than these costs and independent contractors are not required to be paid a loading at all).

The Swedish system is such that all employers pay social fees of 31.42 per cent of the workers' wage to the tax agency to cover certain social security entitlements and payroll tax. The fees cover sick leave (after the first fourteen days), the state aged pension, paid parental leave and occupational injury pay, and contribute to unemployment entitlements.[35] Every business faces the same fixed liability as a proportion of the employee's salary, irrespective of the worker's individual situation. The costs are effectively collectivised, with employers paying a fee linked to salary but employees receiving benefits linked to both salary and need. This likely reduces discrimination on certain grounds, as the employer's costs are less linked to the worker's circumstances. Importantly, instead of a casual loading, temporary employment attracts the same social fees from

employers, and temporary employees thus receive the same associated social security entitlements. Temporary work also has mandated maximum time limits before permanent work must be offered, except in certain circumstances.[36] Similarly, independent contractors, as 'employers' of themselves, must pay the same social fees and thus incorporate these costs into the rates they charge clients. Thus, social dumping through a form of engagement is greatly reduced.[37]

A system similar to the above could be established in Australia, whereby the casual loading is phased out in favour of social insurance fees on all work that goes (via the tax office) to social insurance agencies, which pay out the associated entitlements. The cost to business of such a system in Australia could be neutral, depending on the entitlements offered – at least where the business is not engaged in social dumping. If such a system were introduced in Australia, the incentive for opportunistic cost shifting onto workers could be minimised; and contingent work, particularly casual and labour hire work, could be reduced closer to levels of genuine business needs for flexibility and otherwise be replaced by permanent employment. From the worker side, much casual work and independent contracting would look less superficially attractive as the real costs and benefits would be made more transparent and able to be compared and evaluated more easily against permanent employment. As with the introduction of the superannuation system, such a system could be phased in over a practical time frame. The system would be 'future proof', in that it would help universalise rights at a national level and thus, where there is community consensus, help facilitate the rollout over time of more progressive standards, such as more extensive paid parental leave, subsidised by the state or by employers via the level of social services fee, or a combination of both.

Full and equal employment

Some forty years of neoliberal policies have confirmed what Keynes argued: the free market cannot alone create full employment. A free-market model will always lead to levels of unemployment and there is a necessary role for government in filling the gaps to mobilise all labour resources. The options for achieving this are several. One is direct employment in an expanded government service providing greater services to the community – for example, in environmental repair, health, education and the arts – but there is no sound reason this could not extend to a government role in other areas, such as manufacturing, particularly of electric cars.[38] This can include a 'job guarantee' in the public service, where the public service acts as employer of last resort. Needing to be assiduously avoided, however, is the risk of coercive 'workfare' measures requiring a worker to accept a job they do not want lest they lose benefits. A better option subsists in 'active' labour market programs, where government-funded agencies provide retraining or relocation services to get workers into quality private-sector jobs that they want and in the regions and industries where there is a labour shortage – that is, to provide better linkages between demand and supply where the market has failed, or into cost-free further training and education. Concerns about the unaffordability of these approaches are unfounded. The increased tax revenue and welfare savings created by employing surplus labour mean the measures pay for themselves.

Australia's experience with subsidised childcare during the pandemic shows the potential for promoting women's workforce participation. If Australia's female labour force participation was increased 10 percentage points to match Sweden's, it would add at least 6 per cent – more than $100 billion – to GDP, as outlined in Chapter 10. Universal childcare

access and adequate paid parental leave (in Sweden it is eighteen months, shared by the parents) would not only promote gender equality but be a significant economic windfall for the nation.

Universal basic income and capital

Basic security also needs to extend beyond those currently employed, and universal basic income (UBI) is an attractive form of basic security for all to set a level below which no-one can fall. The idea of a UBI has a long history and, partly due to recent concerns about the effects of automation and declining employment, it has moved from the fringes to the mainstream in policy discussion, with interest across the political spectrum. UBI can broadly be defined as a 'policy proposal of a monthly cash grant given to all members of a community without means test, regardless of personal desert, with no strings attached and, under most proposals, at a sufficiently high level to enable a life free from economic insecurity'.[39] There remains disagreement about the goals of a UBI and the form it should take but experiments have been conducted in several countries – including Finland, Kenya, India, Canada, Namibia, and the United Kingdom – with encouraging results.[40] Some proposals favour cash payments additional to existing means- and needs-based payments and services. Less attractive approaches promote replacing such services with a universal cash payment.

To ensure universal basic security and a greater quality of life for everyone and throughout their lives, we need to consider both UBI and also universal basic capital (UBC) – that is, a capital endowment for all, available early in life. To paraphrase the philosopher Søren Kierkegaard, the paradox of life is that it must be lived forwards but can only be understood backwards.[41] The arrow of capitalist time seems to present

a similar paradox. People tend to accrue the most money only towards the end of their lives, when they have already used up most of the time and possibilities to make use of it. They often lack access to significant capital at all, well into adulthood. If only we could ensure a decent level of security of capital and income for all, throughout our lives.

Australia's industrial relations system and even the most progressive proposals for a UBI as a form of general basic security focus on wages and income. But in some ways this is outmoded: the real game to ensure basic security is wealth. As Piketty showed in exhaustive empirical detail, under capitalism, the return on invested capital outperforms growth in wages – so, over time, society's wealth is concentrated away from wage earners towards capital owners.[42] Wealth also becomes concentrated into fewer and fewer hands and, without intervention, this process is inexorable.

Illustratively, last year in Australia the median household increased its wealth more through the increase in property prices over the year than all of the household's wages and other forms of income combined.[43] So a focus on merely lifting property-less low-paid workers' wages almost misses the point. Wealth in Australia is distributed much more unequally than is income.[44] Differences in capital compound class, gender and a whole range of disadvantages over one's lifetime. The superannuation system takes advantage of the power of investment over time to provide income in retirement, but the capital is only available then, and contributions are linked to wages, so differences in earnings can compound, resulting in wealth inequality.

As Le Grand points out, UBIs and UBCs are two sides of the same coin. UBI proposals tend to be funded by state capital investments paying out a dividend to individuals over time to alleviate hardship and maintain a minimum safety net. UBCs tend to award that capital stake upfront

instead, which can be used for the individual to invest or spend over their lives. One is a safety net, the other is a springboard.[45] In 2014, Piketty called for a grant of €120,000 (today €136,252, or AU$199,698) for every French citizen, awarded at the age of twenty-five and funded by a wealth tax.[46]

Le Grand notes that longitudinal studies show that 'young adults' ownership of financial assets has a significant impact on their lives and livelihoods. The simple fact of possessing assets at 23 has been shown to improve young people's prospects, in terms of employment, earnings and health, at the ages of 33 and 42'.[47]

Experience from the British UBC shows the UBC has to be significant enough to encourage investment and discourage spending all of it upfront; also, that it needs to be both significant and universal enough to be deeply popular in order to avoid being abolished.[48] The possibilities for human development of a UBI and/or a UBC are mind-boggling. The creative and entrepreneurial potential that could be unleashed is immense, as are the possibilities for improved quality of life, particularly for young people, many of whom have now been locked out of the housing market in Australia, along with its wealth-generating potential.

As well as the wealth tax that Piketty proposes, a UBC or UBI could be funded through properly taxing and investing Australia's energy resources wealth, which is, after all, part of the national commons. The Norwegian sovereign wealth fund, Government Pension Fund Global, shows the possibilities that exist when common energy resources are properly managed and taxed. The fund was established in 1998, funded by state taxes on offshore oil wealth, and is now worth more than AU$1.85 trillion, or AU$393,000 per Norwegian citizen.[49] Australian journalist Paul Cleary has argued that Australia's gas wealth is even bigger than the

Norwegian fund and, if the current gas boom were properly taxed and managed, Australia could have an even bigger fund.[50]

While climate change means those fossil fuels are better left in the ground, Australia's gas resources are dwarfed by the immense renewable energy resources and export earnings potential from solar, wind and geothermal energy in this country, as well as the green hydrogen that could be produced from these sources. Australia has the highest concentration of solar energy per square metre of any continent, and 10,000 times more solar energy than the nation needs.[51] It is estimated that just exploiting areas already within 25 kilometres of Australia's underdeveloped electricity infrastructure could provide 500 times the nation's electricity needs, and there exists huge and growing global demand for energy resources.[52] This demand is also likely to grow rapidly in Europe as it shifts away from reliance on Russian fossil fuel imports. Properly taxing these resources and investing the proceeds shows the potential for a generous UBC and/or lifelong UBI.[53]

The real and imagined potential for inflationary effects, and the exacerbation rather than amelioration of class differences, would need to be assessed and accommodated where necessary through adequate system design. Fears of 'moral hazard' (an economically deleterious disincentive to work) are a neoliberal hangover based in an imaginary image of the 'lazy poor'.[54] The UBC could be phased in by awarding it to everyone over a certain age and then to younger people as they reach the threshold age, for example, eighteen to twenty-five.

Conclusion

In this chapter, I have presented a range of policies to promote more universal security of work and income. If they seem too ambitious to

survive political opposition, consider the direct and indirect benefits to the economy and business, as well as the cost and consequences of doing anything less. Active labour market programs are essentially 'supply side' (business-subsidising) policies – state-funded programs that provide business with the labour and skills they need and otherwise cannot obtain. Social fees are likely to be cost-neutral to business, compared with current arrangements when social dumping is accounted for, and they would provide greater certainty of total labour costs. Full and equal employment and growing worker bargaining power would lift economic growth rates by bringing more people into the workforce, especially women, and raise consumer spending power and demand to create a larger (faster growing) pie that could offset for business the loss of national income share.

A return to full employment policies would also help smooth out the business cycle and the frequency and extent of recessions, just as stimulatory measures did during the GFC and the COVID-19 pandemic. And a UBI and/or a UBC would inject immense stimulus into the economy, encourage financial literacy, unleash economic potential, and also keep up consumer spending throughout the business cycle. With anything less than these, we face growing social and economic divisions, and we can look to the United States to see where that leads: to the rise of authoritarian anti-movements, threats to basic democratic institutions, and the very fabric of society tearing at the seams. Universal basic security is our best defence against the rise of reactionary authoritarian forces that Polanyi warned us about. And the new work relations architecture and the proposals in this chapter are a good way to achieve it.

CHAPTER 5 – PILLAR III

Fair Standards and Remuneration

MARILYN PITTARD

This chapter focuses on the core legislative rights in the new work architecture that would promote fair labour standards and remuneration, promote decent work and working conditions, and enable a living minimum wage and pay equity. The chapter outlines the current National Employment Standards (NES) that apply to all national system employees under the *Fair Work Act 2009* (Cth) (the Act) and briefly discusses unfair dismissal protections and the current legislative mechanism for setting the minimum wage. It then identifies gaps in these standards and discusses necessary improvements in outlining a more appropriate bedrock of rights for all employees in light of community expectations of fairness, rights emerging internationally and recent policy discussions.

The proposed core legislative rights

As in the current system, the proposed core rights must be a true floor of rights, one that cannot be avoided by the employer and employee via agreement. They are, and should continue to be, minimum standards that can be improved upon in other instruments such as awards, collective agreements and/or individual contracts.

Fairness demands that these core rights also have a more universal application than current legislative protections. While the focus of the Fair Work Act is on employees rather than contractors, and some employees, such as casual employees, have fewer rights than others under the Act, it is proposed here that the rights of permanent employees should set a universal standard for all workers. Following the directed devolution approach, the new tribunal and its subordinate bodies should translate the rights of permanent employees into equivalent standards for other workers, taking the form of engagement into account but without diminishing the universal standard. For example, while unfair dismissal protection currently applies only to permanent and long-term casual employees meeting certain conditions, other workers ought to have a similar protection against capricious termination of contract or be able to seek compensation equivalent to the job security lacking in their form of engagement. This tribunal can add to and augment the core legislated standards through test cases. Decent working conditions and minimum standards should be available to all workers, including those who are engaged in independent contracting arrangements with one employer.[1]

Labour standards: current approach and mechanisms

The Act addresses fair standards and remuneration by providing safety

nets through modern awards and a legislated floor of rights in the NES.

Currently, the core standards in the NES – such as entitlements to a diverse range of leave (paid and unpaid), weekly hours of work and notice periods to end the employment relationship – apply to all employees covered by the national system. While these legislated standards are determined by Parliament, they have been significantly informed by previous award test case standards, which were developed over the years by the independent tribunal.[2] They have not been amended very significantly since they were enacted in 2009.[3] Other core standards – such as span of hours, paid breaks, maximum shifts and overtime pay – are contained in modern awards. As these awards are specific to relevant industries or occupational groups, standards will not be uniform, though some terms must be included in modern awards (for example, about dispute resolution).

A federal minimum wage is determined by the Fair Work Commission, which also has powers to provide for pay equity. Wages for specific industries (and some occupations) are also contained in modern awards. Enterprise agreements, which are subject to considerable regulation, including the approval by a third party (the Fair Work Commission), can provide more beneficial conditions above those of awards and the NES. A reduction of the award floor of rights could occur where the enterprise agreement is more beneficial overall than the award. The NES rights, however, cannot be lawfully negotiated away in an enterprise agreement or in a contract of employment.[4]

In Australia today, the core rights to ensure minimum fair standards – which cannot lawfully be eroded by awards, enterprise agreements or contracts – are as follows.

- Standards that are legislatively enshrined in the NES, that is:
  - maximum weekly working hours and reasonable overtime

  - leave, including for: annual holidays and public holidays, sickness of the employee, compassionate reasons, community service, family and domestic violence suffered by the employee or a close family member, carer's duties, and parental duties after the birth or adoption of a child
  - the right to request flexible work
  - converting employment status from casual to ongoing employment
  - minimum notice periods and redundancy pay on termination of employment by employer
- Protection from unfair dismissal, that is, legislated right not to be unfairly dismissed
- Minimum national wage, by orders of the Fair Work Commission under powers conferred by the *Fair Work Act 2009* (Cth).

It should be noted that the rights outlined so far are not exhaustive; other rights, which are commonly regarded as essential, exist (and are addressed in other chapters), namely:

- decent physical working conditions and a safe working environment to promote employee wellbeing (in Chapter 3)
- the right not to be discriminated against for personal characteristics or political and other views (in Chapter 6)
- the right not to be bullied or sexually harassed at work (see Chapter 6)
- the right to freedom of association and not to be victimised on account of union membership (in Chapter 7)
- freedom of expression at work, including academic freedom of expression (in Chapter 7).

Improving rights and filling the gaps: conditions promoting fair labour standards in contemporary workplaces

While the current legislated standards set minimums and are core standards, there are some anomalies in their scope and application, and there is a need to expand and revise some existing rights.

Rights to paid leave should extend to parental leave, menstrual and menopause leave, and domestic violence leave; and payment for working overtime should be ensured, and the opportunity for converting casual to ongoing work enlivened. Some improvements in existing unfair dismissal protection, notice of termination and redundancy pay are also warranted.

Many modern societies and economies provide some basic employment rights that are additional to those outlined above. It is argued here that the current core standards should be augmented in a number of ways to reflect those developments and to promote fairness. These additional rights include:

- the right to flexible work from home
- the right to 'disconnect' or switch off from the workplace after hours
- the right not to be subject to intrusive surveillance
- the right to privacy
- 'work rights' comprising no 'zero hours' contracts, and the right not to be fired and re-engaged on inferior conditions.

In the new work architecture, the Fair Work Commission or its successor should have an enhanced role to promote genuine gender pay equity and a role to eliminate the current, worsening gender pay gap.

The national legislative rights that this chapter proposes should be reviewed, improved and amended, and extra rights that should be added as core rights are discussed below.

Paid leave

Currently, the NES differentiates between paid and unpaid leave, largely for historical and economic reasons.

Paid leave is provided for:

- annual holidays and public holidays
- personal leave, incorporating for illness of the employee, and for carer's duties that the employee undertakes when a family member is ill or needs care[5]
- compassionate reasons, such as family bereavement
- community service, such as jury service or volunteer firefighting, undertaken by the employee.

Unpaid leave is provided when the employee or a close family member is suffering 'family and domestic violence', and when parents take leave after the birth or adoption of a child. Extra carer's leave, which is unpaid, can be taken where the paid personal leave is exhausted.

While at the time of writing the Fair Work Commission is reviewing whether awards should contain provisions for paid domestic violence leave, there is a strong case to include such leave as paid leave in the minimum legislated standards. There is no compelling reason to differentiate that leave from other types of paid leave, such as compassionate leave. Providing such paid leave would iron out any discriminatory aspects for those suffering domestic violence; for example, the death of a close family member currently entitles an employee to paid leave but being a victim of domestic violence does not.

Similarly, there is a strong case for the right to paid parental leave. While parental leave in the NES is not paid leave, there is a separate government scheme to give a certain minimum payment for a period of

time to the primary carer of the child, plus 'Dad or partner' leave. This scheme is akin to a social security payment, as it does not reflect the employees' wages paid but, rather, provides up to twenty weeks' payment at the national minimum wage.[6] Given that many employers have schemes for paid parental leave,[7] a fair labour standard today would include periods of parental leave for both mothers and fathers paid at their salary. There is an example of best practice in Sweden, where a total of 480 days' paid leave is provided, to be shared by the parents, with a minimum of ninety days to be taken by each parent.[8] The advantages of such a scheme, in addition to economic benefits to the parents, include participation by both parents in child care giving, thereby promoting equal opportunity in child care and challenging the assumption that mothers are the primary carers; increased women's participation in the workforce; gender equality; benefits to child development; and furthering paternal bonding with the child. Increased women's participation in the workforce requires complementary focus on affordable childcare.

In modern economies, including in Australia, there is increasing debate about the need for menstrual and menopause leave, the argument being that paid leave should be provided in addition to standard sick leave to recognise adverse effects. Some employers in Australia and in countries such as the United Kingdom and India are voluntarily providing this leave to their employees, indicating the increasing recognition that such leave is needed.[9] Although there is debate as to whether such leave improves or undermines the equality of women, there is a persuasive case that paid leave should be an entitlement for employees suffering symptoms, which would be additional to sick leave; however, unlike sick leave, it would not accumulate from year to year. Similarly, the debate for leave that improves wellbeing of employees and contributes to participation of women in the

workforce has recently broadened to embrace leave for fertility treatments, hysterectomies and vasectomies, and therapies for gender affirmation. The pressure of balancing work and personal life could be alleviated by the provision of such leave.[10]

Paid leave of various types is granted to address issues – for example, holidays to enable workers to enjoy periods of rest away from work, to be refreshed and enjoy recreation time – so that any ability to 'cash out' untaken leave should continue to be controlled and limited.

Right to convert employment from casual to ongoing employment status

The right to convert from casual employment to ongoing employment should be broadened and not narrowly constrained. It should recognise that a pattern of casual employment over a reasonable period or sustained period of time should give rise to that conversion right, even where there are technical breaks in employment or no express ongoing commitment. A classic example is sessional staff engaged by tertiary institutions, where there are breaks between semesters or periods of engagement, although there is an unspoken assumption that the casual work will go on, and indeed commonly does go on for many years.

Reasonable working hours and overtime

Core labour rights should prescribe reasonable maximum hours of work per week, including the ability to work reasonable overtime with pay. There is a current curious provision in the NES: while effectively restricting hours worked over the maximum to reasonable overtime, it makes no provision for overtime with pay, that is, for paying the worker for the reasonable hours worked above the maximum working hours.[11]

The source of any obligation to pay overtime would generally be in an award; however, where there is no applicable award prescribing overtime pay, it is currently possible for an employer to require reasonable overtime *without* additional remuneration and not breach the NES standard. The fair standards that cannot be bargained away should include a right to overtime pay.

Right to flexible work from home

Flexible work under awards and enterprise agreements is subject to the agreement of the employer and individual employees. The main statutory provision – section 65 of the *Fair Work Act 2009* (Cth) – confers on employees a right to request flexible work, but not a right to flexible work. Flexible work includes change to hours of work and location of work and therefore embraces working from home.[12]

The right should be changed so that the right to work from home, not simply the right to request it, is conferred on employees. The pandemic has shown that working from home is possible in many industries where it was previously either regarded as virtually impossible (for example, helplines or call centres) or the culture was not to work at home (for example, in legal practices). There are benefits to both employers and employees of working from home.[13] As the future of work is now embracing a hybrid model of combined 'in-office' and 'at-home' work, leaving the right as simply a right to request will not suffice to give effect to such flexible work.[14] The benefits, too, go beyond the workplace, the employee and their family: society as a whole benefits from less traffic and transport congestion and reduced air pollution.

The right to work at home should be enshrined as a labour right for all employees from the commencement of employment, and without the

limitation of the eligibility provisions based on prior length of service, age of the employee or other factors. There should only be strong, limited exceptional reasons for the right to work at home not to apply, with the onus on the employer to justify any unreasonable additional costs by providing full costings, or that the work is inherently not viable for performing at home (for example, manufacturing, maintenance of equipment or deliveries). A right of appeal to the national tribunal or a nominated third party for any removal of the right to work at home should be provided.

Right to disconnect or switch off from work

Technology enables employees to always be connected to work, often without being paid properly for extra hours, or never being free from work, frequently with the risk of deleterious consequences for health and wellbeing. The right to disconnect from the workplace is currently part of the ACTU Charter[15] and has been introduced in various ways into the labour laws and practices in countries such as France,[16] Spain,[17] Belgium[18] and Ireland.[19] The Labour Party in the United Kingdom has included in its latest green paper a right to switch off.[20]

Enshrining this right would address adverse consequences for employees of not switching off after the normal working hours, and effectively being 'on call'. The right would put some safeguards and protective limitations on always being connected to work and would ensure that payment would be made for agreed additional working hours, or that these hours are included in the count towards normal working hours. The details of the right would be tailored to different industries and occupations through awards of the national tribunal. It would also protect those working from home from an obligation to work extra time at home.

Right not to be subject to intrusive surveillance and the right to privacy at work

Both the right not to be subject to intrusive surveillance and the right to privacy at work may be interconnected, in the sense that surveillance of employees by the employer may involve an invasion of the employees' privacy and dignity. However, these rights are also separate and distinct, as the keeping and disclosing of certain information about employees does not necessarily involve surveillance; and not all surveillance will invade privacy.

Current legislative controls on workplace surveillance vary considerably between the states, with Victoria having minimal protections for surveillance and New South Wales having stronger protections in place. To avoid laws operating patchily, there should be a uniform right that employees will not be subject to intrusive surveillance. It is recognised that, in addition to invading employees' privacy and dignity, employers putting employees under scrutiny is often deleterious to their health and welfare. Studies show that the wellbeing and health of employees are affected by constant electronic monitoring by employers.[21] During the pandemic especially, AI management in some workplaces expanded through use of surveillance and algorithms, resulting in workplace stress and unfair punitive measures against employees, including increased performance targets, work intensification, unreasonable monitoring of breaks, and dismissal.[22] Employees, especially those in precarious or insecure employment (but not limited to those categories), are not in a position to object to being subject to such monitoring; moreover, employees are frequently unaware that it is taking place.

The right not to be subject to intrusive surveillance should include strong measures to ensure that any workplace surveillance by the employer

is for valid, essential and justifiable reasons only; that it is undertaken overtly and not secretly, and only after consultation with, and notice to, employees and unions; and that private conversations or activities of employees will not be recorded.

The use by employers of biometric data, such as facial recognition or digital 'clocking on and off' (by using fingerprints), has been used increasingly and is usually tied to automated payment systems or operational reasons. However, there is little scope for employees to realistically decline to provide that information in an employment context. A requirement to disclose such data to employers should be permitted in very limited and exceptional circumstances only (for example, for airline pilots as a security measure for public safety).[23]

Privacy legislation at Commonwealth and state levels usually exempts employment records from the principles that regulate the collection, storage and use of information. There is currently a major review of privacy legislation.[24] Regardless of the outcome of that review, it would be a fair standard to extend the right to privacy of employees in the workplace to ensure that their records are subject to safeguards for collection, proper handling, and limits on retention and disclosure. This extension of privacy rights should not depend on employer size, as the privacy legislation currently does.[25]

'Work rights' – no 'zero hours' contracts and the right not to be fired and re-engaged on inferior conditions

Fair standards for employees should include prohibitions on employers engaging employees for contracts whereby employees may be given zero hours of work, and are effectively on call for no remuneration (as distinct from casual engagement, where the employee is free to decline a specific

offer of work within the casual arrangement). This practice of 'zero hours' contracts has been rife in the United Kingdom, to the detriment of employees, and there should be a control on such abuse of power through a protective labour right.[26]

In the United Kingdom and other countries, some employers have engaged in the practice of firing their employees and rehiring them on inferior pay and conditions.[27] While there may be safeguards against such abusive practice in Australia's regulatory system, it is not impossible for an employer to navigate a path around these safeguards and to – lawfully – dismiss a whole workforce (or part of it), then re-engage that workforce on lower wages and less beneficial conditions. Fair labour standards would prohibit such a practice, so that an employee would have a right not to be dismissed and re-engaged on less beneficial terms. Further, there should be a safeguard on the practice of dismissing a workforce and replacing that workforce with cheaper labour, as was done by P&O in March 2022 in the United Kingdom.[28] There are some checks on such actions within the Australian system, typically through unfair dismissal and redundancy laws. However, the financial and other consequences for breaching these laws should be sufficient to act as disincentives to employers contemplating such unfair practices.

Fairness in ending the employment relationship

A number of improvements should be made in the areas of fair dismissal, reasonable notice to terminate employment, and fair redundancy pay.

Right to fair dismissal

Unfair dismissal prohibition should continue to safeguard employees from harsh, unjust or unreasonable dismissal – that is, from arbitrary or

capricious dismissal or for dismissal without fair procedure, including terminating employment without giving the employee an opportunity to be heard in relation to a proposed dismissal. However, as discussed above, the new tribunal and its subsidiary bodies ought to ensure equivalent job security or compensation for classes of employees currently without unfair dismissal protection. It is noted that compensation for contravention of the general protections in the Act does not have the same limits on compensation that unfair dismissal has; compensation for breach of the general protections includes compensation for loss or detriment beyond lost wages (for example, mental illness) and is not capped by reference to salary or specified months. This anomaly should be rectified by bringing unfair dismissal compensation into line with these provisions. The current strict application of the twenty-one–day limit for lodging unfair dismissal applications should arguably be eased for applicants seeking compensation only, as there is not the same necessity for speedy resolution of the claim where reinstatement is not sought as a remedy. Unfair dismissal protection should also support the right for an existing workforce not to be fired and rehired on inferior wages and conditions, as discussed above.

Notice of termination of employment by employer

Notice periods for termination of the employment relationship by the employer are specified in the NES to enable the employee some time to seek and obtain new employment and be compensated for the time it might take to find such employment. The specified notice periods should remain linked to length of service, but it is arguable that the minimum should be at least two weeks' notice (not the current notice period of one week) for employment longer than, say, six months. The express notice period as a labour right should clarify that 'reasonable notice' of termination of

employment, which might be in an employee's contract of employment or implied under common law in that contract, is not excluded by the statutory standard.

Redundancy pay

When a job becomes redundant, so that an employer no longer wants that job performed, and there is no possibility of the employer offering redeployment or alternative employment on at least the same pay and conditions, redundancy pay should be paid (as it is now in the Act), dependent on length of service, with no maximum cap.[29] There is an argument that redundancy pay should continue to increase after ten years' service, to recognise longer service.[30] The availability of long service leave to employees has been a factor in the decision for the current cap on redundancy pay, but such leave serves a purpose that is different to that of redundancy pay. The discriminatory aspects of redundancy pay should also be addressed to ensure such payments operate equitably.[31]

Fair pay and equal remuneration

The concept of fair pay is fundamental to fair standards. This entails prescribing minimum pay for adults and juniors, as a real floor of rights applying to all employees. The minimum wage should be a living wage[32] – it should not be a wage that leads employees into poverty or sees them needing to supplement their wages earned in full-time work by undertaking additional employment in order to live. While the capacity of the employer to pay the minimum wage might be relevant in very unusual circumstances, as determined by a third-party tribunal, the employees should not be placed in situations where they are bearing the cost of business mistakes or downturns in economic fortunes.

The new tribunal should determine the minimum wage annually; the minimum wage should not be set legislatively by Parliament, although the framework for determining fair remuneration would be legislated. There should be minimum wages determined for occupations and for industries, again which provide a true floor of rights. In Australia, this has been done through the award system.

Underpinning fair pay is the concept of equal remuneration – the principle of equal pay for work of equal or comparable value. This principle entails that there should be no gender-based discrimination undervaluing the work or worker of any gender. There should also be no depression of pay just because employees in an industry are predominantly female or indigenous.

On the surface at least, the current system generally appears to have the capacity and an adequate legal framework to enable the setting of fair remuneration and to meet equal pay standards, given the Fair Work Commission's power to make orders for equal remuneration for men and women for work of equal or comparable value;[33] and to deal with award wage changes based on work value.[34] However, the reality is very different. Despite a formal commitment in Australia's labour laws to the principle of equal remuneration, there remains a persistent gender pay gap. The gender pay gap in male and female average weekly earnings is currently approximately 14 per cent[35] and the 'total earnings gender pay gap for all employees widens to 31.3%' when part-time workers are included.[36] The gender pay gap, too, has increased over time due to '[t]he gendered outcomes of enterprise bargaining, together with the failure of award modernisation and the federal equal remuneration provisions to deliver fairer pay outcomes for women'.[37] There is also a persistent indigenous pay gap. In 2019, the indigenous pay gap on median adjusted weekly

household income was 33.3 per cent.[38]

Addressing these inequalities requires oversight by a tribunal with a commitment to achieving substantive equality, and continuous monitoring and assessment of pay rates with the required openness and capacity to root out the norms and structural drivers behind them.[39] To help eliminate bias, it is necessary for the tribunal to be representative of a large cross-section of the community, as discussed in Chapter 2.

A problem in achieving pay equity, even when legislation has been favourably drafted, has been the dependence on a male comparator to women's work. Experiments with equal remuneration principles in the previously larger New South Wales and Queensland jurisdictions, which looked at the whole situation of women's work, have shown promise and should be pursued. Proper valuing of work should be undertaken to ensure that wages reflect the value of the work itself and to avoid women's work being undervalued by reason of being 'feminised'.

So, too, should be the integration of equal remuneration considerations into the agreement-making process. That is, women and men should benefit equally from collective bargaining. More importantly, there is currently unequal access to the benefits of collective bargaining. In feminised industries or occupations and some others, the minimum pay in the award is often treated as the actual rate, not simply the floor, with little scope for improvement. This tendency should be taken into account and addressed in any new equal remuneration principle. In some cases, government is the main funder, and so substantial government expenditure is crucial to enabling pay inequity to be addressed.

In recent years the present system has resulted in a stagnation in minimum wages, with wages growth of little over 2 per cent per annum, sometimes less, and in recent times below the growth of prices.[40] In the

last twenty years, the minimum wage relative to average full-time wages has suffered a sharp decline. The late Hon. Joe Isaac drew attention to the significant issue of wage stagnation in 2018,[41] and various commentators, including the Reserve Bank of Australia, have urged that action be taken.[42]The challenge is to build in safeguards in setting remuneration that avoid the outcomes of the present system and achieve fair remuneration. Various strategies involve legislative reform, including changing the criteria for wage determination to emphasise 'the needs of the low-paid, their relative living standards and the objective of reducing the incidence of low-paid work'[43] and taking away the need to take into account macro-economic effects in wage fixing.[44] Other factors such as the imbalance of power are addressed in other chapters.

A new architecture should strengthen the legal framework and wage-setting mechanisms to promote equality in remuneration with a view to eliminating the gender pay gap and the indigenous pay gap, addressing the needs of the low paid and ensuring fair remuneration for all, whether these 'working citizens' be legally characterised as employees or contractors.[45]

Mechanisms for change

Enshrining labour standards in legislation gives rise to the problem that these standards are at the will of the political process and the government of the day, as to updating them and to supplementing them. On the other hand, enshrining standards in modern awards leaves many gaps of coverage. There must be a reasonable balance between standards set by the tribunal and core standards legislated by Parliament to ensure good coverage of fair standards.[46]

As the new architecture envisages that the core standards discussed in this chapter (apart from wage determinations) will remain within the

purview of Parliament, a strong mechanism is needed to ensure that recommendations for improvements to legislated minimum standards can be brought forward to Parliament, after a process involving submissions by interested parties to the new national tribunal.[47] This would ensure that the currency of fair standards is maintained and would be less likely to stall through government inertia. While it is realistically challenging to prevent a new government of a different political persuasion from initiating legislative changes to diminish labour standards or to fetter Parliament from eroding the standards, it is important to leave the national tribunal with broad power to appropriately maintain these core standards, through awards (and collective agreements) in the event of adverse parliamentary intervention.[48] The determination of wages, however, should rest with the national tribunal, not Parliament, with changes to the framework legislation to enable goals of fair and equitable remuneration to be achieved. It would remain open to the national tribunal to improve upon these core labour standards, via awards and through the bargaining process. The tribunal could also consider the extension of appropriate fair standards to 'working citizens' beyond the employee category.

These legislated core labour standards should remain non-negotiable standards; that is, they should not be able to be eroded through individual agreement or collective bargaining.[49]

Conclusion

The current labour standards apply generally to permanent and ongoing employees and sometimes to long-term casual workers. Proposals to ensure coverage of workers providing labour services to a business should be implemented to ensure that core labour standards are extended to 'working citizens' and to precarious and vulnerable workers who might in

name be classed as independent contractors (see Chapter 9).

Proposals have been put forward in this chapter both for revising and amending the existing core labour standards and for introducing new standards to promote fair labour standards and remuneration, and decent work and working conditions, and to enable a living minimum wage and pay equity. The revisions of core labour standards to extend paid leave to parental leave, menstrual and menopause leave, and domestic violence leave are in keeping with international best practice. Introducing new rights – the right to flexible work from home, the right to 'disconnect' or switch off from the workplace after hours, the right not to be subject to intrusive surveillance, the right to privacy, and 'work rights' including no 'zero hours' contracts, and the right not to be fired and re-engaged on inferior conditions – would also avoid the impact of many unfair labour practices by employers. Fair pay, including pay equity and elimination of gender and other biases, needs urgent attention in Australia.

CHAPTER 6 – PILLAR IV

Addressing Discrimination, Harassment and Bullying at Work

ANNA CHAPMAN

This chapter explores the strengths as well as potential weaknesses of a new architecture of legal regulation to address problems of discrimination, sexual and other forms of harassment, and bullying at work. The chapter investigates the possible advantages of such a new framework over current legal regulation that is fragmented and provides only reactive and individualised rights. Existing laws have prohibited discrimination and sexual harassment at least since the mid-1980s, yet there is no reason to believe that the incidence of these workplace harms is declining. The problems of workplace bullying also do not appear to be abating following the enactment in 2014 of new provisions designed to stop this behaviour.

In recent years the momentum to take seriously the need to address such harms in Australian workplaces has been building. Global social movements, including the #MeToo movement and Black Lives Matter, have given voice to workers in Australia, demanding effective action in relation to gender-based and racialised forms of harassment and violence. In 2019 the ILO recognised, in the fullest manner to date, the need to address the problems of violence and harassment in the work context through the adoption of a 'Violence and Harassment Convention'.[1] The existence and content of the convention provide a strong normative statement that recognises 'the right of everyone to a world of work free from violence and harassment'. Although, regrettably, Australia has not to date ratified this convention, the Minister for Industrial Relations has

been reported as indicating (on 27 October 2021) that the government is considering ratification.

In addition to this important international development, work undertaken within Australia has greatly contributed to building a momentum of change. In 2020 the Australian Human Rights Commission released its detailed report on the results of a national inquiry into sexual harassment in Australian workplaces. This report builds on several earlier reports of the Commission into the problem of sexual harassment in Australia. The 2020 report, entitled 'Respect@Work', makes for confronting reading. Its opening sentence identifies the scope of the problem clearly: '[w]orkplace sexual harassment is prevalent and pervasive: it occurs in every industry, in every location and at every level, in Australian workplaces'.[2] The report contains fifty-five recommendations, covering a broad range of matters. Many recommendations identify amendments that are needed to the *Sex Discrimination Act 1984* (Cth) and the *Fair Work Act 2009* (Cth), and many others go to a range of contextual matters. These include a national campaign to change the behaviours that underlie sexual harassment, and adequate funding of Working Women's Centres, Community Legal Centres and Legal Aid. In early September 2021 the Commonwealth Parliament enacted a range of legislative changes in response to *Respect@Work*,[3] though several key recommendations for legislative amendment remain to be enacted.

This chapter explores the potential of the new framework proposed in this book to provide a more effective legal framework than currently exists regarding the problems of discrimination, harassment and bullying in Australian workplaces. In doing so, the objective is to address the problems with the existing legal framework, including those identified in *Respect@Work*, as well as to action the call contained in the ILO's Violence and Harassment Convention.

The ideas developed here explore the advantages as well as the limitations of the envisioned new framework to address the deep-rooted problems of sexism, racism and other forms of prejudice and stereotyping as they manifest in Australian work settings. These ideas have benefited greatly from feedback and discussions with colleagues, both those who are authors of other chapters in this book, as well as more widely. Nonetheless, much more development of these ideas is needed.

The existing legal framework

The existing legal framework regarding discrimination and the abusive workplace behaviours of sexual and other forms of harassment and bullying is not fit for purpose. The legal landscape is fragmented, between numerous Commonwealth and state or territory laws. Many different statutes are potentially relevant in prohibiting and providing redress in relation to these behaviours. There are four substantive anti-discrimination statutes at the Commonwealth level, each dealing with a different group of claims – namely, claims by workers of discrimination related to their race, nationality or ethnic origin; claims of discrimination related to sex, gender or sexual orientation; claims of discrimination or harassment related to disability; and claims of discrimination related to age.[4] These overlap with state and territory anti-discrimination statutes, which also provide mechanisms of redress to workers in respect of claims related to their race, nationality, sex, gender, sexual orientation, disability and age, and in relation to sexual harassment, as well as attributes not provided (either at all or in an enforceable sense) at the Commonwealth level, such as the attributes of physical features, spent convictions, and political belief.[5] In addition, the *Fair Work Act 2009* (Cth) (FW Act) (Part 3-1) provides redress to employees in relation to adverse action or

prejudicial treatment by an employer on a list of attributes that are similar, but not identical, to those found in Commonwealth, state and territory anti-discrimination statutes.[6]

This body of legislation is highly complex. For example, anti-discrimination statutes contain different formulations through which their attributes (of sex, race, disability, and so on) are identified and defined, and the meaning of central concepts such as discrimination are articulated in different ways in different statutes. Although the concept of sexual harassment has a relatively consistent meaning across statutes, there have been doubts as to whether harassment that is sex-based rather than sexual is covered by anti-discrimination schemes. Some Commonwealth statutes are closely tied to international conventions and use concepts from those instruments, whereas state and territory statutes do not. Anti-discrimination statutes also contain different exemptions and exceptions that employers frequently seek to argue exonerate them of liability. Although a casual glance may reveal similarity in these key criteria between statutes, closer attention to the drafting used in the different Acts reveals that there is much difference in key concepts, such as between Commonwealth anti-discrimination statutes, as well as between state and territory anti-discrimination legislation. Not only do the central concepts of this fragmented patchwork of anti-discrimination law differ, often in subtle ways, but also the procedures and time frames for lodging a claim or grievance typically differ from statute to statute.

At first glance the adverse action framework of the FW Act appears to be similar to anti-discrimination law, but on closer examination it is quite distinct from that body of law. Moreover, court decisions have further emphasised those differences and confirmed that adverse action under the FW Act is developing along a separate path, largely in isolation

from anti-discrimination law. In contrast to anti-discrimination statutes, the FW Act does not contain definitions of the attributes on which adverse action is prohibited, nor does it contain articulations of the key concept of discrimination. Doubt remains as to what discrimination means in the context of the FW Act, including whether it implicitly prohibits indirect discrimination. Notably, the FW Act is silent on the concept of sexual harassment and does not name it in the legislative provisions at all, and whether it is implicitly covered under the existing adverse-action protections remains unclear.

In some ways the exemptions for employers in relation to adverse action are broader than those found in anti-discrimination law. This advantage to employers might have been ameliorated to some degree in that the FW Act contains rules more favourable to claimant–workers on which party bears the onus of proving the allegation in the claim, though this rule favouring claimants may not make much difference in practice. Procedures for lodging an application, and the time frame for doing so, as well as remedies and outcomes in relation to adverse action, differ from anti-discrimination law, both at the Commonwealth level and the state/territory level. Costs rules are generally seen as more favourable to claimant–workers under the FW Act than under anti-discrimination law.

There are many instances in which the interpretation by courts of anti-discrimination law, as well as the FW Act provisions of adverse action, have narrowed the scope of protections to workers. Indeed, there has not been a decision of the High Court of Australia for more than ten years that has made a substantive determination in favour of a worker under either anti-discrimination law or the FW Act provisions. Employers have succeeded in all such claims, typically on highly technical interpretations of the legislation that have found favour with courts. These decisions undermine

the mostly modest objectives of the statutory schemes. Courts and tribunals across all statutes have struggled to understand intersectional discrimination authentically, where the aggrieved worker identifies that their experience was related to the intersections of several attributes, or where not all relevant attributes are covered in the statutory scheme in question.

Research and understandings about the problems of discrimination and harassment in work settings have developed over time. The body of law that we have today evidences this history, with more recently enacted (or revised) anti-discrimination statutes tending to reflect more developed thinking regarding these issues, whereas older drafting may not. In addition, all anti-discrimination statutes, as well as the adverse action provisions of the FW Act and subsequent amendments, bear the marks of the political compromises that were made in order to secure their passage through Parliament. Political trade-offs do not always result in legislative coherence. These two dynamics – of timing and political compromise – increase the complexity of the Australian laws that deal with discrimination and harassment at work. The federal character of lawmaking on these topics, with both Commonwealth and state/territory statutes, has resulted in a body of law that it not coherent. Neither is it internally consistent nor does it form a unified whole. In 2011 the Commonwealth attorney-general commenced a project to consolidate Commonwealth anti-discrimination law. Despite extensive public consultation and discussions over a number of years, the project stalled, with no apparent path forward, attesting to the complexity and difficulties in this area of law.

A new type of law, designed to address increasing public concern over bullying in the workplace, was enacted in 2014. These provisions, in Part 6-4B of the FW Act, provide a mechanism for workers to access a fast and informal process before the Fair Work Commission (FWC) designed

to stop ongoing problems of repeated bullying. The FWC does not have power to order compensation or reinstatement, and a worker could make an application to the FWC regarding bullying at the same time as pursuing other potential claims, possibly under anti-discrimination law or the adverse-action protections, or elsewhere. The concept of bullying in these provisions is defined by reference to repeated unreasonable behaviour directed at a worker. It may involve a discriminatory dimension or it may not. These anti-bullying provisions in the FW Act draw on understandings developed in work health and safety (WHS) law, where organisations are under a positive duty to provide and maintain a work environment that is safe and without risks to health, including psychological health. Although clearly the problem of workplace bullying is within the remit of WHS schemes, until recently it has not been seen as such by the regulators of WHS. The same can be said in relation to sexual harassment – the behaviour of sexual harassment is clearly within the remit of WHS law but, like with bullying, there has been, at least until the 2020 R*espect@Work* report, a reluctance by regulators to view sexual harassment as being within the scope of their responsibility.

In 2021 the FW Act was amended, as a response to *Respect@Work*, to extend the anti-bullying provisions in Part 6-4B to the conduct of sexual harassment (as defined in Commonwealth anti-discrimination legislation). The amendments empower the FWC to make an anti-sexual-harassment order and, like an order in relation anti-bullying, the FWC does not have the power to order compensation or reinstatement. Also analogous to the original Part 6-4B in relation to anti-bullying, an application for an anti-sexual-harassment order can be made at the same time as another application, such as under anti-discrimination law. These new provisions came into effect on 11 November 2021.

It is understandable that workers are bewildered by this range of different laws that respond to sometimes very similar factual circumstances, and sometimes quite different circumstances, and do so in very different ways, with different requirements and different procedures, time frames for lodging a claim, and outcomes. A key feature of the Australian legal landscape is that, generally speaking, an aggrieved worker must choose only one statutory scheme to pursue their grievance under, with the obvious exception being an application to the FWC under the Part 6-4B anti-bullying and anti-sexual harassment provisions, which can be made simultaneously with other applications. For example, a worker must choose either a Commonwealth anti-discrimination statute or a state (or territory) anti-discrimination statute, or the adverse action protections of the FW Act. Or they might seek to attract the interest of the relevant state WHS regulator for conduct within the scope of those schemes. To add a further layer of complexity to this range of choices for a worker, the common law of contract of employment may also provide redress in some circumstances, though that is generally a very expensive (and long) path for a worker to take. Free legal assistance and advice are in short supply; these may not be able to be ameliorated by trade unions, with their resources stretched across a number of fronts. Accordingly, it is not surprising that many workers who have a genuine grievance do not lodge an application anywhere.

The fragmented and complex character of the Australian regulatory regime not only presents significant problems in terms of access to justice for workers, it also provides a very messy and unwieldy field for employers to navigate and understand. A legal structure that lacks coherence is unlikely to deliver a clear message on values, or a clear set of principles that can be operationalised at the level of the organisation.

As well as being fragmented, complex and opaque, anti-discrimination law is reactive only. The different statutory schemes rely on workers, largely acting as individuals, to lodge an application for redress of their individual harm with the appropriate government agency, then to follow it through to settlement or determination. In short, there is no public enforcement body of anti-discrimination law. This contrasts with WHS law and also the role of the Fair Work Ombudsman in enforcing the adverse-action protections in the FW Act, though adverse action has not featured prominently in the compliance and enforcement activities of the Fair Work Ombudsman to date. In anti-discrimination law an individual worker is required to show enormous fortitude and resilience to initiate a claim and see it through to its end point, especially where they may be squaring off against the legal team of a recalcitrant employer on their own.

Over the years many academics and others have called for anti-discrimination law to be amended to add a positive duty on employers to take proactive steps to eliminate discrimination and sexual harassment in their workplaces, and for a public enforcement agency. The rationale underlying positive duties lies in the value of prevention, specifically a view of the necessity of tackling the drivers of discrimination and harassment at work, including underlying cultural values. The introduction of a positive duty on all employers to take reasonable and proportionate measures to eliminate discrimination and harassment was recommended in the 2020 *Respect@Work* report, though regrettably the previous Commonwealth government deferred consideration of this recommendation. The debate about the need to move away from a system of redress alone, in favour of adding to it a scheme designed to prevent harm through enforceable positive duties, underscores a key failing of the current legal framework in that it is reactive only. The adverse-action protections in the FW Act

are also reactive only – they offer, at best, redress and not prevention.

This section of the chapter has made visible the various reasons why current legal regulation regarding discrimination, harassment and bullying is not fit for purpose. It is fragmented and provides highly complex and inconsistent sets of rules that are opaque to workers and many organisations. Judicial interpretation has narrowed the protections given to workers. Importantly, the current legal framework is based on an approach that requires those on the receiving end of discrimination, harassment and bullying to initiate a claim and follow it through.

A New Framework

The new work architecture explored in this book focuses on a framework in which a central body or lead agency sets the relevant high-level standard or standards that all work settings must meet, leaving the detailed elaboration of how the standard or standards translates in different industries to a lower level of implementation. In the context of the Australian system, this lead agency would be a national body, charged with the task of determining national standards for workplace relations across Australia. Subsidiary bodies or agencies would then determine how the national standards translate for a particular industry or group of industries. There are important feedback loops between the subsidiary agencies and the higher-level body, allowing for innovation and flexibility.

In an article exploring directed devolution as a possible approach to the regulation of the gig economy, Emeritus Professor David Peetz refers to these subsidiary bodies as 'agencies of detail'.[7] Professor Peetz

emphasises that devolution in this model is directed, in that it is not an unconstrained transfer or delegation of power from the higher level agency to the agencies of detail. Rather, the power of agencies of detail to work out the implementation of the national standard is bounded in order to ensure that the power of capital over workers is itself constrained. Peetz makes the important point that decentralisation can leave workers worse off, unless account is taken of the power of capital vis-à-vis workers. In addition, some workers may be left worse off unless account is taken of power dynamics between workers, related to, for example, sex, gender, race, and different abilities.

The Robens reforms to WHS law, which inspired the new architecture explored in this book, are widely seen as generating a culture of shared responsibility, and an awareness and level of cooperation in reaching the broad standard. In WHS law, the standard (called a general duty) is that organisations must do what is reasonably practicable to provide and maintain a work environment that is safe and without risks to health. Importantly, workers, employees and employers are all involved in finding the best approach by which their work setting will meet this general duty. Workers have voice in the system through elected health and safety representatives and committees.

In relation to national standards to address the problems of discrimination, harassment and bullying at work, the higher-level agency would be tasked with the function of determining the standard or standards. The standard might require organisations that engage people to perform personal services to provide and maintain a work environment that generates a 'fair go', in the sense of compliance with, and promotion of, a set of principles derived from international labour standards and human rights, and possibly other sources as well. An organisation would

have a positive duty to provide and maintain its work settings and work relations in compliance with those principles, unless doing so would impose 'unjustifiable hardship' on the organisation. The national standard would identify criteria that must be taken into account in ascertaining the meaning of 'unjustifiable hardship', including ensuring that due weight is given to the need to promote the objectives of the relevant international conventions.

The elaboration of the broad national standards would take place at a lower level, where agencies of detail would be charged with providing directions to an industry or industries regarding acceptable approaches and methodologies by which employers are able to satisfy the national standard. The agencies of detail would provide elaboration on the meaning of the key concept of 'unjustifiable hardship' in the particular industry or industries in question. The national standards would identify the relevant international instruments from which they are drawn, and international best practice regarding those conventions would provide a source of knowledge for the agencies of detail, as well as organisations and workers. In elaborating the broad standards, it would be important for agencies of detail to draw on, and leverage, existing understandings and knowledge of these problems, including the *Respect@Work* report as well as other government initiatives of primary prevention such as *Change the Story* in relation to gender-based violence.[8]

There would be flexibility in how employers are able to meet their obligation under the national standard, giving employers (in consultation with their employees) a discretion to craft an approach that best fits their organisation. Workers would be important participants in the new architecture and would have a central voice. Organisations would be required to consult with their workers over matters that are relevant in

actioning the national standard. In addition, workers would occupy key positions equivalent to the roles performed by workers in WHS schemes – as elected fair-go representatives and as members of fair-go committees – with powers in relation to compliance and enforcement of the national standard. Trade unions would also have powers to enter work settings for the purpose of investigating suspected contraventions of the national duty.

Importantly, enforcement under the new architecture would rest with individual workers, trade unions and representative groups, as well as with a publicly funded agency. That agency would be fully empowered and properly resourced to conduct compliance activities – including, across the full spectrum of its responsibilities, inquiries into systemic problems, rigorous investigations, and enforcement. Its officers would have strong understandings of the drivers of discrimination and other abusive behaviour and of the impacts on workers of those behaviours.

The advantages of this new architecture over the existing legal landscape that seeks to provide redress in relation to discrimination, sexual and other forms of harassment and bullying in work settings are numerous. The new work architecture would bring consistency and coherence in the obligations of an organisation, while at the same time allowing for more detailed regulation to be crafted at the industry level. The standards would be more transparent to organisations, workers, trade unions and others. The new scheme would provide for a positive duty on organisations to take preventative action by engaging with, and taking seriously, relevant international standards, and requiring organisations to take positive measures to achieve the objectives of international standards, to an outer limit of where the measure would impose an 'unjustifiable hardship' on them. Through elaboration by an agency of detail, employers

would have a good sense of what that concept means in the context of their particular industry. In addition to individual workers enforcing the national standard, a properly funded regulator would do so as well.

The new framework presents an opportunity to set aside the unhelpful technicalities that have reduced the protective scope of the different statutory schemes and seriously undermined their potential to bring about workplaces free of abusive behaviour. Judicial education and training will be needed, and participation in these programs ought to be an ongoing expectation of judicial office and of holding an appointment on a tribunal.

Commentators have written about how issues of discrimination and harassment have been positioned for much of the twentieth century as matters of marginal concern to the industrial or workplace system. This new architecture brings with it the potential to bring the problems of discrimination and abusive conduct from the margins of the legal regulation of the labour market into the centre of its concerns. They would be core aspects of the 'fair go', rather than being seen, as they may still be, as marginalised issues of women workers, workers of colour, workers with disabilities, LGBTIQ+ workers, and so on. While law reform in relation to anti-discrimination law at the Commonwealth level has stalled, the new architecture explored in this book offers an opportunity to refresh the approaches taken to the core principles underlying these damaging harms. Importantly it provides an opportunity to bring adverse action concepts, together with anti-discrimination understandings, under the broad banner of a 'fair go'.

The new architecture is not without risks. Importantly, there is a danger that hard-won gains for workers may be lost or become diluted in the new scheme. Close attention would be needed in order to ensure that the new system did not gravitate to the lowest level. The system needs to

nudge organisational practices to level up, rather than level down. Serious attention will need to be paid to constraining the power of employers through constraining the power of agencies of detail.

A number of complex questions arise in relation to moving from the existing legal framework to the new architecture. Importantly, current anti-discrimination law covers work contexts as well as other settings such as education and the commercial provision of accommodation, goods and services. Learnings from these other settings, and in particular the education context, have been important in the development of anti-discrimination law in the work context. Presumably the application of anti-discrimination law in relation to such non-work contexts will continue, though the case load of anti-discrimination agencies such as the Australian Human Rights Commission and state/territory anti-discrimination agencies will be considerably reduced. There will need to be good mechanisms of coordination between this continuing scope of anti-discrimination law and the workplace 'fair go' jurisdiction.

In addition, behaviours that are vilifying raise broad public interest considerations, which may be broader than other types of discriminatory, harassing or bullying conduct that occurs at work. The question of whether the 'fair go' standard should include vilification and racial hatred in the work context will necessitate careful analysis.

Conclusion

This chapter has used a proposed new architecture inspired by Robens and guided by the concept of directed devolution to provide some preliminary imagining of how the workplace problems of discrimination, harassment and bullying might be better addressed. The new framework developed in this book provides an opportunity to freshly think about how best to

address these recalcitrant problems in Australian work settings. Some benefits are apparent in the new approach, including the ability to write in a positive duty on employers, and to establish a properly resourced regulatory agency regarding discrimination, harassment and bullying. There are, unsurprisingly, some risks to guard against, including a concern that gains in anti-discrimination law that have been hard won over recent decades, especially at state and territory level, will be lost if this new scheme results in reduced protections for workers.

CHAPTER 7 – PILLAR V

A Fair Say All Round

MARK PERICA AM[1]

In recent times, an aspiration for greater workplace participation in decision-making and workplace democracy seems to have lost all currency in Australia. There are political, economic and ideological reasons for this phenomenon.

The COVID-19 pandemic has demonstrated fissures in our society and polity. Suspicion of public health directives, vaccine scepticism, the bizarre spectacle of a siege in a union office, and a conspiratorial turnaround in the motives of politicians and in any exercise of state power demonstrate a feeling of powerlessness, alienation and civic disengagement amongst our citizens.

A new work architecture should embrace a goal of workplace democracy based on a series of models and representative structures that facilitate meaningful workplace participation. An architecture that embraces workplace democracy would lead not only to greater civic engagement but also to improved efficiency, productivity and profitability.

There is discussion elsewhere in this book that the Robens model should form the basis for the new architecture. The existing network of WHS committees in work settings embodies the participatory Robens approach. It is suggested here that the remit of these committees could be expanded to responsibilities with respect to workplace participation as 'fairness committees'. However, in this chapter I argue that such an initiative on its own would be insufficient to entrench workplace participation and therefore should be part of a broader suite of worker participation mechanisms.

What is workplace participation and why is it needed?

Workplace participation covers everything from schemes of worker control to a suggestion box. It could include employee share schemes, worker board representation, works councils, joint consultative committees and collective bargaining, worker cooperatives, joint decision-making, consultation and information sharing. Workplace participation is a continuum, with workplace democracy at one end and information sharing at the other. The management theorists Harrison and Freedman have stated, 'any action, structure, or process that increases the power of a broader group of people to influence decisions and activities of an organisation can be considered a move toward workplace democracy'.[2]

There are two main reasons for needing it: moral/political and business.

The moral/political argument

Item 2 of the Australian Charter of Employment Rights recognises that labour is not a mere commodity. Workers and employers have the right to

be accorded dignity of work.[3] Item 5 recognises the need for workplace democracy. Dignity at work, workplace participation and democracy are related. In the workforce, employees contract their time and energy, but their autonomy and self-ownership as human beings should be respected. This includes a right to participate actively in decision-making affecting their working lives.[4]

Workplace participation also 'enhances civic engagement, political democracy and how workers view their work'. The ILO concept of social dialogue advocates the 'extension of employee citizenship rights and not just business expedience'.[5]

The business case in favour

Research supports the business case for systems of workplace participation as well as for specific practices such as participative decision-making, self-managed teams, quality circles, gain sharing and employee ownership. Taken together, this work clearly indicates the multiple benefits of workplace participation in terms of productivity, profitability and employee wellbeing.[6]

The narrow banding of workplace participation in Australia

Up to the mid-1980s, academics predicted an increase in worker democracy brought about by semi-autonomous work groups, joint consultation mechanisms, share ownership schemes, worker board appointments and the various iterations of the ACTU–ALP Accord. It was predicted that workplace democracy would flourish and workers would have an ever-increasing say in most aspects of their working lives.[7] This has not transpired, for the following reasons.

Rise of employer-driven employee involvement schemes

Over the last twenty years, business interest in workplace participation has not been high. Management-sponsored 'employee involvement' schemes concerned with business goals such as employee motivation and commitment to organisational goals have been adopted within a narrow range of decision-making.[8] The involvement tends to be 'confined to a limited range of topics, to information sharing and consultation rather than workplace democracy'.[9]

The rise of human resource management, together with the fall of industrial relations, has had practical consequences for workplace participation. The transition from 'Personnel' or 'Human Resources' departments to 'People and Culture' has shifted focus away from the balancing of competing interests to the prosecution of the interests of the firm. In this environment, a contest or disagreement with management decisions is often seen as aberrant.

Reduced enterprise bargaining coverage

For reasons articulated below, the *Fair Work Act 2009* (Cth) does little to encourage workplace participation. There are consultation requirements in the Act, and workers and their employers are free to agree on more prescriptive mechanisms of workplace participation within the terms of an agreement.

After two decades of growth, the number of current enterprise agreements stagnated around 2013 before beginning to drop sharply. The number of current agreements plummeted after 2013, with total current agreements now at their lowest point since 1999.[10] The decline has naturally resulted in a reduction in the number of employees covered by agreements. (Harvey and Redford give a more detailed account of the

decline in enterprise bargaining in the following chapter.)

Decline in union membership

Union membership is on a steady decline. The proportion of employees who were trade union members fell from 40 per cent in 1992 to 14 per cent in 2020.[11] The decline has been significant for workplace participation and representation. Under delegate structures, workers can contest and question management decisions. In the absence of a union, workplace participation is dependent on the commitment of employers to drive it.

Non-standard employment

Studies suggest that workers engaged in atypical employment (such as casual employment or gig work) are unlikely to have much of a say on workplace issues. Workers will refrain from voicing issues because they fear negative personal or professional consequences. One of the most important factors is fear of losing one's job.[12] Only 8 per cent of all casual workers are union members.[13] There is also evidence that employers are less likely to engage with workers with whom they do not have an ongoing relationship.[14]

Since 2015, the gig economy has grown ninefold, to capture $6.3 billion in consumer spend in 2019.[15] Rapid growth has been fuelled by new customers and by increased frequency of usage by existing customers, which has steadily expanded in the past five years. The gig economy workforce has grown substantially and may now be as large as 250,000 workers,[16] although the exact magnitude of the workforce remains difficult to measure due to limitations of existing workforce data collection.[17] Case studies in the United States and the United

Kingdom on gig work and precarious employment suggest these workers are subjected to the unilateral exercise of managerial power, surveillance and control.[18] The gig model distances workers from employment rights and diminishes their opportunity to express their voice at work.

The COVID-19 pandemic

The impact of public health measures during the COVID-19 pandemic has been immense. Prior to the pandemic, one in four workers was a casual, and more than half of casual employees reported having no guaranteed hours. Two-thirds of people who lost a job early in the COVID-19 outbreak were casual.

Some industries have experienced larger employment impacts than others. Unsurprisingly, recreation and hospitality are at the top, with nearly nine in ten workers (89 per cent) experiencing an employment change due to SARS-CoV-2 (the coronavirus), which causes the disease known as COVID-19.

For most industries, the biggest employment impact from the COVID-19 outbreak has been to force employees to work from home. This includes 65% of people working in finance and insurance, 59% in communication, 55% in public administration and defence, and 47% in property and business services.[19]

There is no data on the effect of COVID-19 and working from home on workplace participation. It might be that dislocation through job losses, the emergency nature of the adjustments, a culture predicated on face-to-face interactions, the isolation of workers from their work colleagues, and limitation of interactions through digital platforms would militate against workplace participation in decision-making.

The *Fair Work Act 2009* and workplace participation

The Fair Work Act prescribes a minimal infrastructure for workplace participation. It is limited to consultation on a narrow range of topics in limited circumstances.

The posture of the Act towards union representation and membership has been described as one of 'State neutrality'.[20] A state-neutral legislative architecture confines itself to 'implementing and enforcing a neutral procedural framework enabling workers to choose to be (or not to be) represented by a particular trade union'.[21] The emphasis on majority ballot procedures, bargaining agents that may or may not be union representatives, process rights to good faith bargaining, equal protection from union membership, and modern awards that are creatures of the Commission, rather than the parties, all point towards the neutrality of the legislation.

In so far as unions and delegate structures provide representation, and a mechanism through which workplace issues can be discussed, they facilitate workplace participation. The state-neutral position, together with the decline in union membership, has militated against workplace participation.

The only workplace participation mechanism prescribed by the Act is consultation in respect of major workplace change, changes to rosters, or redundancies.

Consultation under these provisions is not 'perfunctory advice on what is about to happen[;] it provides the individual…with a bona fide opportunity to influence the decision maker'.[22] The purpose of a consultation clause is to 'facilitate change where that is necessary, but to do that in a humane way which also considers and derives benefit from an interchange between worker and manager'.[23]

Section 205 of the Act mandates that an enterprise agreement must contain a term that requires an employer to consult with employees about any major change that is likely to have a significant effect on the employees or any change of their regular roster or ordinary hours of work. If an agreement does not contain a consultation term (or contains an inadequate one), then the model consultation term set out in the Fair Work Regulations 2009 applies.

The consultation term must allow for employees to be represented during the consultation. In the course of the consultation, the employer is required to:

- provide information to the employees about the change
- invite the employees to give their views about the impact of the change (including any impact to their family or caring responsibilities)
- consider any views given by the employees about the impact of the change.

Section 389(1)(b) of the Act provides that an employer has an obligation to consult on a redundancy only when a modern award or enterprise agreement applies to an employee and contains a requirement to consult. Most modern awards contain a consultation provision for significant change that includes an indicative list which specifically mentions 'termination', 'job restructuring' and 'redundancy'.[24]

Towards a new architecture for representation and participation at work

The decline in union membership, the limited reach of enterprise bargaining, the rise of insecure and gig work, the narrow focus of the Fair Work Act and the current political and economic environment have all militated against the spread of systems of participation and representation in work settings.

Workplace participation in Australia seems to be limited to consultation requirements or employer-sponsored models of employee involvement. Any new work architecture must include more ambitious models promoting democracy at work that is designed to entrench a culture of shared decision-making. This should include capacity building and education, minimum standards, greater union involvement, collective bargaining, special measures for non-unionised work settings, the gig economy, work councils and worker representatives on boards. These are explained below.

Capacity building and education

The act of participation in decision-making, enhanced by education on work processes and the procedural aspects of participation, can lead to ever more informed contributions by workers. The combination of learning through the act of participation, enhanced by education, can facilitate more-informed contributions to decision-making in work settings involving broader and more significant decisions.[25] The state, together with unions, employers and employer organisations, should encourage education in processes of decision-making and participation.

Minimum standards relating to workplace participation

A new architecture should include the objective of encouraging workplace participation in decision-making. The minimum standards should:

- prescribe a positive right for workers to participate in decision-making at work
- require a mechanism for participation in decision-making in work settings that must include representation of persons employed or engaged on a less than full-time or permanent basis

- require a person who conducts a business to genuinely consult with workers who are (or are likely to be) affected by any decision of management
- protect workers from adverse action for raising or seeking to raise issues through a work settings participation scheme.

The minimum standards should also promote the rights of workers as 'industrial citizens' that act to reinforce participation rights such as:

- require persons who conduct a business to facilitate free association by allowing workers to meet, discuss, and receive training from their union during work time[26]
- require persons who conduct a business to respect workers' freedom of communication unless there are exceptional circumstances or compelling business reasons for communication to be limited[27]
- require persons who conduct a business to respect a worker's freedom of expression unless there are compelling business reasons to restrict it[28]
- in an academic setting, require a tertiary education institution to respect workers' academic freedom.[29]

Consistent with the Australian institutional settings, a tribunal should be vested with a broad discretion to assist workers' and employers' understanding of appropriate systems of participation at work or to settle disputes about that participation. A disagreement about the appropriate system(s) of participation in work settings, sectors or industries should be contestable in the tribunal.

Workplace participation beyond employment and the traditional workplace

The current system applies only to workers in an employment

relationship and needs to be expanded to accommodate other forms of work arrangements and decentralised workplaces. Dependent contractors do not have access to the full suite of employment rights. If a right to participate is limited to employees, these rights will not be available to dependent contractors, who are some of the most monitored and controlled workers.

A right to participate contingent on a direct employment status enables businesses to avoid worker voice by structuring the engagement of labour through independent contracts. This deprives those businesses and workers of the benefits of workplace participation.

The new United Kingdom Status of Workers Bill[30] is an attempt at escaping the employee/contractor binary. The Bill seeks to create a universal status of 'worker' where all workers are eligible for the full suite of employment rights. When there is a dispute over employment status, the Bill places the onus on the employer to prove that those working for them are self-employed. A similar universal definition of 'worker' could be used in the new architecture to provide a broader footprint for rights, including rights of participation.

Greater union involvement

Given the history of the institutional arrangements in Australia, it is difficult to conceive of an architecture for workplace participation that does not include participation through, or representation by, a union. Historically and practically, unions have been the bedrock of workplace participation and democracy. Research in the United States and the United Kingdom indicates that workplace participation programs have contributed substantially more to performance in unionised firms than to performance in non-union firms.[31]

Given that unions are the bedrock of workplace participation and democracy, it follows that a new architecture should move from a state-neutral posture to one that supports and encourages growth in union membership, coverage and density. A method likely to have positive effects on union membership, which would strengthen the extent and effectiveness of union representation, is a 'union default' policy.[32] Harcourt and others argue that defaults are 'endemic [in] modern life'[33] and are 'present in an enormous range of products and activities'[34]. Further, 'The employment relationship is suffused with defaults such as common law duties of obedience and fidelity and other terms in the employment contract.'[35]

Under a union default system all new employees would default to the union with the appropriate coverage unless they actively chose not to.[36] In the Australian context, employers could contact a federal agency or the ACTU to determine which union has the appropriate coverage rule.

Following acceptance of the employment, employers would inform new employees of the default and the right to choose the non-union or union alternatives within a specified period.[37] The union or unions would be guaranteed workplace access rights to approach any employees at a reasonable time and in a reasonable way to discuss any matters relating to union memberships such as recruitment.

There is no compulsory unionism under a union default system. A union default would improve both the freedom to associate, or freedom from association, because the default allows anyone who has any aversion to unions to opt out of membership of their own volition. It would therefore not violate the terms of the Freedom of Association Convention (87) of the International Labour Organization.

An architecture that included a union default would lead to a steep increase in union membership, coverage and density. Unions' capacity

and resources to empower and assist members to participate in workplace decision-making would therefore be improved.

The unionised workforce would become a laboratory for and vanguard of models of workplace participation.

Collective bargaining

The Fair Work model of collective bargaining, largely limited to single business enterprise bargaining, seems to be reaching the end of its useful life. The current system has been described as a 'private market conception of enterprise bargaining' conducted by trade unions as bargaining agents.[38] It represents something that the legal academic Keith Ewing describes as a 'representative', rather than a 'regulatory', mode of collective bargaining.[39]

A regulatory mode of collective bargaining conceives of collective bargaining as a public regulatory activity conducted on a national, sectoral or industry level. Collective bargaining is regarded as more like legislating than bargaining. It is aligned with a more organic view of trade unions enjoying their own prerogatives as institutions with their own legitimacy.[40]

The European regulatory model has led to industrial pluralism and worker rights. It has encouraged deep collective workplace participation at all levels on matters ranging from national policy to work scheduling.[41] Bargaining beyond the workplace enhances worker democracy and a culture of workplace participation by allowing worker involvement in everything from shift changes to macro-economic and industry-wide issues. Following the European model, a system of collective bargaining that enables national, industry or sector bargaining could facilitate workplace consultation, joint decision-making and workplace democracy.

Workplaces that are not unionised

A new architecture should encourage workplace participation through trade unions. However, as 85 per cent of workers are currently not in trade unions the architecture must address workplaces without union members. This system should apply only in circumstances where, to the knowledge of the employer, no union members are present.

The model of participation in WHS provides a useful analogue in this context.[42] Any worker or group of workers may ask the person in charge of the business or undertaking (PCBU) to facilitate the election of a representative who will act as the liaison between management and the workers for the purposes of participating in decision-making. The PCBU must then facilitate the determination of one or more groups of workers who can be consulted on workplace decisions.[43]

Work groups are formed by negotiation and agreement between the PCBU and the workers who will form the work group, which will be consulted about decisions that affect their work. The purpose of negotiations is to determine how best to group workers in a way that most effectively and conveniently enables their interests to be represented. The architecture should require both the representative and the work group to be fairly chosen and genuinely representative.

Disputes concerning the election or nomination of the workplace representative, or the selection of the work group, can be determined by the federal tribunal, which should be invested with broad discretion to make orders to settle these disputes fairly, without formality on the merits of the case.

Where a WHS committee is already established in a non-unionised workplace, the remit of the committee could be expanded to include consultation and decision-making about workplace participation. As

Michael Harmer has suggested in Chapter 1, the remit of the committee could be expanded still further, to include consultation and decision-making on matters of human rights, gender and equal opportunity.

The gig economy

Recent scholarship on worker voice indicates that gig and platform workers have used technology to rate experience with platforms and to share experiences about customers, contracts and work processes.[44] Michael Walker has argued that 'the internet has broken down barriers to worker voice'. He 'observed…instances of online voice where workers acted collectively and achieved material outcomes'.[45] This is suggestive of a method for workplace participation based on technology for workers who tend to be separated from one another and work individually.

The new architecture could provide a digital space for consultation, grievance handling and collective decision-making. It could prescribe that a person in charge of an enterprise through a digital platform or where the system of work requires workers to work individually is required to provide a digital method where workers can confidentially interact with one another and be consulted about proposed changes that will affect their work. Workers using the digital platform for participation could be accorded the minimum standards and protections mentioned earlier and could take disputes on these matters to the federal tribunal.

Work councils

A work council is a body of non-managerial employees who are elected or appointed by the employees or their union(s) to meet with management and to be informed, consulted and involved in management decisions. In European countries, work councils are empowered with significant

rights to co-determination. There is strong evidence that European-style work councils build employee commitment and cooperation and facilitate high trust and low-conflict relations between management workers and unions.[46]

Debate exists as to whether this model of participation is 'transferable' to the Australian context.[47] The consensus seems to be that work councils are transferable and that they are 'worth considering as a matter of public policy'.[48] The method of selection could be appointment by relevant unions in the organised sector or elections in businesses that are not organised.

The success of work councils is dependent on a shift in culture in Australia. In those circumstances, some piloting might be necessary. Work councils could be mandated for enterprises and undertakings with more than 1,000 employees or $100 million in annual revenue. These enterprises have the resources to set up, design and implement a system for work councils.

The state and federal public sector could lead the way as model industrial citizens. Following consultation with the relevant unions and the public sector employers, representative work councils could be rolled out within government departments at the state and national level.

Worker representatives on boards

Worker representation on corporate boards, also known as board-level employee representation (BLER) refers to the right of workers to appoint or elect representatives to a board of directors. A rare example of BLER in Australia are the right of staff of the Australian Broadcasting Corporation to elect the staff-elected director to the ABC board.[49]

In the United States and Canada there is renewed interest in BLER that transcends political lines.[50] In Europe, there are diverse methods of appointment. In some cases, the board-level employee is appointed by

unions, sometimes they are elected directly by the employees, in other cases they are selected by other employee committees. An off-the-shelf model is the method of appointment of worker representatives to trustee companies of industry superannuation funds by the ACTU. This could easily be adapted to include appointment of directors.

Evidence suggests that worker representatives are more focused on employee and stakeholder issues than they are on the share price and that they seek to prevent earnings manipulations, support risk-reducing policies and have a long-term interest in the firm. The interests of workers informed by local workplace participation could be conveyed to the worker representative on the board. The worker board member symbolises a commitment to full industrial citizenship and to the rights of workers to participate at all levels of decision-making.

As a first step, the Federal Government should amend the *Corporations Act 2001* (Cth) to ensure that employers with more 1,000 employees or $100 million in annual revenue include worker representation on their boards of directors.

Conclusion

What is suggested here is a series of reforms designed to entrench and enrich workplace participation in a new work architecture. The reforms could be introduced gradually or together and include:

- the introduction of strong minimum standards to entrench workplace participation in all work settings, including for those who are not in a direct employment relationship
- capacity building by the state, unions and employers to facilitate and promote workplace participation and the skills required to undertake it
- the empowerment of a federal tribunal with a broad discretion

to resolve disputes concerning the implementation of workplace participation systems

- the legislative promotion of union membership and trade unions as the primary representatives of workers through a union default system
- the introduction of collective bargaining beyond the enterprise level to include national, industry or sectoral bargaining
- a requirement that persons in charge of gig or platform businesses provide a digital platform for consultation with the workers in those businesses
- a mandated form of workplace consultation for workplaces without union members, which includes an obligation that the consultation work group and worker representatives are fairly chosen and genuinely representative
- a requirement for work councils and worker representatives on boards of large businesses and undertakings.

Such a project does not lack ambition, but we should keep our eyes on the prize of a more socially democratic Australia where all workers have a fair say all around.

CHAPTER 8 – PILLAR VI

Bargaining in the New Work Architecture

KEITH HARVEY & BEN REDFORD

This chapter considers the Australian enterprise bargaining system and its future.[1] It suggests that the collective bargaining reforms that occurred at the beginning of the 1990s were intended to result in a new Australian industrial relations paradigm, a hope that failed to materialise. The incumbent system is resulting in shrinking coverage and low wages growth and has failed to deliver its promised productivity dividend.

In this chapter, we propose a significant overhaul, particularly in relation to the current focus on enterprise-level bargaining and its confined approach to the concept of 'good faith'. A new system would facilitate collective bargaining at the level most appropriate to achieve a fair outcome for bargaining parties – at the enterprise, multi-enterprise, sectoral or industry level – and would broaden the concept of good faith to require conduct that is fair in the circumstances.

The recent history of collective bargaining in Australia

The wages and conditions of employment of most Australian employees are largely set in three ways: by legislation (for example, the entitlements provided by the National Employment Standards (NES) contained in the *Fair Work Act 2009*);

through modern awards created by the Fair Work Commission, which are designed to 'provide a fair and relevant minimum safety net of terms and conditions' about employment matters not in the NES; and through 'over-award' wages and conditions obtained through voluntary bargaining between employers and employees at the enterprise level. Together with some 'common law' employment rights, these mechanisms regulate how much employees are to be paid and what other conditions of employment they are entitled to.

The current legislative scheme regulating collective bargaining in Australia had its inception in the reforms introduced in the early 1990s. As a key component of the Keating Government's micro-economic reform agenda, the new collective bargaining scheme was heralded as a 'win–win' for employers, employees and unions, with claims that a 25 per cent boost in enterprise productivity would be unleashed through a system in which the immediate interests of an employer and its employees would be more closely aligned through an exchange of remuneration for productivity at the 'enterprise' level.[2] This new enterprise bargaining system included an option for employers to make collective bargains directly with their employees, so long as bargaining complied with certain 'good faith' bargaining principles. The reforms also introduced a new legislative regime in relation to the right to strike.[3]

The Howard Government's *Workplace Relations Act 1996* reinforced the concept of enterprise-level bargaining. The Act's scheme continued to facilitate collective bargaining at the enterprise level either between employers and unions or employers and a group of employees, but it abandoned the obligation to bargain 'in good faith'. Industry-level or sectoral bargaining was effectively prohibited by removing the protection for industrial action deemed to be in support of pattern bargaining – that

is, an agreement covering multiple employers, including sector-wide bargaining that had previously been common (for example, in the metal and building industries). The Howard-era changes further devolved these bargaining units to the individual level, through the introduction of statutory individual agreements, or Australian Workplace Agreements (AWAs).

The Rudd Labor Government's reforms – the *Fair Work Act 2009* – were designed to abolish the statutory individual contract scheme embodied by AWAs. In doing so, the reforms reasserted within the system the pre-eminence of collective bargaining at the enterprise level. The bargaining provisions of the Act have been largely unaltered during subsequent Coalition governments.

The Rudd reforms reintroduced the concept of 'good faith bargaining' into the system. This concept provided the Fair Work Commission with limited power to intervene to ensure bargaining representatives conducted themselves in accordance with several 'good faith bargaining requirements'. These were designed to facilitate the processes of bargaining and avoid protracted industrial disputes by allowing the tribunal to make bargaining orders binding on the parties and, in extreme circumstances, to make a workplace determination.[4]

The trade union movement has become increasingly dissatisfied with the industrial relations system and, in the leadup to the 2019 election, was advocating for reforms through its 'Change the Rules' campaign. The reforms were opposed by major employer groups.[5]

Included in the union movement's agenda were proposals to reform the 'good faith bargaining' principles.[6] Dissatisfaction with the good faith bargaining scheme had been building for some time, particularly arising from its apparent inability to assist in the resolution of intractable disputes[7]

and prevent frustration of the process by an employer determined to avoid the operation of a collective bargaining agreement.[8]

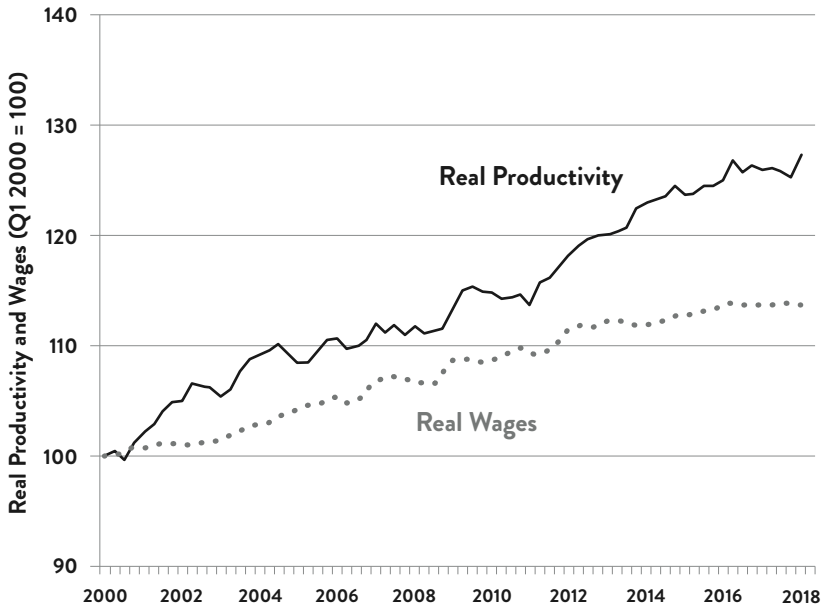
Bargaining for agreements has been considered a battleground – economic warfare designed to pressure the other party to concede. Little emphasis has been placed on working to ensure that enterprise bargaining and the agreements that flow from them represent a win–win–win outcome for employees, employers, the economy and society.

Has the regulation of collective bargaining in Australia succeeded in achieving its stated objectives?

The collective bargaining system should work fairly for all parties, allowing for sustainable growth in real wages over time commensurate with increasing labour productivity. There is considerable evidence that workers are not fairly sharing in national income.

The Productivity Commission noted in 2021 that 'the past decade of economic growth marks the slowest in at least 60 years on a per person basis'.[9] Moreover, the Commission observed that, 'Considering that Australia's poor economic performance in the 1970s was a key justification for the economic reforms of the 1980s and 1990s, the fact that the last decade of growth was even worse warrants further reflection.'[10]

Australian employees have not been sharing equitably in gains in labour productivity, a fact noted by many commentators, including the Productivity Commission. The experience is charted by the table reproduced opposite from a recent book, *The Wages Crisis in Australia: What it is and what to do about it*.[11]

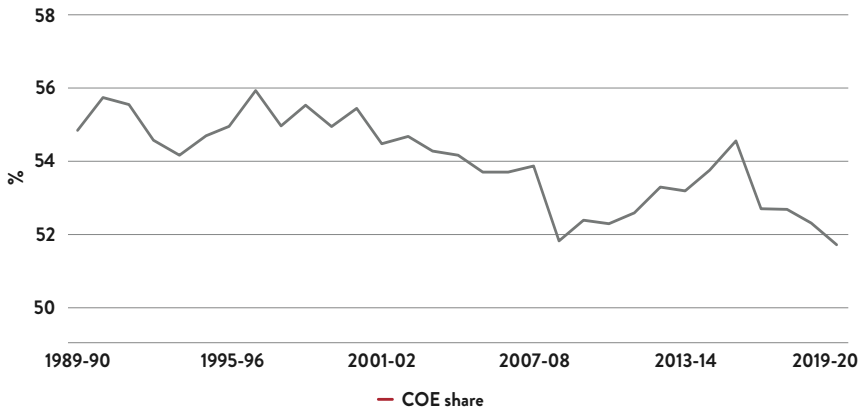


The authors of that book conclude (among other things) that wage growth has stagnated, despite ongoing increases in productivity, and that the relationship between wages and productivity has vanished and real labour incomes have declined.[12]

The Productivity Commission has also noted the stagnation of wages growth in Australia: 'During the mining boom, wage growth outpaced labour productivity by a significant margin until about 2012–13. Since this time, wage growth has stagnated, despite labour productivity continuing to grow. Numerous explanations have emerged for this "wage growth puzzle", with answers ranging from too little labour market dynamism to too much casualisation, part-time work and job insecurity'.[13] The Commission considered a range of factors said to be responsible for this phenomenon, including, 'Changes to workplace relations laws that weaken employee bargaining and declining union membership' and 'Falling usage of collective bargaining beginning about the same time as falling wage growth'.[14]

The Productivity Commission has noted that, when labour productivity improves, this is not sufficient to translate into real wage increases. For that to happen it is necessary that 'workers have the capacity to bargain with employers for increases in remuneration in line with observable productivity improvements'.[15]

The Commission's verdict includes tacit recognition that it is only through bargaining with employers that real wage growth can be achieved. Since the mid-1990s, awards that govern wage rates where no enterprise bargaining exists have been deliberately set at a 'safety net' or minimum-rate level to encourage enterprise-level bargaining. ABS national income data shows that the wages share of national income has continued to decline: 'In 2019–20, compensation of employees (COE) share of total factor income fell to 51.7%, the lowest share since 1963-64. COE grew 3.5%, below the ten-year average of 4.5%, reflecting changes to the composition of the labour market and slow growth in the wage rate.'[16] The profits share of total factor income was 29.4 per cent in 2019–20, the highest share in recorded history (see table below).



Source: Australian Bureau of Statistics, Australian System of National Accounts 2019-20 Financial year

Wages share of total factor income

Enterprise bargaining has been a formal part of the Australian industrial relations system for about thirty years. There is evidence that the system has now begun to run out of steam – that in some areas of the economy, structural impediments are making bargaining ineffective, and that in others 'bargaining fatigue' has set in. The number of agreements made, and of employees covered by those agreements, has continued to decline over recent years.

According to the Federal Attorney-General's Department's *Trends in Enterprise Bargaining* report, as of 30 June 2021 there were 10,182 current agreements, covering 1.78 million employees.[17] Enterprise bargaining coverage, in both numbers of agreements and employees covered, peaked in 2011–12. The number of agreements now in force is less than half that in 2010–11 and the number of employees covered is about 700,000 fewer in an economy that has continued to expand. The number of applications under section 185 of the Fair Work Act for approval of an enterprise agreement peaked at 7,812 in 2011–12, and in 2020–21 the number was just 3,419.[18]

The construction sector accounts for a third of all agreements but for just 96,500 of all employees covered, or about 5% of the total number of agreement-covered employees.[19] The 1,756 agreements in manufacturing cover only 127,200, or 7%, of all agreement-covered employees. Other private-sector industries cover relatively few employees.[20] Some sectors (for example, financial services) have seen a dramatic drop in the number of employees covered.[21] It has been estimated that only about 14% of private sector employees are covered by agreements.[22] The bulk of employees covered by agreements are in public sectors such as public administration and safety, education and health care, and social assistance. Together, these three sectors contain about 12% of all agreements but represent 46% of all employees covered by agreements.[23]

In a technical sense, all collective agreements are now made between an employer and their employees. In certain circumstances, unions have a right to be involved in the making of agreements as bargaining agents but are no longer able to be parties to the agreement.[24] Employers may also propose and make collective agreements with their employees without the involvement of a union. Such agreements may be described as 'non-union' agreements. Unions may seek to be covered by agreements even where they have had little role in the making of the agreement.[25] Even though 90 per cent of employees working in the private sector are not paid union members, agreements are twice as likely to be classified as union agreements.[26] Union agreements predominate in terms of numbers of agreements (by 2:1) and especially in terms of employees covered (by 15:1). However, the term 'union-covered' needs cautious treatment.[27]

Other data in the ABS's *Employee Earnings and Hours* report shows that, on average, non-managerial employees covered by collective agreements are paid significantly better than those on awards. In mining and construction, the bargaining margin is over 100 per cent.[28] However, there are two significant exceptions – namely, retail and accommodation, and food services (hospitality). ABS data for May 2021 shows that agreement-covered non-managerial employees in the retail sector had average weekly total cash earnings of just 98.8 per cent of the total cash earnings of award-covered employees. On an hourly basis, the figure was 102.2 per cent. In other words, retail workers have derived little or no benefit from enterprise bargaining over nearly thirty years.[29]

In the hospitality sector, the position is even worse: agreement-covered employees earn much less than those on awards: average weekly total cash earnings of non-managerial employees were just 79.8 per cent of

award-covered employees (92.5 per cent on an hourly basis). Employees would be better off on the award.[30] This is a clear failure of the enterprise bargaining system.

Current issues in enterprise bargaining

The Australian collective bargaining scheme is predicated on a presumption that employers and employees should engage in collective bargaining at the enterprise level. The objects of the Fair Work Act relevantly include: '(f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action'.[31]

This raises several challenges. The system encourages competition based on wage restraint at the enterprise level. An enterprise that can achieve a wage discount with respect to their competitor achieves an economic advantage. Thus, enterprises are encouraged to compete not based on innovation, efficiency or productivity but on their ability to reduce their wage bill through a combative approach to collective bargaining.[32]

The system is also cumbersome. The fragmentation of sectors into often tiny bargaining units requires the investment of significant resources by employers, employees and unions. It is difficult to conceive of a more inefficient system – where, in effect, the only means by which to achieve real wages growth with respect to a sector or an industry requires the repeated conduct of a detailed legal process at the micro-enterprise level.

Many employees have significant economic power exercised over them by entities that are not considered their 'employer' at law – a third-party funder (such as in industries that rely on government funding

or subsidies); the host employer (in a labour hire context); the principal client (in a contracting situation); the entities at the top of a supply chain (with respect to those at the bottom). Accordingly, the 'bargaining' that occurs within the Australian system often takes place without the involvement of the significant economic power, and workers who are not considered to have an employer at all are effectively ineligible to access the system.

The Fair Work Act allows for multi-employer bargaining only in very limited circumstances, but these parts of the Act appear to have been some of its least successful and most under-used provisions. Division 9 of Part 2-4 of the Act was designed to encourage bargaining by low-paid, award-dependent workers. In the eleven years of the Act's operation, only five applications under section 243 have been made, none since 2014–15 and not one resulting in a 'low-paid bargaining agreement' being made.[33] Most applications have been refused.[34] This section of the Act appears to be completely ineffective and has not achieved the object of this division.[35]

Multi-employer agreements – for example, covering franchisees – are permitted by Division 10 of Part 2-4 of the Act, but this type of agreement can only be accessed by employers and only if no-one has 'coerced' the employer to make the application (for example, by industrial action). In the past five years, about ten such applications have been made each year by employers.[36]

Bargaining in a de-unionised/gig/outsourced economy

Much has changed since the reforms of the early 1990s created the pre-eminence of collective bargaining at the enterprise level. The economy, the types of employment and the relative strength of employers and

employees have all changed significantly. When the reforms occurred, more than fifty per cent of employees were members of a trade union. Since then – largely coinciding with the period of enterprise bargaining – rates of union density have declined substantially.[37]

The designers of this system may well have believed that there was a level of equality of industrial bargaining power at the time. This is no longer the case: with less than 10 per cent of employees in the private sector unionised, there is a real power imbalance. Employers are increasingly able to propose agreements to their employees without significant countervailing power against them. Agreement-making has progressively reduced terms and conditions of employment in return for relatively modest increases in rates of pay, or none.

The structure of employment has also begun to change, with not only more casual and temporary employees but also increasing reliance on contracting out entire functions within industries and the use of labour hire models of employment. These arrangements can make use of collective agreements that apply to or were made with a workforce not of the ultimate employer but with a labour hire firm. Employees have little or no bargaining power in such arrangements.

Many businesses have demanded that their workers become subcontractors using ABNs rather than engaging them as employees. Whole new classes of workers have emerged in the so-called 'gig' economy – for example, in food delivery, ridesharing and other sectors.

Although this is now under challenge in Australia and elsewhere, gig workers have not been considered to be employees and cannot make an enterprise agreement under the Fair Work Act. They are therefore excluded from legislated collective bargaining (and other) protections and possibilities for improving their working conditions, including pay.

A fairer bargaining framework

The system should aspire both to increase bargaining coverage rates and to address wage stagnation and income inequality – indeed, the two concepts are inexorably interrelated.[38]

The Australian system already recognises, to some extent, that multi-employer or sectoral bargaining could assist to overcome the 'constraints on the ability of low-paid employees and their employers to bargain at the enterprise level…'[39] Despite having never achieved this objective, the reform represented a tacit acknowledgment of both the limitations of the enterprise-based system and the potential benefits of a scheme in which bargaining at the multi-employer, sectoral or industry level should be preferred.

However, one of the reasons the scheme has struggled is that it is subordinate to the overall policy objective of the legislation: to encourage collective bargaining at the enterprise level.[40] To access the scheme, 'substantial difficulty' accessing bargaining at the enterprise level must be shown[41] without regard to the standards being achieved through enterprise bargaining (such as with respect to wage outcomes).[42] In Europe,[43] the United States[44] and more recently in New Zealand,[45] initiatives have been adopted to promote industry- or sector-level bargaining. Some of these models have had success in increasing bargaining coverage and outcomes for employees when compared with jurisdictions (such as Australia) where bargaining is more fragmented and decentralised.[46]

Collective bargaining at the industry or sectoral level is not a panacea for all the ills of the system. But the pre-eminence of collective bargaining at the enterprise level should be discarded. The 'bargaining unit' (whether an enterprise or part thereof, a group of enterprises, a sector or an industry) should be set according to what is 'fair' – that is, reasonable, relevant and appropriate to the circumstances of the enterprises, sectors or industries

concerned and the wishes of the industrial parties concerned.

The vision for a work regulation architecture propounded by this publication uses the metaphor of a construction or a building resting on a foundation of the principle of fairness. The level at which collective bargaining occurs – the bargaining unit – should be set according to that principle. In many instances, the principle of fairness will weigh in favour of a bargaining unit that encompasses multiple employers, an entire sector or an industry. For example, a bargaining process involving a group of employers competing to provide a similar service in a similar context is likely to result in a 'fairer' outcome for both employees and employers if the process involves each of those employers and their employees engaging in the process as a single bargaining unit. The process conducted in this way is also likely to be far more efficient.

The low-paid bargaining reforms also recognised the relevance of third parties who are not employers and permitted such persons to be required to be involved in the bargaining process if they exercise a sufficient degree of control over the terms and conditions of the employees who will be covered by the agreement.[47] This is a crucial principle which should be retained and expanded. The enterprise focus of the system means, in practice, that bargaining frequently occurs without the involvement of a key economic power (such as a government funder, a controlling parent entity or an end user), which further frustrates the system's workability and stagnant outcomes.[48] Again, according to the principle of fairness, entities that control economic power with respect to the employees who are to be subject to the bargained outcome should be compelled to participate and be bound by the outcome.

The low-paid bargaining scheme also appears to envisage a broad-ranging role for the Fair Work Commission to provide such assistance to

the parties as it considers appropriate to facilitate bargaining, including by exercising the powers it has in relation to a bargaining dispute.[49] This recognises the appropriateness of the involvement of the industrial tribunal in the process – especially in a multi-employer context, where the bargaining dynamics may be more complex. More generally, the Act also recognises the appropriateness of a level of regulation of the behaviour of the bargaining parties through the good faith bargaining principles.

However, the failure of these principles to prevent the frequent occurrence of long, intractable bargaining disputation or to deal adequately with 'surface bargaining' suggests a need for their enhancement, particularly if the system is reformed to encourage larger bargaining units such as those at a sector or industry level (as it should be). The enhancement of these principles should be based on the principle of fairness – that is, that the industrial tribunal should be generally empowered to do what is fair to facilitate the making of a collective agreement at a level that is itself consistent with the principle of fairness. This may necessarily mean the tribunal must take on a role that is more interventionist and could include, for example:

- orders to require parties to exchange statements of position, statements of agreed matters, statements of options for resolution
- orders to facilitate proper communication between the bargaining parties and the persons upon whose behalf bargaining is occurring
- orders preventing direct dealing[50]
- orders to require the provision of information necessary to inform the bargaining conversation
- compulsory conferences and compulsory mediation, including with relevant third parties
- last-resort, interest-based arbitration.[51]

Conclusion

In this chapter, we have sought to show that enterprise bargaining – the 'big idea' of the 1990s – has failed to deliver its stated objectives. Bargaining coverage is shrinking, especially in the private sector; wages growth is low or stagnant; and any productivity gains have not been shared equitably. Employees and businesses have lost their enthusiasm for enterprise-based bargaining. The 'good faith bargaining' provisions of the Act have failed to deliver on the Parliament's intentions. In a workforce that is de-unionised and increasingly based on non-standard forms of employment and work, enterprise bargaining cannot deliver what Australian workers and enterprises need. Other forms of collective bargaining are needed.

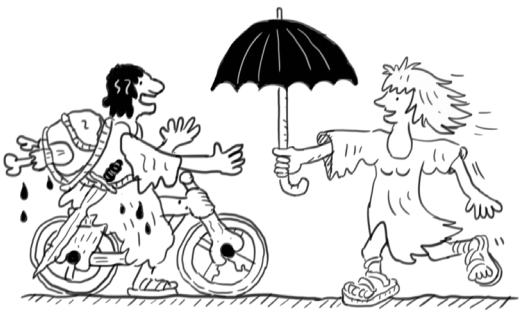
What should be the future of collective bargaining in Australia? We argue that the system is now failing both existing employees and those engaged in new forms of work. To make bargaining fairer, it is necessary to remove politically imposed limitations on the ability of industrial parties to bargain in good faith as suits their best interests, including industry-wide bargaining as practised in many other countries.[52] Reforms to the current system are needed, including measures to boost the bargaining ability of low-paid employees, gig economy and labour hire workers, and employees of dependent contractors or franchisees. This must include the ability of the industrial tribunal to assist parties to reach a fair bargain in circumstances where the bargaining power of employees is weak and where good faith bargaining is demonstrably not occurring.

CHAPTER 9

The Participants

JOELLEN RILEY MUNTON

In any new architecture of a work relations system, it will be vital to extend the coverage of the system to all hirers and workers, so that everyone who influences the conditions under which work is performed shares responsibility for meeting the aspirations of a 'fair go' or a 'fair say all round', and that everyone who participates in work relationships is entitled to fair treatment. Australia's present system of regulation already recognises the need to extend coverage beyond parties to direct employment relationships in some respects, although these measures largely apply only in matters of workplace safety. This chapter explains why there are gaps in the present Fair Work system, what measures presently exist to extend rights and responsibilities beyond employment relationships and what principles ought to be adopted in order to provide more comprehensive coverage to all participants in the labour market.



Promoting access to the entitlements articulated in earlier chapters to a more comprehensive community of working citizens faces the particular

challenge of escaping the assumptions embedded in our present system, and our customary ways of thinking about work. One such assumption that emerged when Commonwealth legislation abandoned the terminology of 'industrial relations' for its laws, and adopted the notion of 'workplace relations' instead, is that working relationships occur in a particular place.[1] This has tended to focus attention on labour regulation as something that is appropriately limited to the direct contractual relationships between employers and employees in an individual enterprise.

Another assumption is that any proposal to extend the reach of our system will mean that the instruments we presently use must accommodate all kinds of work. For instance, modern awards typically include clauses such as minimum shift times for casuals, so that casual employees must be paid for at least three or four hours' work on each occasion for which they are engaged. An assumption that such an entitlement must be available to all workers within the system means that any kind of work that does not require the worker to attend a workplace to exclusively serve one employer must be excluded from the system entirely. This need not be so. The worker who must attend a particular place and serve exclusively may retain the benefit of a minimum shift entitlement under an award, because this is a convenient way of ensuring that they receive decent remuneration from their commitment to the employer. The worker who can juggle several assignments for different hirers at once while working out in the field should nevertheless be afforded a decent rate of remuneration for their work, notwithstanding that the traditional constraints of the award system may not be the best way to deliver this entitlement. The concept of directed devolution offers insights on how this might be done, as discussed in Chapter 2.

Articulation of an aspiration to broaden the reach of our system of labour regulation sometimes provokes the question 'Which workers

should get which rights?' In our thinking about a new architecture for our system of rights and obligations for participants in working relationships we need to escape the limitations of our current experience and think more creatively about how we might ensure that the fundamental aspirations of the system can be met. For some new kinds of work, where the worker is not confined to working exclusively for one employer in one place, the award system as we presently know it, with its particular kinds of rostering requirements, will not be the most appropriate way of promoting decent working conditions and job security. That doesn't mean workers falling outside of the award system should not be entitled to fair treatment. New forms of regulation will need to be developed to accommodate the reality of contemporary working arrangements. This doesn't require demolition of the system that serves regular employment well. The modern award and enterprise bargaining systems need not be abandoned just because they do not accommodate a wider class of workers. These systems do, however, need supplementation by means to afford fundamental rights to all who participate as working citizens. This concept is perhaps best understood by first reflecting on the gaps in our current Fair Work system.

Gaps in the current system

The current Fair Work system (like the Workplace Relations system before it) leaves a significant gap in the effective regulation of all working relationships, for two essential reasons. First, most of its protections are available only to workers who fall within the common law definition of employment,[2] and this definition has proved to be too narrow to encompass new forms of labour engagement in the on-demand economy. Most Australian cases involving rideshare and food-delivery drivers, for example, have found that these workers are not

employees according to the common law test, even though they have worked long hours in the exclusive service of a platform that dictates their rates of remuneration.[3]

Even before the advent of platform-based gig work, the legal tests distinguishing between employees who do benefit from award wages and other conditions and independent contractors who are left to negotiate their own terms were being manipulated in ways that left some unskilled workers without minimum award conditions. See, for example, the case of Country Metropolitan Agency Contracting Services Pty Ltd v. Slater, where an employer purported to treat a seasonal tomato picker as an independent contractor and paid her less than award wages.[4]

Secondly, the *Fair Work Act 2009* (Cth) – in the main – imposes obligations only on the direct employers of employees. Single-business enterprise bargaining allows employers to avoid extending the terms of an enterprise bargain made with directly employed staff to contract labour engaged through labour hire agencies (see Chapter 8, describing enterprise bargaining). So it has become very common for workers undertaking the same work, on the same worksites, to be paid at different rates and to enjoy different conditions of work.[5] Labour-hire workers are typically engaged as either casual employees or independent contractors of the labour-hire agency, so they will not enjoy paid leave entitlements and may be paid significantly lower rates of pay than the direct employees of the host employer. This was especially apparent in the case of CFMMEU v. Personnel Contracting Pty Ltd,[6] where a young backpacker engaged on a construction site to perform unskilled tasks such as sweeping up after tradespeople was paid only 75 per cent of the wages he would have earned under the relevant award, and enjoyed no paid leave entitlements, because the labour-hire agency believed

it had engaged him on an independent contract. It took several years of litigation, all the way to the High Court of Australia, to determine that the labour-hire agency was mistaken and the contract was in fact a contract of employment.[7]

The young backpacker in this case was engaged on what is commonly known as an 'Odco contract', after the case of Building Workers' Industrial Union of Australia v. Odco Pty Ltd.[8] In that case, decided in 1991, the court held that tradespeople who were engaged on a particular contract were properly characterised as independent contractors and not employees. The terms of this contract were published in the report of the case and have found their way into many contracts ever since. The strategy of engaging workers on Odco contracts is now in doubt as a consequence of the High Court's criticism of the decision in CFMMEU v. Personnel Contracting Pty Ltd.[9] Nevertheless, in this case, and in ZG Operations Pty Ltd v. Jamsek,[10] the High Court affirmed that in Australia we look to the written contract made between the parties to determine the character of their working relationship, not to the underlying reality of their working relationship. So it is in the hands of hirers, and the lawyers drafting their contracts, to determine whether workers will be covered by our system of labour laws. It is not difficult for hirers to establish contracting arrangements that avoid employment.

Widespread use of contracting strategies (described by Emeritus Professor David Peetz as 'Not There' employment[11]) has contributed to the rise of precarious work in Australia, to the detriment of large sectors of the labour force and the Australian economy more generally. Census figures from 2016 indicated that about 25 per cent of workers hired as employees in Australia are engaged as casuals, and almost 1.3 million workers in Australia are independent contractors with no employees of

their own.[12] A more effective system of regulating work relationships would ensure that hirers cannot, simply by structuring contracts to escape any finding of a direct employment relationship, avoid meeting their obligations to those who labour in their service.

It is not impossible to devise a system that captures a wider range of working relationships. Work health and safety regulation already does this, to some extent.

Present measures dealing with regulatory avoidance

Australia's model Work Health and Safety (WHS) regime, described in Chapter 3, recognises the limitations of attaching obligations only to direct employment relationships by the innovative concept of the person conducting a business or undertaking (PCBU). WHS legislation extends responsibility for taking all practicable steps to ensure safe work for all participants in the workplace. PCBUs bear responsibilities to all workers who come within their control, including not only their own employees but also contractors, subcontractors, labour hire workers and volunteers.[13] Similarly, all workers in a workplace have a duty to take reasonable care for their own and others' safety and must cooperate with the PCBU in complying with safety requirements.[14]

Presently, the concept of the PCBU applies only in work health and safety regulation. Effective regulation in the broader field of labour relations requires a means of identifying all persons who influence the application of workplace standards (let's call them 'Influencers'). The obligations on Influencers need to be extended to each of the important pillars in our system – not only to meeting safety standards but to the provision of decent pay and conditions of work; respect for human dignity and rights at work; prevention of discrimination and harassment; and

support for job and income security. Precisely how Influencers should be charged with responsibilities in the case of each of these kinds of rights and interests will need to be developed according to the process of directed devolution explained in Chapter 2.

The proposal that all Influencers should bear responsibilities in a system of workplace regulation is not so radical as some might think. Our current laws already recognise that certain business practices can exacerbate the risks of regulatory avoidance and worker exploitation. For example, 'sham contracting' has attracted penalties since the enactment of the *Independent Contractors Act 2006* (Cth) and accompanying amendments to the *Workplace Relations Act 1996* (Cth) in 2006. These prohibitions on misclassifying employees as contractors, and firing employees in order to rehire them as supposedly 'independent' contractors, can now be found in the Fair Work Act ss. 357–359.

Following the 7-Eleven wage theft scandal and several other incidences of widespread non-compliance with minimum wage laws, the Federal Government enacted the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth). This legislation added some provisions to the Fair Work Act (ss. 557A–557C), holding franchisors liable for the breaches of their franchisees if they failed to take reasonable steps to prevent those breaches. It also held parent companies responsible for the breaches of subsidiaries under their control, on the same basis. These provisions complemented the existing accessory liability provision in section 550 of the Fair Work Act, allowing a claimant or the Fair Work Ombudsman to pursue any person who had knowingly aided or abetted a breach of the Act for penalties. For example, one accounting practice that influenced an employer's practice of underpaying staff by providing a flawed payroll system has been penalised under this provision.[15]

Supply chain responsibility

In some industries, our laws have developed the concept of supply chain responsibility, providing incentives for enterprises at the peak of supply chains to monitor compliance with labour laws by the intermediaries in the chain. Supply chain regulation operates on the assumption that the entity at the top of the supply chain exerts considerable influence on subcontractors' ability to meet obligations to pay the workers at the bottom of the chain and should therefore exercise that influence responsibly. An example of the way in which a client (or head contractor) can influence the terms and conditions of work at the base of a supply chain is illustrated by the circumstances leading to an enforceable undertaking given by Coles Supermarkets to the Fair Work Ombudsman (FWO) in respect of its tendering process for trolley collection services.[16] Coles had accepted tenders that set prices for trolley collecting contracts that would not allow subcontractors to profit unless they failed to pay award wages to the trolley collectors. The FWO alleged that Coles must be aware that the contract price for these services would not be sufficient to ensure payment of minimum wages to the collectors, so sought, and obtained, enforceable undertakings from Coles to ensure that its tendering process would not encourage underpayment of workers.

Legislation to impose obligations on head contractors to make payments to workers where the intermediary had failed to do so was first introduced by the *Industrial Relations (Ethical Clothing Trades) Act 2001* (NSW), which applied in the textile, clothing and footwear industry, well known for its exploitation of outworkers.[17] Other states followed suit[18] and there are now provisions in the Fair Work Act dealing with textile, clothing and footwear industry outworkers that impose obligations on 'indirectly responsible entities' to pay wages to workers if the direct employer has failed to do so.[19]

It would be valuable to extend supply chain responsibility to other industries typified by supply chains with vulnerable workers at their base. Although no legislation has been passed for other industries, the concept that Influencers in a supply chain should take responsibility for monitoring compliance with workplace laws in respect of the workers of subcontractors servicing their businesses has been adopted by an association of building owners. The Cleaning Accountability Framework operates on the basis that commercial property owners will accept a role in monitoring compliance with labour laws in respect of the cleaners who service their buildings. The cleaning industry is also one in which large clients tend to subcontract work to small service providers.[20]

Directors' and officers' liability

The WHS legislation, and the accessory liability provisions in the Fair Work Act, ascribe responsibility to directors and officers of corporate employers who oversee breaches of safety or workplace relations obligations. Imposing accessory liability on the managers who make decisions for a corporate employer is an important way to ensure that they take their safety and compliance responsibilities seriously – just as seriously as their responsibility to earn profit for shareholders.[21] For some decades now, corporate governance principles have recognised that directors and officers of corporations should take into account broader stakeholder interests when they consider their enterprises' activities. Some specific legislation has been enacted to ensure that company directors meet certain responsibilities. For example, the *Corporations Act 2001* (Cth) section 596AB makes it an offence for a company director to deliberately evade payment of employee entitlements. The most recent example of embedding a commitment to corporate social responsibility in our laws is

the enactment of the *Modern Slavery Act 2018* (Cth), which requires large corporations to monitor their supply chains to ensure that the corporation is not benefiting from, or adversely influencing, exploitative labour market practices in our own and other jurisdictions. So we are confident that our proposal to broaden the scope of responsibility for compliance to workplace law conforms with the spirit of the age by recognising the interconnectedness of enterprises in business network and by encouraging them to take their ethical responsibilities seriously.

Small-business regulation

A proposal to extend rights and responsibilities under workplace laws to all workplace participants is also compatible with earlier legislative measures extending rights to fair dealing to small-business operators. After several reviews of the trade practices legislation, and whether it was meeting the needs of small businesses in general[22] and of franchisees in particular,[23] the Howard Coalition Government enacted the *Trade Practices (Fair Trading) Act 1998* (Cth) to address a perceived problem in large businesses abusing their superior bargaining power over small businesses.

The franchising business model is particularly susceptible to the risk of unfair business practices. Franchisors usually require a substantial investment from franchisees to buy into the franchise. The franchisor typically owns all intellectual property rights in the business and imposes contractual obligations on franchisees to follow strict operations manuals in conducting the business. Franchisees are often restricted to operating in a particular territory, so their opportunity to profit by expanding the business is limited. Sometimes, franchisors require that franchisees purchase all supplies from the franchisor, and franchisors often fix the prices that franchisees can charge customers for goods and services. These

features of franchising arrangements mean that the franchisor exerts a great degree of control over the franchisee's capacity to profit from the business, while leaving the franchisee to bear most business risks. As part of the 1998 fair trading reforms, the government tabled regulations containing a mandatory Franchising Code of Conduct to impose a range of rights and responsibilities on parties to franchise agreements. This code (amended periodically over the years since 1998) is now found in the *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (Cth). Among other provisions, it includes an obligation that the parties act towards each other in good faith[24] and it stipulates some restrictions on franchisors' rights to terminate franchise agreements. If a franchisor wishes to terminate a franchise agreement, they must give the franchisee reasons for that decision, and reasonable notice,[25] and the franchisee has a right to contest the decision by bringing a dispute. Even where a franchisee has committed a breach of the agreement, the franchisor must provide written notice of the breach, and an opportunity to correct it, before the franchisor can terminate the agreement. If the breach is remedied, the franchisor cannot terminate for that breach.[26] Breach of these provisions attracts potential penalties.

The provisions protecting franchisees in the Franchising Code of Conduct demonstrate a commitment to ensuring a degree of fair dealing in business arrangements between those who exercise power and control and those who are vulnerable to potential abuse of that power. They were instituted by the Howard Coalition Government and maintained throughout subsequent years of both Labor and Coalition governments, so they demonstrate a bipartisan commitment, outside of the confines of employment regulation, to regulating for fair treatment of working people. Our proposal that the same fair treatment be afforded to other

non-employed workers, such as on-demand gig workers, is consistent with these measures. Of course, the current small business protections in the competition and consumer legislation have significant limitations. A new architecture for regulating work must address those limitations. Nevertheless, the measures demonstrate that a commitment to fair dealing beyond employment is compatible with contemporary aspirations.

Specialist regulatory regimes

Non-employed work has been a feature of the transport industry in Australia for many decades. When early court decisions found that owner–drivers were not employees and therefore escaped employment regulation,[27] state governments took steps to create specialist regimes to regulate this kind of work. The earliest such scheme is the New South Wales regime, first introduced into the *Industrial Arbitration Act 1940* (NSW) in 1979, and now in the *Industrial Relations Act 1996* (NSW), Chapter 6. That regime, discussed further in Chapter 11 of this book, provides for the making of contract determinations for owner–drivers. It has survived several changes of government and has enjoyed bipartisan support. It even survived potential extinction when the Howard Federal Government enacted the independent contractor laws overriding most state industrial laws dealing with independent contractors.[28] Victoria and Western Australia also enacted special transport industry legislation to afford owner–drivers certain protections from exploitative practices, notwithstanding that they are not employees of their hirers.[29]

Conclusion

Australia's current Fair Work system has some serious gaps in coverage caused by its focus on regulating only those work relationships that

classify as employment under the common law. We need broader coverage, especially in order to address the rise in precarious forms of worker engagement. Many such workers lack protection because they are classified as independent contractors. Where those workers are inappropriately classified as independent contractors, because they do in fact provide exclusive service to the one hirer, it makes sense to extend the coverage of the current award and enterprise bargaining systems to their engagement. Sometimes, however, workers will be engaged in new forms of work (such as platform-enabled gig work), where the worker can accept assignments from many work providers. This kind of work may need its own forms of regulation, tailored to the particular circumstances of the work arrangements and providing new means of ensuring decent remuneration for the work, as well as protection from hazardous working conditions, discrimination and harassment, and capricious dismissal.

These fundamental entitlements to decent working conditions should be available to all workers, including those who are genuinely engaged in independent contracting arrangements. Independent contractors do presently enjoy some legislative protections, such as the unfair contracts provisions in the *Independent Contractors Act 2006* (Cth) section 12 and the prohibitions on unconscionable dealing in the *Competition and Consumer Act 2010* (Cth),[30] but these measures are unsuitable for low-paid itinerant workers. They depend on an aggrieved worker initiating litigation in the Federal Court system. That system is expensive and slow, and hence of no use to those who need quick and inexpensive resolution to their grievances to allow them to return promptly to earning a livelihood. Australia needs a coherent and comprehensive system of labour regulation that provides access to inexpensive and effective dispute resolution, regardless of the particular contractual arrangements between the hirer and the worker.

In short, we need a system that recognises the obligations and entitlements of all participants, regardless of the form of the contract through which they engage in the labour market. We need a system that recognises the influence that a range of parties wield, one that holds all parties accountable for respecting the essential pillars of a fair system of labour regulation in the way they wield their influence. This doesn't necessarily mean extending the current system of awards and enterprise agreements to all kinds of worker engagement, but it does mean inventing appropriate means to ensure decent pay and working conditions, dignity at work and job security for all working citizens. Above all, we need to ensure that the most vulnerable workers in the system – those who earn the least from their labour – are protected by a fair safety net of wages and working conditions.

CHAPTER 10

The Economic Impact of the New Work Architecture

MARGARET MCKENZIE

This chapter provides some estimates of the economic impact of various specific reforms proposed in the AIER's new work architecture. The estimates are for impacts, mainly on GDP, of the reforms based on a literature search and standard methodologies applying ABS data.[1] The specific reforms investigated here have been limited to those where the impacts in terms of benefits and costs on wages, participation (in the labour market, employed and unemployed) and employment are more readily assessed from the standpoint of methodology and data availability. The analysis finds that the economic impact of each of these reforms is highly positive: conservatively, overall, more than a 6% increase to GDP can be expected, as well as more than a 6% impact on wages, at least 4 percentage points' increase in labour market participation and a 6% increase in employment.

It can confidently be said that any costs incurred due to regulatory and administrative changes would be far exceeded by the magnitude of these gains due to economies of scale (costs per unit output fall with a higher level of output), as in the case of multilevel bargaining, where there are clear savings.[2] Increased staffing costs of service provision (for example, childcare) arising from the reforms are estimated and shown to be far less than the benefit here derived. The reforms will enable employment of a more productive workforce, with a fuller utilisation of the skills and effort of

females and other categories of workers. The reforms will reduce staff turnover and assist an undisrupted accumulation of human capital, thereby improving business viability, productivity and profitability.

The other reforms set out in this book, which cannot be evaluated within the scope of such a publication, are no less important, and this is because they provide for the achievement of consensus needed to ensure the effective implementation of the reforms considered below. The unevaluated reforms also support productivity improvements that are reliant on the increases in health, morale, initiative and cooperation in the workplace. As is standard in economics, the impact of implementing the model is greater than the sum of its parts, with each reform serving to augment the benefits of the others for a larger benefit overall. For example, increasing workforce participation also increases income and spending, which would raise business profits as well as promoting wellbeing and equity.

The initial contribution to GDP is estimated by calculating changes in wages, participation and employment that would be expected to result from implementation of each reform, leading to proportional changes in aggregate income and GDP. The estimates assume that any increases in wages and employment would be realised under the conditions of persistent resource under-utilisation (idle capacity in the economy) that pertain in Australia, with high levels of unemployment, underemployment and discouraged workers (people who are not looking for work but want to work). In line with key literature, a Keynesian perspective is adopted, in that wage increases are not seen to reduce employment when there is unemployment but will instead stimulate spending.[3]

The estimates here are first-round estimates; they do not evaluate the effects of feeding into the economy increases in employment and income arising from increased spending (especially of lower-income households)

on goods and services, investment in capital goods, or productivity improvements over the longer term.[4] If these subsequent-round effects were also taken into account, the economic benefits would be higher. The subsequent effects on spending and income further ensure that increased wages are not an impost to employers, as can be seen in higher-waged, better-regulated economies.[5]

The benefits of these reforms would serve to reverse the decline in various productivity measures and other indicators of weakness in the Australian economy relative to other countries with better institutions. The weakness is shown in the trend downwards in Australia's real GDP growth per capita since 1998, at less than the average for the OECD and for the G7, and less than most of the Nordic countries from 2012 up to 2019 before COVID-19.[6]

The impacts on wages and employment would also reduce inequality, and that is not investigated here. For instance, improving wages for casual workers would lift lower wages proportionately more, which in turn would reduce the gender pay gap and improve income inequality generally. Also warranting investigation are the crucial less tangible gains that follow from improvements to income and employment, such as to wellbeing and morale.

Estimating the impacts of reforms

The reforms addressed here include:

- non-standard workers and contractors being given standard entitlements, including paid leave and job security (Pillar II)
- a more representative tribunal with greater focus and capacity regarding gender equality and gender-/minority-based pay gaps (Pillar III)

- introducing eighteen months' paid parental leave and universal free/affordable childcare (Pillar III; see also Pillar II)
- improving workplace cultures by adding a positive duty on employers to eliminate sexual harassment, discrimination and bullying (Pillar IV)
- introducing multilevel bargaining at multi-employer/sector/industry level. (Pillar VI).

Giving non-standard employees and contractors standard entitlements, including paid leave and job security

Moving casual employees and 'independent contractors' onto permanent rates of pay is likely to increase total wages by 3.2%, or about $24.5 billion initially, increasing workers' pay and adding 3% to GDP in first-round effects alone, with further increases due to the impact of the increase in consumer spending from those increased wages.

The increase from casual to permanent rates of pay would benefit some 2.6 million workers who were working as casual employees at February 2022.[7] This is around 24% of the workforce, or almost one in four workers, having increased from around 13% in the early 1980s to reach 24% by 1996.[8] In this analysis, the average hourly wages of casual workers were taken to be raised to match the average hourly wages for permanent workers. The hourly rate for permanent full-time workers is $45.20, or $10.25 more than the average rate for all casual workers ($34.95). Permanent part-time workers earn $38.06 per hour, 8.9% or $3.09 more than the average for all casual workers.[9]

The impact on total wages of raising casual wages to permanent levels is simply estimated by applying average increases to the total number of people who receive them. For workers without paid leave entitlements,

30.1% work full-time and 69.1% part-time.[10] If full-time casual workers increase their average hourly pay by 29.3% per hour to match that of full-time permanent workers, annual total wages would increase by $7.9 billion, while paying casual part-time workers the extra 8.9% per hour needed to reach the pay of permanent part-time workers would add an extra $5.6 billion in earnings. The addition to total wages from moving onto permanent rates of pay would be around $13.5 billion for the year, an increase of 15.1% in the wages for casual workers and a 1.8% increase in total wages for all employees.

An estimated one million 'independent contractors'[11] would be expected to be paid by award only casual rates, an average of $29.80 an hour.[12] Their rates of pay are assumed to increase to match those of permanent part time workers on EBAs at $40.40 an hour, and they are assumed to work an average of 20 hours per week (similar to the average hours worked by casuals on EBAs).[13] The increase in total wages per annum is $11.0 billion – a 36% increase in the earnings of around $30 billion for owner managers without employeess and about 1.4% in total wages across the economy.

More representative tribunals with greater focus and capacity regarding gender equality and gender-/minority-based pay gaps

More representative tribunals and other reforms would serve to reduce the gender pay gap (or GPG: the percentage point gap between female earnings and male earnings), which has proved particularly intractable.[14] The GPG is fed by Australia's particularly high gender imbalance across industries and occupations relative to other higher income countries, with a higher concentration of women in industries where casual and insecure work is predominant and with wider wage inequality.[15]

Addressing the GPG would reverse a trend that has seen Australia slip six places to fiftieth in the World Economic Forum's Global Gender Gap Index 2021 rankings, with the highest five rankings going to four Nordic countries followed by New Zealand.[16]

It is estimated that, if the GPG was closed by allowing the 5 million employees who are female[17] (or almost 50% of the total) to all receive an increase of 16.0% that corresponds to the total earnings GPG for full-time employees, the increase to total wages per annum for employees currently would be $48 billion, or 6.6%.[18] Including an estimated half-million female 'independent contractors' would add another $4.6 billion, for a total increase of $53 billion.

Eighteen months' paid parental leave and universal free/affordable childcare

Eighteen months' paid parental leave (PPL) and the provision of free childcare would lift Australia's policy, bringing it more into line with world's best practice in Sweden and the Nordic states and raising Australia's labour force participation. It is estimated that, if Australia's female labour force participation (unemployed and employed) increased by around 10 percentage points to match Sweden's at 70.4%[19], or by about one million women, then overall labour force participation would increase by more than 4 percentage points, with higher male participation adding further benefits. This would add around 900,000 to employment, increasing it by more than 6%, and increase GDP by least 6% – as much as $100 billion or more, well above the cost in terms of provision.

Considering free childcare specifically, in the direct calculation made here, offering (at no charge) additional childcare hours per month to those with children aged five and under who are not working but want to would

add nearly 200,000 non-participating persons to the labour force (80% of whom are female) and another 100,000 transferred from unemployment, thereby increasing total employment by about 2.3%.[20]

Providing free childcare is estimated to cost about $5 billion per year in government expenditure on childcare currently – more if numbers increase and/or standards improve (that is, if staff ratios, wages and training increase) – about an extra 0.25% of GDP and a very small impost on the government budget (of $628 billion in 2022–23).[21] This addition to costs is consistent with the impact of the period of free childcare on inflation that was seen in mid-2020, which assisted the real incomes of households with children[22] and added public spending of $2.6 billion for the three months.[23]

The increase in women's participation in Australia would reverse this country's catastrophic decline in international rankings for opportunity and participation[24] and its abysmally low ranks for PPL and childcare.[25]

Offering better PPL would address the highly gendered PPL take-up in Australia, where women account for 88% of all primary carer's leave utilised and men account for 12%[26], with women taking up 99% of private sector primary carer leave and men 99% of secondary carer leave.[27]

Free childcare would allow increased hours of work to almost a million people who wanted to work more hours; or who were unemployed and wanted work, were caring for children or other people's children including grandchildren – more than 80% of whom are female.[28]

Increased PPL and free childcare would address the findings of Dixon (2020) which modelled the outcomes of offering forty hours more childcare per month to the 450,000 parents and carers (80% women)[29] who had children aged five and under and who wanted to enter work or work

more hours. The extra forty hours of childcare per month would increase the hours worked by women by 1.9 per cent and the hours worked by men by only 0.4%, making for a 1% increase in total hours.[30] Applying a type of model that tends to conservative findings, Dixon found that the size of the childcare sector would increase by 12% and that by 2030 $15 billion (or 0.8%) per year would be added to GDP.[31]

In terms of the cost of provision of childcare, it is estimated that, if the staff numbers required were to increase proportionately to the increase in childcare hours (by 12%), this would add around 16,000 to the 130,800 people working in childcare and early childhood education in 2019.[32] The cost of provision of childcare in terms of total wages for childcare workers would increase directly from around $6.5 billion per annum to around $7.3 billion (or more if properly paid), or a tiny 0.04% of GDP.[33]

Improving workplace cultures by adding a positive duty on employers to eliminate sexual harassment, discrimination and bullying

Improving workplace cultures would address conditions in which as many as one in three workers are likely to have experienced bullying.[34] Workplace bullying has been estimated by the Productivity Commission to cost the Australian economy between $6 billion and $36 billion every year – this wide range indicating the ongoing dearth of data.[35] Better workplace cultures would counter survey results from the Australian Human Rights Commission (AHRC), which showed that 23% of women and 16% of men – some 1 million people – had been the victim of workplace sexual harassment in 2018.[36]

An indication of the benefits of improved workplace cultures is shown in a study by Deloitte which modelled the costs of sexual harassment. Deloitte included costs in its model that are not direct losses to GDP,

including use of the health system by those involved and pharmaceuticals prescribed to treat mental health conditions; the costs of employer-funded Employee Assistance Programs; and the costs of treating injuries for sexual assault victims. Also included were costs related to legal processes, such as the costs of complaints lodged with the AHRC or jurisdictional anti-discrimination agencies, for court cases, and for police investigations and penalties.

Deloitte found that, with an average weekly wage of $1,244 across the economy, each case of workplace sexual harassment represents approximately four working days of lost output. The largest loss of productivity – staff turnover (found in 10% of cases), 32% of costs – resulted in lost income to individuals, lost profits to employers and reduced tax paid to government. Significant losses also resulted from absenteeism (28% of costs) and manager time (24% of costs). Costs included '$2.6 billion in lost productivity, or $1,053 on average per victim, and $0.9 billion in other costs, or $375 on average per victim, with lost wellbeing for victims of actual or attempted sexual assault at a total of $249.6 million, or $4,989 on average per victim.'[37]

Introducing multi-level bargaining at multi-employer/sector/industry level. (Pillar VI)

Multilevel bargaining would reverse the consequences of restricting collective bargaining to the individual enterprise level, which appears to have been key to slowing Australia's wage growth over recent decades, including relative to other comparable countries. Over the decade or so since the *Fair Work Act 2009* (Cth) was introduced, there has been no growth at all in real wages. At the December quarter 2021 average compensation per worker of $1,647 was still only just above the March

quarter 2012 of $1,643 in 2021 dollars, always lower except for the spike at June 2020 of $1,694.[38]

Multilevel bargaining can address the low wage growth which the federal Treasury,[39] the Reserve Bank of Australia (RBA)[40] and other stakeholders have identified as a key constraint on the economy. Labour market tightening has been continually posited as the solution to low wage growth, yet lower unemployment has not worked.[41] The RBA has noted the contribution of low wage increases in EBAs.[42]

Introducing multiple-level bargaining would remove the restriction of bargaining to the single enterprise–only level that has been operating over the last two decades[43], in particular allowing employers to avoid the coverage of their workers by EBAs.[44] It would address the problem that, 'Unfortunately, under Australia's more American-style, enterprise bargaining system, labor union density has been in steep decline, bargaining coverage has fallen, inequality has risen sharply, wage growth has begun to stagnate, the middle class has weakened and economic growth has worsened.'[45]

Introducing multilevel bargaining would also reduce inequality, as illustrated by ILO cross-country data in which higher collective bargaining coverage is associated with lower inequality.[46]

Multi-level bargaining would reverse the effect of enterprise bargaining in incentivising business models of labour supply through outsourcing. It would limit employment via third party employers which can operate without bargained agreements and where union access has been rendered legally and technologically difficult. The current use of these arrangements has left more than 3 million workers who have only award protection or are in sham contracts and who are therefore vulnerable to poor conditions and wage theft.[47]

The effect of collective bargaining in general is shown by our estimation that paying workers by award and on individual arrangements at the higher rates paid in collective agreements (even though currently bargained at enterprise level) would yield an extra $68 billion, or 9.1 per cent of total annual wages for all employees: around 3.4 per cent of GDP (of just over $2 trillion) for 2020–21. This can be compared with a gross operating surplus of $576.6 billion for total corporations for 2020–21.[48]

The percentage increase needed to reach collectively bargained wages (even enterprise-bargained) was calculated for the 2.7 million workers in total who are paid by award only, and for the 4.1 million paid by individual arrangement at May 2021.[49] Average weekly total cash earnings for full-time workers on 'collective agreements' were a large $600 more than for those paid by award only, while full-time workers paid by 'individual arrangement' received $74 more. The increase in total wages was calculated on the basis that full-time workers paid by award would need an increase of 46.5 per cent in their average weekly total cash earnings in order to match those on collective agreements, while part-time workers would need a surprisingly similar increase of 44.9 per cent.

Self-evidently, removing restrictions on multilevel bargaining to allow bargaining at an industry, and even national, level would help bring more workers onto collective agreement rates. If collective bargaining at a multilevel achieved a modest 1 percentage point increase per annum above enterprise bargained wages, it is estimated that it would add $18 to the weekly wages of full-time workers on collective agreements. Key stakeholders have advocated wage increases as a means to address slow rates of growth in the economy. While it is understood that wage increases could be inflationary, this is less likely to be an issue when there is unemployment in the economy and it is growing as a result of the

increased spending. Clearly the factors underlying inflation are complex, including those related to trade and labour shortages in the supply chain, which would be alleviated by wage increases.

Conclusion

As this chapter has described, the proposed reforms would provide significant economic benefits. These benefits are likely to far outweigh the costs of regulation or provision. This is in a context where there have been restrictions on multilevel bargaining for more than two decades and worker protections have been eroded. The lifting of wages and employment would serve to reverse Australia's increasing lag behind other comparable countries in terms of economic and social performance, and address widening inequality by raising incomes and work participation, in particular for lower-waged workers and females.

In summary, the estimated effects of the reforms in the first instance are:

- to provide permanent rates of pay to casual employees and 'independent contractors', estimated here to increase total wages by 3.2% (or about $24.5 billion) initially, adding 3% to GDP
- to improve labour force participation by providing 18 months of paid parental leave and free childcare, estimated here to increase employment by up to one million and increase total income by up to $100 billion, or as much as 6% of GDP, with free childcare estimated to cost about $5 billion more per year in government funding and closing the GPG by lifting female wages estimated to add more than $50 billion to the economy
- to pay higher collective agreement rates of pay to workers paid by award and to 'independent contractors', estimated here to add $68 billion, or 4% of GDP.

It has been reported that improving workplace culture through addressing sexual harassment would save an estimated $2.6 billion, and bullying has been reported to cost as much as $36 billion per annum.

CHAPTER 11

Transition

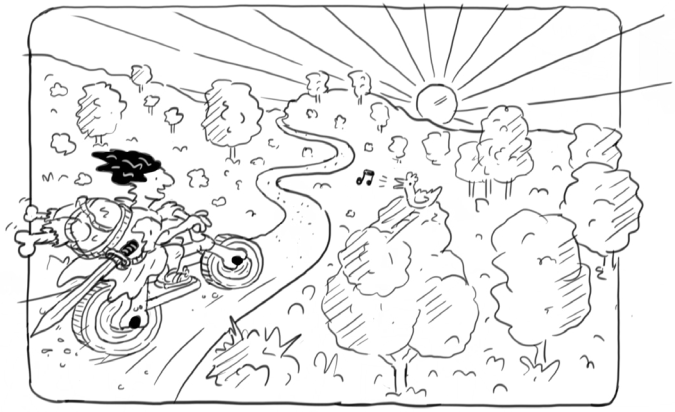
PAUL MUNRO AM & DAVID PEETZ

As we move to a more comprehensive architecture of work relations, one remaining question concerns how the policy details in the model would be developed through a transition period. Answering this question takes us back into the lessons of history. In this chapter, we show how system-wide implementation benefits from an effective national consensus. We discuss how broad consultation fostering investigative discussion with stakeholders across industries and policy forums and promotion of public understanding are pivotal to building momentum for change. In a sense, we extend the concept of 'a fair go all round' discussed throughout this book, from an objective of the system to the process of its implementation – one that includes all stakeholders.

Later in this chapter, we consider how a consensus approach can be married with the idea of directed devolution that was discussed in Chapter 2. We focus on those provisions of the New South Wales Industrial Relations Act that regulate conditions for owner–drivers of trucks.

Building from existing models

Our work architecture proposals call for substantial structural reform. They require a supportive consensus extending across Commonwealth, state and territory jurisdictions. Innovations at enterprise levels may advance some elements of the model; however, system-wide implementation builds on effective national consensus. Guidance for bringing about reform on the scale proposed can be found in the processes assembled



to secure adoption of uniform health and safety legislation for Australia modelled on Robens (summarised in Chapter 3).

Another source of guidance on how to transform policy settings, legislation and institutions can be found in Australia's two great economic reform programs of the twentieth century. Those programs were post-war reconstruction from 1944 and the Hawke–Keating administrations' changes to the Australian economy from 1983. Each set of reforms was driven primarily by perceptions of crisis: in the 1940s, the need for national purpose to address post-war economic stagnation; in the 1980s, the need to address recovery from the recession of 1982 and industry stagnation. Likewise, in the face of a global pandemic and disruptive climate change, modern society demands rescue from crisis, yet it must avoid reversion to old, depressed conditions and settings.

There were several common elements in the processes that led to legislative, institutional and budgetary changes implementing those recovery policies. We can examine the collective histories of post-war reconstruction successes and failures and the associated career of the main architect, H C Coombs.[1] A Coombs model, repeatedly adopted by him, started with the development of policy in disciplined isolation

from operational administration. The White Paper 'Full Employment in Australia'[2], as well as the four commissions of investigation and report established by the Secretariat of Post War Reconstruction, instance policy formulation as a distinctively discrete phase. Intrinsic to that process was a senior college of policy expertise. Its work was informed and tested through wide-ranging consultation, at times using an ad hoc investigative and reporting agency. Policy formulation through that process had the functional advantage of widening community and stakeholder understanding of the issues involved. That interaction helped build consensus for the next phase of the process: implementation of the required structural framework and principles. The appropriate department or agencies had carriage of that phase. Transitions to devolved activity, to apply and enforce the resulting system and evaluative checks, were a third phase, constituting the developed and evolving work of the structure and its participants.[3]

The Prices and Incomes Accord, developed from 1979 through to early 1983, and the 1983 National Economic Summit Conference were widely acknowledged as key parts of the process for developing and implementing an array of Hawke administration policies.[4] Through the 1983 Economic Summit Communiqué, that policy instrument was stamped with approval and shielded by a consensus.[5] Core policy formulations evolved from protracted gestation through high-level economic policy deliberations. Adopting recovery and reconstruction policies developed by Bill Hayden and his advisers, Bob Hawke added the reconciliation theme spelt out in his 1979 Boyer lectures.[6] Before entering parliament in 1981, Hawke had been a member of the Reserve Bank board from 1973 to 1981, a position that influenced his thinking. His views also were substantially shaped by 'his membership of two key government-established industry inquiries, the

Whitlam Government's Jackson Committee and the Fraser Government's Crawford Committee'.[7]

Experience suggests that the best chance for successfully implementing a devolved architecture for work relations will proceed from widely tested distillation of key policy elements. This publication starts the process. The initial focus should be on broadening consultation and fostering investigative discussion with stakeholders across industries and policy forums. Promotion of public understanding must be seen as pivotal to building momentum for the changes proposed.

Integrating consensus with directed devolution

An example of how the consensus approach can be married with the concept of directed devolution is provided through consideration of what is now Chapter 6 of the *Industrial Relations Act 1996* (NSW). As far back as 1979, the New South Wales Parliament legislated to allow the New South Wales Industrial Relations Commission (NSW IRC) to regulate minimum terms of contracts for owner–drivers of trucks and other 'contract carriers'. This legislation, which remains in place, has had implications for safety, with various ideas for extending the model to gig economy workers in other industries and jurisdictions.

The legislation enables the NSW IRC to issue 'contract determinations' that specify minimum standards for covered workers. These are analogous to awards in labour regulation. The NSW IRC can also approve contract agreements, which are analogous to collective agreements in labour regulation and between owner–drivers and firms. These contract agreements are exempt from competition law restrictions.

The road transport industry has long experienced high rates of contractor work ('owner–drivers') and has been characterised by low pay,

incentives to drive fast and skip breaks, fatigue, use of drugs or stimulants, overloading, long working hours, poor safety, high debt and insolvencies. Chapter 6 of the Act has sought to redress these problems. It has not solved them but it has moved towards a solution, in no small part due to its longevity.

Its longevity is not least because the relevant union, the Transport Workers' Union (TWU), had long had reasonable links with owner–drivers. Indeed, it had originally been formed as a union of mostly self-employed carters (the Federated Carters and Drivers' Industrial Union, registered in 1906). In the 1970s, the TWU was able to persuade a state Labor government that the numerous owner–drivers in New South Wales were vulnerable and warranted regulation. However, successive conservative ('Liberal') governments have not sought to repeal it. The New South Wales conservative government has traditionally supported Chapter 6 of the Act. It was the last government to amend it positively by introducing a means of dealing with disputes over goodwill. Even when the idea of regulation of owner–driver conditions was under threat in 2016 (due to political mobilisation against the federal Road Safety Remuneration Tribunal), the New South Wales Government vowed not to touch the system as it realised it was a natural constituency (small-business owner–drivers) that was benefiting from it. The owner–drivers themselves, many of whom see themselves as entrepreneurs and risk-takers and who want to avoid what they might see as the strictures of the employment relationship, are attracted to the narrative associated with this form of regulation. There are shared interests to a certain extent among some transport operators – businesses that would otherwise be pressured to contract out work in response to competition from low contracting practices or rates.

An indicator of this model's ability to attract consensus support was the fact that the model gained exemption from the operation of the federal Independent Contractors Act, which constitutionally would have rendered the New South Wales legislation worthless, and this exemption was gained from a federal Liberal government.

The NSW IRC is not officially directed to establish rates that are equivalent to the award rate but in practice it has behaved as if it intended to do so. Hence, the system has ensured that employees and owner–drivers are comparable in terms of price, such that one model does not undercut the other. This is achieved by linking the adjustment to the labour rate component of owner–driver rates in the relevant contract determination to the adjustment to the federal modern award and then building cost recovery on top. Most employers see the value in this approach, rather than having to change business models every time one form of engagement is cheaper than another. The labour rate was originally linked to the Transport Industry (State) Award that covered all drivers in New South Wales. This continued to be the case even after WorkChoices, as this award provided a higher rate than the modern award and continued to rise every year through the State Wage Case, but the union abandoned it in 2016–17 in order to link to the modern award, which had become more attractive.

Conclusion

The industrial relations notion of 'a fair go all round' was coined to emphasise the centrality of fairness. The notion meant weight should be given to factors surrounding the employment, rights and reasonable expectations of the parties.

The proposals advanced about a new architecture for work relationships seek to secure an approach founded on balanced participation, assessment

of interests affected and respect for fairness in achieving outcomes. The proposed architecture aims to resolve a wide range of issues and conflicts that demand urgent remedial action. The more there is broad involvement in that process, the better the chances of good outcomes.

It will be no easy matter to reform the existing system. In this chapter, we have canvassed ways to progress an agenda of change. The difficulties anticipated should not discourage development of initiatives directed to improving or rebuilding structures.

The system receives consensus support, having survived for more than four decades, with several changes of government. While broad involvement of all stakeholders in system design is desirable, it remains the case that not all forms of directed devolution will attract consensus support. A good model should not be rejected solely because it lacks consensus support. The key feature is that a model allows appropriate solutions to be found to the problems that are specific to a sector or industry. However, a form of directed devolution will be more likely to survive for a long period if it has the support of a wide group of stakeholders.

Conclusion

RON MCCALLUM AO

It is clear to most observers that Australia's labour law mechanisms are broken. Wages have stagnated; enterprise bargaining has diminished in importance and utility; and workers such as contractors, who are not running businesses, and gig economy workers find themselves largely shut out of the major tenets of employment law. Women find themselves subject to harassing behaviour in workplaces, and persons with disabilities, older Australians, and members of the LGBTIQ+ community are still discriminated against. The recent pandemic; the war in Ukraine, which has affected resources and supply chains; and changes in technologies have all exacerbated the problems with our system. Put plainly, Australia's network of labour and employment laws and practices has failed to give the participants – especially employees, workers and small-business owners – a fair go all round, a principle that used to ground our labour laws in earlier times.

It is my honour to be a patron of the Australian Institute of Employment Rights because its Charter of Employment Rights does show us a way forward. I have spent my entire adult life of more than half a century as an academic and a practising labour lawyer. In all that time, I have never seen our laws to be so unresponsive to the present situation in which Australia finds itself. Put another way, the laws lack the fairness that is a hallmark of good and appropriate labour legislation.

This small volume written by twelve contributors charts a possible way to better harmonise our laws and practices so as to ensure a fair go

all round for Australia's labour relations participants. The chapters are products of consultation and discussion in which the key issues have been thrashed out.

The introductory chapter written by James Fleming described the problems with our present system of laws and practices in some detail. James also set out in diagram form, with detailed illustrations by Stephen Mushin, the metaphor of a building with a foundation, a roof, six pillars and participants to describe the path to a broader and more inclusive regulatory system.

Michael Harmer recounted the foundation of the new system in Chapter 1 by arguing that it needs to be underpinned by notions of fairness, or to use a colloquial Australian phrase, by ensuring a 'fair go all round' for all participants. In its objects, the *Fair Work Act 2009* (Cth) speaks eloquently about fairness. For example, section 3(b) says that our 'workplace relations laws should be…fair to working Australians'. Yet, as the chapters in this book point out, many people are treated rather unjustly by our labour laws. In this context, fairness is not a philosophical concept. Rather, fairness requires our labour laws to ensure that all participants are able to achieve fair industrial relations outcomes, as well as complying with mandatory standards.

The roof, with its institutions, search for justice and appropriate enforcement, was discussed by Emeritus Professor David Peetz in Chapter 2. His central idea is that of directed devolution, where the day-to-day responsibilities of places of work are devolved with appropriate guidance to the workplace participants. What is required is a new and a truly independent tribunal to give fair and appropriate guidance.

The six pillars are set forth in the subsequent six chapters. The Robens philosophy that underpins our workplace health and safety laws, which is

a form of directed devolution, was described by me in Chapter 3. Pillar two, concerning work and security, is the subject of Chapter 4 by James Fleming. Professor Marilyn Pittard unpacked core labour standards and renumeration, including the gender gap in wages for women, in Chapter 5. The ever-present issues of discrimination, harassment and bullying – pillar four – were discussed in Chapter 6 by Professor Anna Chapman. She suggested more appropriate methods of dealing with these atavistic attitudes, which still permeate many places of work. Fairness requires that persons who are discriminated against or are harassed should have access to straightforward and prompt remedies.

Workplace participation, which is known as voice at work, was outlined by Mark Perica in Chapter 7. The gamut of mechanisms, from employee consultation to works councils, is set out here. Again, fairness requires consultation and discussion between persons conducting business undertakings and all persons who undertake work in the business.

Australia's form of rather narrow enterprise bargaining has failed businesses and workers alike. In Chapter 8, this final pillar was examined by Keith Harvey and Ben Redford. They show that more appropriate methods of bargaining at industry or sectoral levels may bring about more appropriate outcomes for all participants. Fairness and the principles of freedom of association require that trade unions and employers' associations are entitled to participate in collective bargaining. Professor Joellen Riley Munton unpacks all of the labour relations participants in Chapter 9. While the employer–employee nexus used to cover most workers, the current terrain largely limits or excludes some forms of casual employment, contractors, and consultants of all kinds. A new system needs to cover all persons undertaking work in places of work. The economic benefits of the new system were discussed in Chapter 10 by

Dr Margaret McKenzie. Finally, in Chapter 11, the Hon. Paul Munro and Emeritus Professor Peetz carefully charted the transition forward – or if you like, how we can construct this building.

We contributors have diverse experience, which has shaped our outlooks and inclinations. In other words, we each have different voices. Yet, after much discussion and indeed some soul searching, we have agreed on a way forward. We hope this book will spur further debate and discussion amongst politicians, trade unions, employers' associations, corporations, employees, workers and the public to ensure that appropriate changes to our labour laws and practices make them fit for purpose throughout the next half century.

Appendix: Major Reforms

Listed here are some of the major reforms discussed in this book and the problems they address.

Pillar/Area	Key Problems	Key Reforms
The Foundation/ Overall system	– The system is unfair and leaves out some groups – Overly complex prescriptive regulation, inaccessible tribunal, low level of compliance – System is cumbersome, slow and inefficient	– A directed devolution system presided over by a national tribunal with a broad mandate and subsidiary bodies (more centralised, more universal application to workers, combination of centralisation and decentralisation) – Robens-style devolution of responsibilities to participants to implement objectives, and hence increased adaptability to change – Improved transparency and streamlined processes

Pillar/Area	Key Problems	Key Reforms
The Roof	– Unbalanced tribunal – Complex, fragmented and prescriptive industrial relations system that leaves out some groups	– Balanced tribunal re representation of employers/ employees, men, women and different groups – More comprehensive national tribunal plus subsidiary bodies dealing with detail and covering contractors and gig workers
	– High level of non-compliance with minimum wage laws and labour standards	– More effective enforcement via better-funded and incentivised inspectorate
Pillar I – Health and Safety and the Environment	– Not enough personal responsibility, lack of voluntary constructive action at work to uphold standards – Lack of safety committees in smaller workplaces; more small workplaces – Lack of firm initiative to address impact of climate change and pandemics on WHS and on firm output	– More safety committees in smaller workplaces – More voluntary workplace engagement and cultural change re safety – Committees to address impact of climate change on company WHS and on production processes and output
Pillar II – Work and Income Security	– 40% of employees in non-standard work and contractors have lower rights	– Non-standard workers and contractors to be given standard entitlements, including paid leave, job security or equivalent, including via a Swedish-style social services fees system for all workers

Pillar/Area	Key Problems	Key Reforms
Pillar II – Work and Income Security (cont.)	– High level of persistent unemployment and underemployment	– Policies to promote full employment
	– Income and wealth inequality and insecurity	– Universal basic income and capital
	– Lower female workforce participation than in Nordic countries	– 18 months' paid parental leave and universal free or affordable childcare (see also Pillar III)
Pillar III – Fair Standards and Remuneration	– Gender inequality, gender pay gap, indigenous pay gap and inequality of pay in other groups	– A more representative tribunal with greater focus on and capacity for addressing gender equality and gender/minority-based pay gaps – 18 months' paid parental leave, and universal free or affordable childcare (see also Pillar II) – Menstrual and menopause leave, and leave for fertility treatments, hysterectomies, vasectomies, and therapies for gender affirmation
	– Inadequate rights to flexible work, overwork due to workers being contacted after hours, lack of overtime for non–award covered workers in the NES – Wage stagnation	– Clear right in the NES to flexible work rather than a right to merely request it, right to switch off from work, overtime pay for non-award covered workers – Wage-setting criteria to better emphasise needs of the low paid and de-emphasise macro-economic effects

Pillar/Area	Key Problems	Key Reforms
Pillar IV – Addressing Harassment, Discrimination and Bullying at Work	– Sexual harassment, discrimination and bullying laws fragmented, complex and overwhelming, overly technical and marginal to where work is performed	– More coherent, consistent, simpler laws with one national body setting standards and subsidiaries elaborating at industry level – Bring this to the core of the broader 'fair go' standard
	– Continued existence of sexual harassment, discrimination and bullying continue to exist and without decline	– Add positive duty on employers to eliminate sexual harassment, discrimination and bullying as part of 'fair go all round' requirement, unless this causes unjustifiable hardship
	– No public enforcement body for anti-discrimination law	– Establish a public enforcement agency and allow trade unions to inspect suspected breaches – 'Fair go' committees with powers of enforcement

Pillar/Area	Key Problems	Key Reforms
Pillar V – A Fair Say All Round	– Lack of workplace participation, representation and workplace democracy	– Fairness committees, and minimum standards that promote greater workplace participation, representation and workplace democracy – Increased participation and consultation rights – Greater freedom of association and freedom of expression (including worker consultation groups that are fairly chosen and genuinely representative) – Capacity-building by unions and the state – Enhanced participation and representation through enhanced collective bargaining through multilevel bargaining – Digital spaces for participation and democracy in the gig economy – Work councils (subject to initial testing) – Worker representatives on boards

Pillar/Area	Key Problems	Key Reforms
Pillar VI – Bargaining in the New Work Architecture	– Collective bargaining (especially shift to enterprise bargaining) has not met its objectives – Collective agreement rates have declined (partly due to exclusion of unions) – Workers are not sharing in productivity gains – Economic growth has declined – Enterprise bargaining is inefficient and resource intensive, and the main economic power is often excluded from negotiation – Poor outcomes in de-unionised/gig/outsourced economy – Surface bargaining	– Introduce multilevel bargaining at multi-employer/sector/industry levels – Expand system to include non-employers and economic powers in the supply chain – Enhance good faith bargaining requirement to avoid surface bargaining
The Participants	– System is not universal (leaves out non-employees and only includes direct employers) – Leads to regulatory avoidance, inequality, lack of safety	– Expand the participants covered by the work relations system to all people who influence the application of standards, extend responsibility across the supply chain, and extend director and officer liability and franchisor liability

Pillar/Area	Key Problems	Key Reforms
Transition	– Implementing work relations changes is difficult and contested, and changes are often short-lived	– Apply the principle of a fair go all round and lessons from history in implementing the new system – Broad consultation and investigation should be used to build momentum and wide support to ease the transition and create support for a stable system over time, even if not all elements achieve consensus support

Notes

Introduction

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45 WHSA NSW, s. 50.

46 WHSA NSW, s. 64.

47 WHSA NSW, s. 72.

48 WHSA NSW, s. 68(1).

49 WHSA NSW, s. 84.

50 WHSA NSW, s. 85(1).

51 WHSA NSW, s. 85(2).

52 WHSA NSW, s. 85(3).

53 WHSA NSW, s. 90(1).

54 WHSA NSW, s. 90(2).

55 WHSA NSW, s. 90(3).

56 WHSA NSW, s. 76(1).

57 WHSA NSW, s. 76(4).

58 WHSA NSW, s. 77(1)(a).

59 WHSA NSW, s. 77(1)(b).

60 See, for example, *Workplace Health and Safety Regulation 2017* (NSW).

61 Richard Johnstone & Michael Tooma, *Work Health and Safety in Australia: The Model Act* (Sydney, The Federation Press, 2012), p. 189.

62 David Walters & Theo Nichols (eds), *Workplace Health and Safety: International Perspectives on Worker Representation*, (London, Palgrave MacMillan, 2009).

63 Michael Tooma, *Safety, Security, Health and Environment Law* (Sydney, The Federation Press, 3rd edn, 2019). Tooma's focus is primarily upon the synergies between health and safety law and security law.

64 WHSA NSW, s. 19.

65 Victoria Prosecuting Government Over Quarantine Failures', *Workplace Express*, 29 September 2021. See *Occupational Health and Safety Act 2004* (Vic), s. 21(1).

66 *Kassam v. Hazzard; Henry v. Hazzard* [2021] NSWSC 1320, Beech-Jones J. An application has been made to seek leave to appeal to the High Court.

67 *Public Health Act 2010* (NSW), s. 7(2).

68 *Kassim v. Hazzard; Brown v. Hazzard* [2021] NSWCA 299.

69 *R v. Darling Island Stevedoring and Lighterage Co. Ltd*; ex parte Halliday (1938) 60 CLR 301.

70 *Construction, Forestry, Maritime and Mining and Energy Union Mr Matthew Howard*

v. Mt Arthur Coal Pty Ltd T/a Mt Arthur Coal [2021] FWCFB 6059.

71 WHSA NSW, ss. 47–9.

72 Jeff Tollefson, 'Why Deforestation and Extinctions Make Pandemics More Likely' (2020), *Nature* 584. pp. 175-6.

73 Tord Kjellstrom et al., 'Heat, Human Performance, and Occupational Health: A Key Issue for the Assessment of Global Climate Change Impacts', *Annual Review of Public Health* (2016), 37(1), p. 97; see also Darryn Snell & Peter Fairbrother, 'Toward a Theory of Union Environmental Politics: Unions and Climate Action in Australia', *Labor Studies Journal* (2011) 36(1), p. 83.

Chapter 4 – Pillar II

1 Guy Standing, 'The Precariat: Today's Transformative Class?', *Development* (2018), 61(1–4), pp. 115, 120.

2 Guy Standing, *The Precariat: The New Dangerous Class* (Bloomsbury Academic, 1st edn, 2011), p. 10; Guy Standing, 'Economic Insecurity and Global Casualisation: Threat or Promise?', *Social Indicators Research* (2008) 88(1), pp. 15, 17.

3 Figures as at 2013: see OECD, *In It Together: Why Less Inequality Benefits All* (OECD, 2015), oecd-ilibrary.org/employment/in-it-together-why-less-inequality-benefits-all_9789264235120-en, figure 4.1.

4 See, for example, Paula McDonald, Penny Williams, Andrew Stewart, Robyn Mayes & Damian Oliver, *Digital Platform Work in Australia: Prevalence, Nature and Impact* (Queensland University of Technology, 2019).

5 Inga Laß & Mark Wooden, 'Trends in the Prevalence of Non-Standard Employment in Australia', *Journal of Industrial Relations* (2020) 62(1), pp. 3, 4; see also Guy Standing, 'Economic Insecurity and Global Casualisation: Threat or Promise?' *Social Indicators Research* (2008) 88, pp. 15–30.

6 Sharon F Matusik & Charles W L Hill, 'The Utilization of Contingent Work, Knowledge Creation, and Competitive Advantage', *The Academy of Management Review* (1998) 23(4), pp. 68.

7 See Erica Di Ruggiero et al., 'Competing Conceptualizations of Decent Work at the Intersection of Health, Social and Economic Discourses', (2015) 133 *Social Science & Medicine* 133, p. 120.

8 ILO, *Decent work. Report of the Director General*, Report I-AI, International Labour Conference, 87th Meeting, Geneva (June 1999).

9 ibid.

10 See the 1944 Declaration of Philadelphia, incorporated in the ILO's constitution: ILO, *Constitution of the International Labour Organization* and *Standing Orders of the International Labour Conference* (26th Session).

11 See Karl Polanyi, *The Great Transformation* (Farrar & Rinehart, Inc., 1944).

12 See also Thomas Piketty, *Capital in the Twenty-First Century*, trans. Arthur Goldhammer (The Belknap Press of Harvard University Press, 2017).

13 Polanyi was writing in 1944 so does not talk of the 'welfare state' per se, which was just being established in many Western countries, but of the proto-welfare state elements he saw emerging.

14 See also Thomas Piketty, *Capital in the Twenty-First Century*, trans. Arthur Goldhammer (The Belknap Press of Harvard University Press, 2017).

15 See, for example, Roger Backhouse & Bradley W Bateman, *Capitalist Revolutionary John Maynard Keynes* (Harvard University Press, 2011).

16 Joanne Loundes, 'A Brief Overview of Unemployment in Australia', Melbourne Institute Working Paper No. 24/97 (Melbourne Institute of Applied Economic and Social Research, 1997).

For example, women's workforce participation in Sweden in 1966 was 55.1%, rising to 75.3% in 1980. In Australia, it was still at 43.4% in 1969 and only 52.0% in 1980. Source: OECD.Stat, data extracted 22 March 2017.

18 J M Keynes, 'Economic Possibilities for Our Grandchildren (Afterword by D Shestakov)' (2009 [1930] (6) *Voprosy Ekonomiki*, p. 60.

19 See Richard Cockett, *Thinking the Unthinkable: Think-Tanks and the Economic Counter-Revolution 1931–1983* (HarperCollins, revd edn, 1995).

20 ibid.

21 Arne L Kalleberg & Steven P Vallas (eds), 'Probing Precarious Work: Theory, Research, and Politics', *Research in the Sociology of Work* (Emerald Publishing Limited, 2017).

22 Tejaswini Ganti, 'Neoliberalism', *Annual Review of Anthropology* (2014) 43(1), p. 89.

23 ibid.

24 See David Harvey, *A Brief History of Neoliberalism* (New York, Oxford University Press, 2005, 2011) for a description of neoliberalism's rise as a hegemonic ideology.

25 For an excellent overview, see *Journal of Australian Political Economy* (2018), Special Issue – Labour's Declining Share and Economic Inequality in Australia, p. 18.

26 Australia had the third-highest levels of non-standard work in the OECD in 2013:

Laß, Inga & Mark Wooden, 'Trends in the Prevalence of Non-Standard Employment in Australia' (2020), 62(1) *Journal of Industrial Relations,* pp. 3, 4.

27 ibid, pp. 601–602.

28 For an excellent overview, see *Journal of Australian Political Economy* (2018), Special Issue – Labour's Declining Share and Economic Inequality in Australia, p. 18.

29 op. cit., p. 117.

30 See Ulrich Beck, *The Brave New World of Work* (Polity Press, 2000); Ulrich Beck,

Risk Society: Towards a New Modernity (Sage Publications, 1992).

31 Iain Campbell, 'Casual Work and Casualisation: How Does Australia Compare?', *Labour & Industry: A Journal of the Social and Economic Relations of Work* (2004) 15(2), p. 85.

32 See Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Polity Press, 1990).

33 Quoted in Justin Fox, 'The Comeback of Keynes', *Time*, 27 January 2009; Robert Skidelsky, *Keynes: The Return of the Master* (Public Affairs, revd and updated 2010), p. xvi.

34 See AIER submission on the Fair Conduct and Accountability Standards for the Victorian On-demand Workforce, 15 February 2022. Available on request from AIER.

35 More comprehensive unemployment insurance is provided through unemployment funds, often run by unions, for workers who pay an additional small membership fee.

36 Generally, temporary employees must be made permanent after working twenty-four months for an employer in any five-year period. This might soon be reduced to eighteen months, given recent negotiations between trade unions and employer groups about amending Sweden's *Employment Protection Act (Lag om anställningsskydd* 1982: 80).

37 That is not to say temporary employment is still not overused in Sweden, but its effects are less detrimental than in Australia, which, considering both the extent of casual employment and the lack of associated entitlements, is the worst in the OECD and more closely resembles the state of temporary employment in developing countries. See Iain Campbell, 'Casual Work and Casualisation: How Does Australia Compare?', *Labour & Industry: A Journal of the Social and Economic Relations of Work* (2004) 15(2), p. 85.

38 Automotive manufacture ensures a significant technology and skill base and has flow-on effects in other industries. Many car industries around the world are partly state-owned and/or -subsidised, such as in France. The loss of the car industry due to the withdrawal of the state in Australia is unfortunate.

39 Juliana Uhuru Bidadanure, 'The Political Theory of Universal Basic Income', *Annual Review of Political Science* (2019) 22(1), pp. 481, 482.

40 op. cit., p. 482; Julian Le Grand, 'A Springboard for New Citizens: Universal Basic Capital and a Citizen's Day', *LSE Public Policy Review* (2020) 1(2), p. 5.

41 Søren Kierkegaard, *Journalen JJ*:167 (1843), *Søren Kierkegaards Skrifter*, Søren Kierkegaard Research Center, Copenhagen, 1997, vol. 18, p. 306.

42 Thomas Piketty (trans. Arthur Goldhammer), *Capital in the Twenty-First Century* (The Belknap Press of Harvard University Press, 2017).

43 See 'Household Financial Resources, December 2020 | Australian Bureau of Statistics' (30 June 2021), abs.gov.au/statistics/economy/finance/household-financial-resources/latest-release.

44 Geoff Gilfillan, *Inequality and Disadvantage*, Parliamentary Library Briefing Book: Key issues for the 46th Parliament, July 2019, aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook46p/Inequality, accessed March 2022.

45 Julian Le Grand, 'A Springboard for New Citizens: Universal Basic Capital and a Citizen's Day', *LSE Public Policy Review* (2020) 1(2), p. 5.

46 See Thomas Piketty (trans Arthur Goldhammer), *Capital in the Twenty-First Century* (The Belknap Press of Harvard University Press, 2017).

47 Julian Le Grand, 'A Springboard for New Citizens: Universal Basic Capital and a Citizen's Day', *LSE Public Policy Review* (2020) 1(2), p. 3.

48 ibid.

49 As at 20 February 2022: See Norway's Central Bank website: nbim.no. Based on a population of 4.7 million citizens as at end 2021, estimated by Statista, based on international data sources: statista.com/statistics/586489/population-by-citizenship-in-norway/.

50 See Paul Cleary, *Trillion Dollar Baby: How Norway Beat the Oil Giants and Won a Lasting Fortune* (Black Inc., 2016). Australia has the Future Fund and a number of smaller sovereign wealth funds but combined these are only around one tenth of the size of the Norwegian fund.

51 See: Department of Resources, Energy and Tourism, *Australian Energy Resource Assessment* (Department of Resources, Energy and Tourism, Geoscience Australia, Australian Bureau of Agricultural and Resource Economics, 2010).

52 ibid.

53 The UBC could be at least partially recouped and recycled at the end of people's lives through death taxes and hence passed on to young people coming of age. It could be accompanied by a focus on financial literacy in the education system and invested in diversified mutual funds by default, as with our superannuation fund system. The age of access and criteria for withdrawal could be based on evidence-based social research as to what best promotes security, social equality and human emancipation.

54 H J Dawson & E Fouksman, 'Labour, Laziness and Distribution: Work Imaginaries among the South African Unemployed', *Africa* (2020) 90(2), p. 229.

Chapter 5 – Pillar III

1 This is further developed and explored by Joellen Riley Munton in Chapter 9.

2 Marilyn Pittard, 'Reflections on the Commission's Legacy in Legislated Minimum Standards', Journal of Industrial Relations (2011) 53(5), pp. 698–717.

3 Amendments to the Act include new parental leave provisions for parents with stillborn babies, infant deaths and premature births (F*air Work Amendment (Improving*

Unpaid Parental Leave for Parents of Stillborn Babies and Other Measures) Act 2020); permitting flexibility in taking paid parental leave (*Paid Parental Leave Amendment (Flexibility Measures) Act 2020*); entitlement to unpaid family and domestic violence leave (*Fair Work Amendment (Family and Domestic Violence Leave) Act 2018*); and changes (e.g. eligible employees, grounds for refusal by employers) to right to request flexible work in section 65 of the *Fair Work Amendment Act 2013*.

4 Marilyn Pittard & Richard Naughton, Australian Labour and Employment Law (LexisNexis, 2015), ch. 11.

5 The government, after consultation, has foreshadowed that it would 'extend an unpaid leave entitlement to foster and kinship carers in recognition of the vital contributions these carers make to the Australian community and some of our country's most vulnerable children': ministers.ag.gov.au/media-centre/key-measures-support-australian-legal-and-industrial-relations-systems-29-03-2022 (accessed 31 March 2022).

6 See servicesaustralia.gov.au/parental-leave-pay (accessed 2 February 2022). It is based on a primary carer concept (and structured in a way that this is ordinarily the mother of the child), with the primary carer eligible for eighteen weeks' paid leave and 'Dad or partner leave' of two weeks, after meeting income and work tests. Changes to this parental scheme were foreshadowed in the 2022–2023 Budget, with the government proposing to bring in twenty weeks' leave to be shared between both parents and remove the present cap of two weeks' Dad or partner leave. The notion of the primary carer being the mother would therefore be abolished. See ministers.ag.gov.au/media-centre/key-measures-support-australian-legal-and-industrial-relations-systems-29-03-2022.

7 The Workplace Gender Equality Agency (WGEA) report indicates that three out of five – that is, 60 per cent – of employers with 100 or more employees have paid parental leave schemes. See: 'Australian Employers Paying Up for Mums and Dads on Parental Leave' at wgea.gov.au/newsroom/parental-leave-scorecard (accessed 14 February 2022). (NB: Legislation for this proposal and that in note 5 above had not been introduced at the time of writing.)

8 parentsandcarersatwork.com/wp-content/uploads/2018/08/PAW_White-Paper-Parental-Leave-Equality.pdf.

9 Marian Baird, Elizabeth Hill & Sydney Colussi, 'Mapping Menstrual Leave Legislation and Policy Historically and Globally: A Labor Entitlement to Reinforce, Remedy, or Revolutionize Gender Equality at Work?', Comparative Labor Law and Policy Journal (2021) 42(1), pp. 187–225.

10 See Marian Baird, Elizabeth Hill & Sydney Colussi, 'Balancing Work and Fertility Demands Is Not Easy – But Reproductive Leave Can Help', The Conversation, November 2021, see theconversation.com/balancing-work-and-fertility-demands-is-not-easy-but-reproductive-leave-can-help-171497. The authors suggest that such leave could be unpaid, initially.

11 Section 62(2) of the *Fair Work Act 2009* (Cth).

12 A Productivity Commission research paper canvassed the idea that working from home should attract less pay than working in the office. This should be soundly rejected for its likely discriminatory effect on women; see Productivity Commission 2021, Working from Home, Research Paper, Canberra, pp. 4, 31.

13 See, for example, Samuel Cornell et al., 'Positive Outcomes Associated with the COVID-19 Pandemic in Australia', *Health Promotion Journal of Australia*, May 2021.

14 L Gratton, 'How to Do Hybrid Right', *Harvard Business Review* (2021) 99(3), pp. 66–74.

15 Australian Unions, Working from Home Charter, ACTU, December 2020, australianunions.org.au/campaign/working-from-home-charter/ (accessed 2 February 2022).

16 Article 55(1) amended Article L. 2242–8 of the French Labour Code to add paragraph 7, to require the right to disconnect to be negotiated in collective agreements.

17 *Data Protection Act 2018*.

18 Introduced in 2022 and applies to civil servants.

19 The Workplace Relations Commission of Ireland has developed a 'Code of Practice for Employers and Employees on the Right to Disconnect'.

20 Employment Rights Green Paper: 'A New Deal for Working People', UK Labour Party, 2021.

21 European Commission, 'Electronic Monitoring and Surveillance in the Workplace', 2021, examines the psycho-social risks of surveillance.

22 See, for example, 'Digital Surveillance and Control in the Workplace: From Expanding Operational Data Collection to Algorithmic Management?' A study by Wolfie Christl, Cracked Labs, September 2021, crackedlabs.org/daten-arbeitsplatz; and Jamie Medwell, 'When the Algorithm Is Your Boss', *Tribune*, 30 January 2022: tribunemag.co.uk/2022/01/amazon-algorithm-human-resource-management-tech-worker-surveillance.

23 *Australian Human Rights and Technology Report*, Australian Human Rights Commission, 2021, ch. 9, https://tech.humanrights.gov.au/downloads?_ga=2.37250976.1045321008.1638979342-1768864233.1636708605.

24 *Review of Privacy Act* 1988, Attorney-General's Department, ag.gov.au/integrity/consultations/review-privacy-act-1988#:~:text=On%2012%20December%2019%2C%20the,best%20serve%20the%20Australian%20economy (accessed 2 February 2022).

25 The privacy legislation applies to employers in the private sector with a turnover greater than $3 million.

26 Michelle O'Sullivan, Jonathan Lavelle et al. (eds), *Zero Hours and On-call Work in Anglo-Saxon Countries* (Springer, 2019).

27 See, for example, British Gas, Tesco and British Airways in B Kin, 'Fire-and-rehire: What is it and why is it controversial?' bbc.com/news/business-57670287 (accessed 3 February 2022).

28 Keith D Ewing, 'P&O Sackings Show Why Laws to Protect Workers Are So Important', Institute of Employment Rights, UK, 21 March 2022, ier.org.uk/comments/po-sackings-show-why-laws-to-protect-workers-are-so-important/.

29 Marilyn Pittard, 'Redundancy in Australia: A Fair Legal Framework', *Revue de Droit Comparé du Travail et de la Sécurité Sociale* (2017) 4, pp. 170–81.

30 Section 119 of the *Fair Work Act* provides for an increasing period of notice linked to length of service, with twelve weeks' redundancy pay for ten or more years of service.

31 Current NES redundancy provisions mean that women may have difficulty meeting continuous work service requirements, for example. The government has indicated it will consider changes to the NES 'to ensure fairness and equity in redundancy payouts, particularly for women': ministers.ag.gov.au/media-centre/key-measures-support-australian-legal-and-industrial-relations-systems-29-03-2022.

32 Jane Parker, James Arrowsmith, Ray Fells & Peter Prowse, 'The Living Wage: Concepts, Contexts and Future Concerns', *Labour and Industry*, 2016, 26(1), pp. 1–7, DOI: 10.1080/10301763.2016.1154671.

33 *Fair Work Act 2009* (Cth), Parts 2–7.

34 See, for example, Independent Education Union [2021] FWCFB 6038 (work value case).

35 14.2% and 13.8% in May 2021 and November 2021 respectively. It has not remained static: according to WEGA as it has 'hovered between 13% and 19% for the past two decades. There has been an increase of 0.8 percentage points to 14.2% in the gender pay gap since November 2020.' See: wgea.gov.au/publications/australias-gender-pay-gap-statistics (accessed 8 March 2022). There are differences by state, by industry and by age. For example, the gender pay gap in Professional, Scientific and Technical Services is 24.4%, while in Electricity, Gas, Water and Waste Service it is 7.8%.

36 See data compiled from ABS and WEGA statistics: Workplace Gender Equality Agency, 'Australia's Gender Pay Gap Statistics', February 2022, wgea.gov.au/publications/australias-gender-pay-gap-statistics.

37 Sara Charlesworth & Meg Smith, 'Gender Pay Equity', Chapter 6, in A Stewart, J Stanford & T Hardy (eds), *The Wages Crisis in Australia: What is it and what to do about it* (University of Adelaide Press, 2018), p. 90. See also ibid., Tim Lyons, 'Minimum Wages', Chapter 5.

38 In 2018–19, the median adjusted weekly household income among indigenous Australians aged over eighteen was $553. This compares with $915 for non-

indigenous Australians in 2017–18, the last year for which data is available: Australian Institute of Health and Welfare (AIHW) *Report on Indigenous Income and Finance*, Release, 16 September 2021, aihw.gov.au/reports/australias-welfare/indigenous-income-and-finance, accessed February 2022.

39 See further: Gillian Whitehouse & Meg Smith, 'Equal Pay for Work of Equal Value, Wage-Setting and the Gender Pay Gap' (2020), *Journal of Industrial Relations*, vol. 62, no. 4, p. 519.

40 See generally A Stewart, J Stanford & T Hardy (eds), *The Wages Crisis in Australia: What is It and What to Do about It*, University of Adelaide Press, 2018. See also ABS series Wage Price Index and Consumer Price Index.

41 J Isaac, 'Why Are Australian Wages Lagging and What Can Be Done about It?' (2018) *Australian Economic Review*, vol. 51, no. 2, pp. 175-190.

42 Tim Lyons, 'Minimum Wages', Chapter 5, p. 75, in Stewart et al., said: 'Until 2005, the Australian minimum wage bite (the relationship of the minimum wage either to average full-time wages or to median full-time earnings) was the highest in the OECD. But that headline in some ways hid a broader shift. Over the last two decades, this has changed. In that period, our minimum wage bite has fallen sharply, earnings inequality has grown and the incidence of low pay has risen.'

43 op. cit., p. 81.

44 ibid.

45 See Chapter 9.

46 See, for example, Marilyn Pittard, 'Protecting Vulnerable Workers, Fairness and State Intervention' in Alan Bogg, Jacob Rowbottom & Alison L Young (eds), *The Constitution of Social Democracy: Essays in Honour of Keith Ewing*, ch. 13, Bloomsbury Publishing, 2020.

47 This is a process akin to the old Academic Salaries Tribunal, which made recommendations for government consideration; this tribunal served a different purpose, of course, linked to recurrent funding of universities.

48 It is theoretically possible that a later Parliament might enact laws not simply eroding a right but prohibiting it – for example, remove and prohibit the right to disconnect. In that unfortunate situation, the tribunal would be fettered but may find ways to effectively enshrine it, such as ensuring that generous overtime is paid, limiting the span of hours, and so on.

49 Currently award terms can be bargained away where, overall, the employees are better off under the enterprise agreement. A risk with making core labour standards negotiable is that basic standards would be undermined and the aims of a particular standard diminished. For example, some rights cannot be measured easily in monetary terms – such a right is the right not to be fired and rehired on lower conditions, as it might be easily bargained away for a present monetary benefit: it is difficult to measure job protection in monetary terms.

Chapter 6 – Pillar IV

1 *C190 - Violence and Harassment Convention*, adopted 21 June 2019, International Labour Organization.

2 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces*, 2020, p. 13.

3 *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth), which passed the Commonwealth Parliament on 2 September 2021.

4 *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act* 1984 (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act* 2004 (Cth). A fifth statute is proposed: *Religious Discrimination Bill* 2021 (Cth). There are also some attributes upon which discrimination is not unlawful: *Australian Human Rights Commission Act 1986* (Cth).

5 For example, *Anti-Discrimination Act 1977* (NSW); *Equal Opportunity Act 2010* (Vic); *Anti-Discrimination Act 1991* (Qld).

6 Adding further complexity are the unlawful termination provisions in s 772 *FW Act*. These provisions only apply where the adverse action provisions do not: s 723 *FW Act*.

7 David Peetz, 'Institutional Experimentation, Directed Devolution and the Search for Policy Innovation' (2021) 76(1) *Relations Industrielles*, 69–89, p. 74.

8 Australia's National Research Organisation for Women's Safety and the Victorian Health Promotion Foundation, *Change the Story: A Shared Framework for the Primary Prevention of Violence Against Women and their Children in Australia* (2015).

Chapter 7 – Pillar V

1 Senior Legal Officer, Community and Public Sector Union. The views expressed here are my own.

2 J S Harrison & R E Freeman, 'Democracy in and around Organisations: Is organisational democracy worth the effort' (2004) 18(3), *Academy of Management Perspectives*, pp. 49–53.

3 P Stokes, 'Selling Yourself into Slavery', *New Philosopher* (9), 2015, pp. 48–51.

4 P Stokes, 'Selling Yourself into Slavery', *New Philosopher* (9), 2015, pp. 48–51.

5 R Martin, 'Politics and Industrial Relations' in P Ackers & A Wilkinson (eds), *Understanding Work and Employment: Industrial Relations in Transition*, (Oxford University Press, 2003).

6 G Benson & E Lawler, *Employee Involvement; Research Foundations*, Centre for Effective Organisation, Publication G 13-09 (628).

7 For example, E Davis & R Lansbury (eds), *Democracy and Control in the Workplace* (Longman and Cheshire, 1986).

8 P Ackers, M Marchington, A Wilkinson & T Dundan, 'Partnership and Voice With or Without Trade Unions: Changing UK management approaches to organisational participation', in M Martinez Lucio & M Stuart (eds), *Partnership and Modernisation in Employment Relations*, pp. 20–54 (Routledge, 2012).

9 A Wilkinson, K Townsend & J Burgess, 'Reassessing Employee Involvement and Participation: Atrophy, reinvigoration and patchwork', *Journal of Industrial Relations*, 55, pp. 583–600.

10 A Pennington, 'On the Brink: the erosion of enterprise bargaining in the Australian Public Sector', a paper of the Centre for Future Work and the Australia at the Australia Institute (December 2018).

11 P Stokes, 'Selling Yourself into Slavery', *New Philosopher* (9), 2015, pp. 48–51.

12 R Sluiter, K Manevska & A Akerman, 'Atypical Work, Worker Voice and Supervisor Responses', *Socio-Economic Review* 2020, vol. 0, no. 0, pp. 1–21, repository.ubn.ru.nl/bitstream/handle/2066/226192/226192pub.pdf?sequence=1.

13 Australian Bureau of Statistics, 'Trade Union Membership', August 2022, note 10.

14 A Colvin, 'Organizational Primacy: Employment conflict in a post-standard contract world', in K Van Wezel Stone & H Arthurs (eds), *Rethinking Workplace Regulation: Beyond the standard contract of employment* (SAGE Publications, 2013), pp. 194–210.

15 Actuaries Institute, 'The Rise of the Gig Economy and its Impact on the Australian Workforce', Green Paper (December 2020).

16 ibid.

17 ibid.

18 See, for example, A J Wood, *Despotism on Demand: How Power Operates in a Flexible Workplace* (Cornell University Press, 2020) and Elizabeth Anderson, *Private Government* (Princeton University Press, 2017).

19 The data presented in this section is derived from a publication of the Australian Skills Commission: 'Impact of COVID-19 on the Australian Labour Market', nationalskillscommission.gov.au/reports/shape-australias-post-covid-19-workforce/part-1-labour-market-update/11-impact-covid-19-australian-labour-market.

20 Bogg, Forsyth & Novitz, 'Worker Voice in Australia and New Zealand: The role of the State reconfigured', *Adelaide Law Review* (2013) 34(1), pp. 7, 8.

21 op. cit., p. 8.

22 *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v. Vodafone Network Pty Ltd*, PR911257 (AIRC, C Smith, 14 November 2001), para. 25.

23 Logan *J, Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v. QR Ltd* (No. 2) [2010] FCA 652 (22 June 2010), para. 49.

24 See, for example, clause 28 of the *Banking and Finance and Insurance Modern Award 2020* (MA000019).

25 Hande Inanc, Ying Zhou, et al., 'Direct Participation and Employee Learning at Work', *Work and Occupations*, 42(4), pp. 447–75.

26 See the discussion by Marilyn Pittard in Chapter 5 of this publication. Rights similar to this were endorsed by the ACTU in its 2009 Congress paper 'Future of Work – Decent Work Agenda'.

27 ibid.

28 ibid.

29 See *Ridd v. James Cook University* [2021] HCA 32 (13 October 2021) and *NTEU v. University of Sydney* [2021] FCAFC 159 (31 August 2021), both of which consider academic freedom rights. Also see Emeritus Professor Sally Walker AM', *Report of the Independent Review of the Adoption of the Model Code on Freedom of Speech and Academic Freedom* (9 December 2020), dese.gov.au/higher-education-reviews-and-consultations/resources/report-independent-review-adoption-model-code-freedom-speech-and-academic-freedom.

30 A private members' bill introduced into the House of Lords by Lord Hendy, bills.parliament.uk/bills/2876.

31 W N Cooke, 'Employee Participation Programs, Group-Based Incentives, and Company Performance: A Union-Non-union Comparison' (SAGE publications,1994), doi.org/10.1177/001979399404700405.

32 See M Harcourt, G Gall, R V Kumar & R Croucher, 'A Union Default: A Policy to Raise Union Membership, Protect Freedom of Association, Protect Freedom Not to Associate and Progress Union Representation', *Industrial Law Journal*, 48(1), 1 March 2019; and M Harcourt, G Gall, M Wilson, K Rubenstein & S Shang, 'Public Support for a Union Default: Predicting Factors and Implications for Public Policy', *Economic and Industrial Democracy* (2020), pp. 1–24.

33 Harcourt et al., 'Public Support', p. 5.

34 ibid.

35 ibid.

36 Harcourt et al., 'A Union Default', p. 87.

37 ibid.

38 Bogg et al., op. cit., p. 17.

39 K Ewing, 'The Function of Trade Unions', *Industrial Law Journal* (2005) 24, p. 1.

40 Bogg et al., ibid.

41 R N Block & P Berg, 'Collective Bargaining as a Form of Employee Participation: Observations on the United States and Europe', in A Wilkinson, P J Gollan, M Marchington & D Lewin (eds), *The Oxford Handbook of Participation in Organizations* (Oxford, 2010).

42 See, for example, Safe Work Australia, 'Worker Representation and Participation Guide', safeworkaustralia.gov.au/system/files/documents/1812/worker-representation-and-participation-guide-2018_0.pdf.

43 The participatory model in WHS is examined in Chapter 2 of this publication.

44 M B Walker, 'Peer to Peer Voice as Emergent Collective Action' (SAGE journals, 22 July 2021), journals.sagepub.com/doi/abs/10.1177/00221856211031940.

45 Michael Brian Walker, 'Disrupting Precarity: An Enquiry into Worker Voice in Nonstandard Employment' (PhD Thesis, University of Technology Sydney, October 2020), opus.lib.uts.edu.au/handle/10453/147264.

46 H Knudsen & R Markey, 'Works Councils: Lessons from Europe for Australia', Department of Economics, University of Wollongong, 2001.

47 A Forsyth, 'The "Translatability" Debate Revisited: Can European Social Partnership Be Exported to Australia?' *Comparative Law and Policy Journal* (2006) 27, pp. 305–56.

48 ibid.

49 See s. 13A of the *Australian Broadcasting Corporation Act 1983*.

50 For example, the recent platform of the Canadian Conservative Party called for worker-appointed board members: conservative.ca/conservative-leader-erin-otoole-to-ensure-canadian-workers-have-their-voices-heard.

Chapter 8 – Pillar VI

1 This chapter is based in part on the AIER's The Ron McCallum Debate 2018 discussion paper '"Deal or No Deal?" Is Collective Bargaining Delivering for the Public Interest?', co-authored by Renée Burns and Keith Harvey (AIER, 2018), updated and expanded by the present authors.

2 Business Council of Australia, *Enterprise-Based Bargaining Units: A Better Way of Working*, Report by the Industrial Relations Study Commission (BCA, 1989); and Yi-Ping Tseng & Mark Wooden, *Enterprise Bargaining and Productivity: Evidence from the Business Longitudinal Survey*, *Melbourne Institute Working Paper No. 8/01* (Melbourne Institute of Applied Economic and Social Research, July 2001).

3 Prior to the *Industrial Relations Reform Act 1993*, there was no statutory protection for industrial action against actions for damages under the common law of torts (or economic wrongs). Unions could be, and increasingly were being, sued in the common law courts for economic damages incurred by employers during industrial disputes. The new Act introduced the concept of 'protected industrial action'. So long as the industrial action was taken as part of bargaining (and in accordance with the Act), unions and their members were protected against common law damages claims. Protected industrial action is limited only to the period in which bargaining for a new agreement is being undertaken (and only

in accordance with strict rules). The 1993 Act introduced an American concept into Australian industrial relations: that is, that while bargaining is underway, the parties should be left alone to 'slug it out' and that the state has no role. In an early decision of a full bench of the Australian Industrial Relations Commission this was characterised as 'all is fair in love and war' and in bargaining. The tribunal was given only a limited power to intervene in bargaining disputes in the public interest. Traditionally, in the Australian context, there has always been a role for an independent arbitrator to help parties resolves their disputes. The 'hands off' approach does nothing to assist unorganised employees who may be confronted by a 'take it or leave it' non-union agreement being put to them by an employer.

4 The 'good faith' bargaining obligations did not require any bargaining party to make concessions or go to the content of any agreement, only to the processes of bargaining. See Fair Work Bill 2008 Explanatory Memorandum r. 163 and ff.

5 Renée Burns & Keith Harvey, '"Deal or No Deal?" Is Collective Bargaining Delivering for the Public Interest?', Ron McCallum Debate 2018 Discussion Paper (AIER), pp. 18–19.

6 ACTU Congress, Chapter 6, 'Change the Rules for Working People', pp. 90–96.

7 See for example *AMWU v. Cochlear Limited* (2012), FWC 5374.

8 See also Alex Bukarica & Andrew Dallas, with Anthony Forsyth (consulting ed.), *Promoting Good Faith Bargaining under Australia's Fair Work Act 2009: Lessons from the Collective Bargaining Experience in Canada and New Zealand* (The Federation Press, Sydney, 2012); see also A Forsyth & B Ellem, 'Has the Australian Model Resisted US-Style Anti-Union Organising Campaigns? Case Studies of the Cochlear and ResMed Bargaining Disputes', in S McCrystal, B Creighton & A Forsyth (eds), *Collective Bargaining under the Fair Work Act* (Federation Press, Sydney, 2018), p. 45.

9 Productivity Commission, *PC Productivity Insights* 2021, p. 44, pc.gov.au/research/ongoing/productivity-insights/recent-developments-2021/productivity-insights-2021-recent-developments.pdf.

10 Productivity Commission, *PC Productivity Insights* 2021, p. 48, pc.gov.au/research/ongoing/productivity-insights/recent-developments-2021/productivity-insights-2021-recent-developments.pdf.

11 Andrew Stewart, Jim Stanford & Tess Hardy (eds), *The Wages Crisis in Australia: What it is and what to do about it* (University of Adelaide Press, eBook), p. 33. Table caption reads: 'Real wages and real labour productivity, 2000–18, *Source: Calculations based on ABS, Wage Price Index, Cat no 6345, table 1; ABS, Consumer Price Index, Cat no 6401, table 8; ABS, Australian National Accounts: National Income, Expenditure and Product, Cat no 5206, table 2.24.*

12 op. cit., pp. 36–7.

13 Productivity Commission, *PC Productivity Insights 2020: Recent Productivity Trends*, p. 22, pc.gov.au/research/ongoing/productivity-insights/recent-productivity-trends/productivity-insights-2020-productivity-trends.pdf.

14 op. cit., p. 25.

15 Productivity Commission, *Shifting the Dial: 5 Year Productivity Review Productivity and Income – The Australian Story*, Supporting Paper no. 1, 3 August 2017, p. 41.

16 abs.gov.au/statistics/economy/national-accounts/australian-system-national-accounts/2019-20.

17 Attorney-General's Department, *Trends in Federal Enterprise Bargaining Report – June Quarter 2021*, various tables, https://www.ag.gov.au/industrial-relations/publications/trends-federal-enterprise-bargaining-june-quarter-2021.

18 Fair Work Commission, *Annual Reports*, 2009–10 to 2020–21.

19 Attorney-General's Department, *Trends in Federal Enterprise Bargaining Report – June Quarter 2021*, Table 8, p. 23, https://www.ag.gov.au/industrial-relations/publications/trends-federal-enterprise-bargaining-june-quarter-2021.

20 The retail industry had 151 agreements covering 259,800 employees; Transport, Postal and Warehousing (partly public sector) had 1,066 agreements with 117,600 (or 6.5 per cent) of employees.

21 The financial services sector has seen a drop in employees covered by agreements, from 141,000 in March 2018 to just 62,600 in June 2021.

22 Alison Pennington, remarks at the AIER Ron McCallum Debate, 9 October 2018,Sydney.

23 Attorney-General's Department, op. cit., Table 8, p. 23. The concentration of agreements in construction and the metal and manufacturing sectors reflects longstanding bargaining practices in those industries. The predominance of the public sector in terms of numbers of employees covered by agreements may reflect the strength of union density in the public sector relative to that in the private sector (now 10 per cent or less).

24 Fair Work Act, s. 176.

25 Fair Work Act, s. 183.

26 Attorney-General's Department, op. cit., Table 14, p. 37.

27 As noted in the *Trends in Federal Enterprise Bargaining Report*, p. 48, 'Data about unions covered by agreements made under the *Fair Work Act 2009* may not provide an accurate reflection of union involvement in bargaining for agreements. Under the *Fair Work Act 2009* it is possible for a union to have been involved in bargaining for an agreement and then not be covered by the approved agreement. It is also possible for a union to be covered by an agreement because they were a bargaining representative, even if they did not take an active role in the negotiations.' Thus, this term tells us little about the actual involvement of unions in the initiation of,

bargaining for and overall influence of a union or unions in the making of any particular agreement.

28 ABS, 63060DO005_ 202105 *Employee Earnings and Hours, Australia, May 2021*, Table 4, abs.gov.au/statistics/labour/earnings-and-working-conditions/employee-earnings-and-hours-australia/latest-release. In the mining sector there are few award-covered employees, so this figure needs to be treated with caution. In the public sector, agreements operate like 'paid rates' award and there is no bargaining margin.

29 ibid. A similar position may exist in the aged care sector. The recent report of the Royal Commission into Aged Care Quality and Safety, *Final Report: Care, Dignity and Respect*, Part 2, p. 211, found that Australia's aged care workforce is underpaid. In *Application by United Voice and The Australian Workers Union, Queensland* [2011] FWAFB 2633, p. 23, the Fair Work Commission concluded that 'where agreements do exist they result in margins somewhere between 5% and 10% above the award rate but that in many cases there are negotiated alterations in other award conditions which have an offsetting effect on the agreement rates'.

30 ibid. There are a number of possible explanations for this outcome. Firstly, some agreements (for example, the Coles Supermarkets case) may not have actually passed the Better Off Overall Test (the BOOT) and should not have been approved by the Commission. Secondly, there may be a high level of non-compliance by employers with the terms of agreements. The Fair Work Ombudsman has repeatedly found high levels of non-compliance in the hospitality sector, particularly in restaurants. Finally, some employers may be relying on the terms of 'stale' or 'zombie' agreements; that is, agreements that have passed their nominal expiry date but have not been replaced by new agreements with wage increases.

31 *Fair Work Act 2009* as amended, Section 3 (f).

32 See Joe Isaac, 'Why Are Australian Wages Lagging and What Can Be Done About It?', *The Australian Economic Review*, 51 (2), p. 182.

33 Fair Work Commission, Annual Reports, 2009–10 to 2020–21.

34 See, for example, [2014] FWC 6441 and [2013] FWC 511.

35 That is, to 'assist and encourage low-paid employees and their employers, who have not historically had the benefits of collective bargaining, to make an enterprise agreement that meets their needs' with the assistance of the Commission.

36 Fair Work Commission, Annual Reports, 2009–10 to 2020–21.

37 T Bramble, *Trade Unionism in Australia: A History from Flood to Ebb Tide* (Cambridge University Press, 2008), Figure 1.3, p. 9.

38 Andrea Garnero, Stephan Kampelmann & François Rycx, 'Minimum Wage Systems and Earnings Inequalities: Does Institutional Diversity Matter?', *European*

Journal of Industrial Relations 21(2), p. 115. See also 'Industry-wide Bargaining a Cure for Wage Stagnation: OECD', *Workplace Express*, 6 July 2018.

39 *Fair Work Act 2009*, s. 241.

40 *Application by United Voice and The Australian Workers Union, Queensland* [2011] FWAFB 2633, p. 11; *Application by United Voice*, p. 7.

41 op. cit., p. 130.

42 op. cit., p. 55.

43 Sectoral agreements play an important role in wage fixation in many European countries, according to the OECD Employment Outlook 2018, p. 81, read.oecd-ilibrary.org/employment/oecd-employment-outlook-2018_empl_outlook-2018-en#page1.

Nordic countries have utilised sector-wide bargaining to set fair minimum standards and equitably distribute productivity gains. See Andrew Scott, Max Grudnoff & James Fleming, 'Boosting Workforce Participation and Wages', Chapter 6 in Andrew Scott & Rod Campbell (eds), *The Nordic Edge: Policy Possibilities for Australia* (Melbourne University Press, 2021), pp. 132–41. The British Labour Party, at its 2021 annual conference, released a Green Paper on Employment Rights, in which it pledged, if elected to government, to roll out sectoral collective agreements to be known as 'Fair Pay Agreements'. A statement released to coincide with the release of the Green Paper noted that these agreements would be like those to be introduced in New Zealand and that such agreements were already in place in many European countries. The purpose of the new form of agreements was to reverse the decline in enterprise bargaining in the United Kingdom.

44 In the United States a project reflecting the work of more than seventy advocates, activists, union leaders, labour law professors, economists, sociologists, technologists, futurists, practitioners, workers and students from around the world recommended, amongst other things, a system of 'sectoral bargaining' to overcome what was described as a system of 'decentralized bargaining' with 'profound shortcomings'. S Block & B Sachs, *Clean Slate for Worker Power: Building a Just Economy and Democracy* (Labor and Worklife Program, Harvard Law School, 2020).

45 New Zealand has had a lengthy process of consultation regarding the designand operation of sectoral and occupational Fair Pay Agreements in that country. Legislation was due to be introduced in late 2021 and enacted in 2022 to give effect to this plan.

46 See OECD, *Negotiating Our Way Up: Collective Bargaining in a Changing World of Work* (Paris, OECD Publishing, 2019), p. 135; see also C Schnabel, *Union Membership and Collective Bargaining: Trends and Determinants*, LASER Discussion Papers – paper no. 121 (Labor and Socio-Economic Research Center, University of Erlangen-Nuremberg, 2020).

47 *Fair Work Act 2009*, s. 246(3).

48 R Burns, 'Freedom of Association and Collectivity in Australia', *New Zealand Journal of Employment Relations* 2020, no. 44, pp. 20–34.

49 See *Fair Work Act 2009*, s. 246(2).

50 That is, direct dealing between the employer and employees, bypassing their union representatives.

51 The current 'good faith' provisions of the Fair Work Act have failed to provide effective access to arbitration in situations where a party seeking to make an enterprise agreement has been frustrated by the refusal of another party to bargain in good faith – for example, in the Cochlear and Resmed cases (see notes 7 and 8). In such circumstances access to 'last resort' or 'first contract' arbitration is essential in a system based on good faith bargaining obligations.

52 See Mordy Bromberg & Mark Irving, *Australian Charter of Employment Rights* (Hardie Grant Books, 2017), Chapter 9, on fairness and balance in industrial bargaining.

Chapter 9 – The Participants

1 The *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) changed the name of the federal statute from the *Industrial Relations Act 1988* (Cth) to the *Workplace Relations Act 1996* (Cth). This reflected a shift in focus from regulating work across industries to regulating work at the individual enterprise level.

2 The common law test for employment was articulated in *Hollis v. Vabu Pty Ltd* (2001), 207 CLR 21.

3 See, for example, *Michail Kaseris v. Rasier Pacific VOF* [2017] FWC 6610; *Janaka Namal Pallage v. Rasier Pacific Pty Ltd* [2018] FWC 2579; *Suliman v. RAsier Pacific Pty Ltd* [2019] FWC 4807; *Amita Gupta v. Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/as Uber Eats* [2019] FWC 5008; upheld on appeal: [2020] FWCFB 1698. But see *Joshua Klooger v. Foodora Australia Pty Ltd* [2018] FWC 6836 and *Franco v. Deliveroo Australia Pty Ltd* [2021] FWC 2818. *Franco v. Deliveroo* has been appealed.

4 (2003) 124 IR 293.

5 See Anthony Forsyth, *Victorian Inquiry into the Labour Hire Industry and Insecure Work: Final Report*, Industrial Relations Victoria, Department of Economic Development, Jobs, Transport & Resources, 31 August 2016.

6 [2020] FCAFC 122, overturned on appeal to the High Court of Australia in *CFMMEU v. Personnel Contracting Pty Ltd* [2022] HCA 1.

7 See *CFMMEU v. Personnel Contracting Pty Ltd* [2022] HCA 1.

8 [2022] HCA 2.

9 [2022] HCA 2.

10 [2022] HCA 2.

11 See David Peetz, *The Realities and Futures of Work* (ANU Press, 2019), pp. 159–62.

12 Australian Bureau of Statistics, 6333.0 – *Characteristics of Employment, Australia, August 2016* (2 May 2017), Summary of Key Findings. See also G Gillfillan, *Characteristics and Use of Casual Employees in Australia* (Parliament of Australia, Parliamentary Library Research Paper Series 2018–19, 19 January 2018); and G Gillfillan, *Trends in the Use of Non-standard Forms of Employment* (Parliament of Australia, Parliamentary Library Research Paper Series 2018–19, 10 December 2018).

13 See *Work Health and Safety Act 2011*, s. 7.

14 See *Work Health and Safety Act 2011*, ss. 28–9.

15 See *EZY Accounting 123 Pty Ltd v. Fair Work Ombudsman* [2018] FCAFC 134.

16 See *Enforceable Undertaking Between the Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) and Coles Supermarkets Australia Pty Ltd (ABN 45 004 189 708)*, available online at fairwork.gov.au/ArticleDocuments/837/enforceable-undertaking-coles-supermarkets-australia.pdf (last accessed 7 September 2021).

17 See Igor Nossar, Richard Johnstone, Anna Macklin & Michael Rawling, 'Protective Regulation for Home-based Workers in Australia's Textile, Clothing and Footwear Supply Chains' (2015) 57(4) *Journal of Industrial Relations*, p. 585.

18 See *Outworkers (Improved Protection) Act 2003* (Vic); *Industrial Relations Act 1999* (Qld), Chapter 11, Part 2, Div. 3A; *Fair Work Act 1994* (SA), Chapter 3, Part 3A. The state-based outworker laws are analysed in Michael Rawling, 'Cross-jurisdictional and Other Implications of Mandatory Clothing Retailer Obligations', *Australian Journal of Labour Law* (2014) 27, p. 191.

19 *Fair Work Act 2009* (Cth), Part 6-4A; see especially s. 789CB.

20 See Sarah Kaine & Michael Rawling, 'Strategic "Co-enforcement" in Supply Chains: The Case of the Cleaning Accountability Framework', *Australian Journal of Labour Law* (2019) 31(3), p. 305.

21 See Andrew Hopkins, 'What Banking Regulators Can Learn from Deepwater Horizon and Other Industrial Catastrophes', The Conversation, 31 January 2019, theconversation.com/what-banking-regulators-can-learn-from-deepwater-horizon-and-other-industrial-catastrophes-108989.

22 Swanson Committee Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs* (Canberra, Commonwealth of Australia, 1976); Trade Practices Consultative Committee, *Small Business and the Trade Practices Act Vol. 1* (Canberra, Commonwealth of Australia, 1979); House of Representatives Standing Committee on Industry, Science and Technology, *Small Business in Australia: Challenges, Problems and Opportunities* (Canberra,

Commonwealth of Australia, 1990); Reid Committee Report, *Finding a Balance towards Fair Trading in Australia*, *Report by the House of Representatives Standing Committee on Industry, Science and Technology* (Canberra, Commonwealth of Australia, 1997).

23 R Gardini, *Review of the Franchising Code of Practice*: *Report to the Minister for Small Business, Customs and Construction* (Canberra, Commonwealth of Australia, 1994).

24 *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (Cth), Schedule 1, Franchising Code of Conduct, clause 6.

25 op. cit., clause 28.

26 op. cit., clause 27.

27 *Humberstone v. Northern Timber Mills Pty Ltd* (1949) 79 CLR 389.

28 *Independent Contractors Act 1996* (Cth), s. 7(2)(b).

29 See *Owner Drivers and Forestry Contractors Act 2005* (Vic) and *Owner Drivers (Contracts and Disputes) Act 2007* (WA).

30 *Competition and Consumer Act 2010* (Cth), Schedule 2 – Australian Consumer Law, ss. 20, 23.

Chapter 10 – The Economic Impact

1 The estimates are point estimates, which do not estimate statistical reliability. They are partial because the estimates are a result only of the policy change, with all else held constant. For instance, the further impact of increasing wages on employment is not taken account of. They are linear, so that any changes estimated are proportional to the calculated changes in wage rates, participation, and so on, without diminishing returns to adding extra workers, which is plausible with idle capacity in the economy, and also without economies of scale where adding extra workers adds disproportionately more output. The estimates are 'reduced form', in the sense that they do not include feedbacks such as fewer males participating because females in the household are earning higher wages. The results appear to be little different from those achieved by more complex modelling. The time frame for the processes to work through remains unestimated.

2 The size of the administration needed does not increase as quickly as the size of the jurisdiction. The services of the tribunals, and so on, can be public goods, whereby the addition of an extra person to the reach of the jurisdiction might not involve any extra cost. Once the incentives are there in terms of deterrence or encouragement, they may operate costlessly.

3 The authoritative exposition of why raising wages does not decrease employment is to be found in the preface of *Myth and Measurement: The new economics of the minimum wage*, twentieth-anniversary edition, Princeton University Press, 2015.

That work focuses on the micro level, while at the macro level Keynesian stimulus effects on spending result from wage increases.

4 The positive fiscal effects through the government budget are also not considered, with increased tax revenue obtained from higher incomes and consumer spending, and reduced spending on income supports for households with increased incomes.

5 See, for instance, the classic work by Nicholas Kaldor, *Causes of the Slow Rate of Economic Growth of the United Kingdom*: *An inaugural lecture*, Cambridge University Press, London, 1966.

6 Growth in GDP per capita, productivity and ULC (oecd.org), accessed 4 May 2022. OECD Compendium of Productivity Indicators – Productivity and economic growth (oecd-ilibrary.org), accessed 24 April 2022. Labour productivity in Australia was low relative to other comparable OECD countries in the earlier part of the 2000s, falling from an average of 1.3% per annum from 2000 to 2007 to 1.1% between 2010 and 2019, with a relatively small contribution from multifactor productivity, an indicator of innovation. Multifactor productivity is the part of productivity increase that is not due to inputs increase. Also the contribution of improvements to capital quality apparently was nil in the decade to 2019. Many countries with institutions closer to those proposed perform better on these indicators.

7 Casual work (without paid leave entitlements) is a part of insecure work, which includes unpredictable hours; fluctuating pay; inferior rights and entitlements, including limited or no access to paid leave; irregular and unpredictable working hours, or working hours that, although regular, are too long or too few and/or non-social or fragmented; lack of security and/or uncertainty over the length of the job; and lack of voice at work on wages, conditions and work organisation. Australian Parliament Senate Select Committee on Job Security, 'The Job Security Report, February 2022, drawing on the ACTU-commissioned Independent Inquiry into Insecure Work in Australia, *Lives on Hold: Unlocking the potential of Australia's workforce*, 2012, p. 1. The job insecurity report – Parliament of Australia (aph.gov.au). The effect of moving workers in non-standard employment onto higher wages with security should also reduce the labour turnover of firms and the costs entailed in workers leaving and the need to hire new ones, including training, on and off the job. As increases to wages at the lower end of the wage distribution work, however, the composition of the workforce will alter as changes to industry structure and improvements to productivity unfold.

8 ABS Detailed Labour Force February 2022; Geoff Gilfillan, 'Trends in use of non-standard forms of employment', Parliamentary Library Research Paper Series, 2018–19, Canberra, 10 December 2018, p. 3, aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1819/NonStandardEmployment; COVID-19: Impacts on casual workers in Australia—a statistical snapshot – Parliament of Australia (aph.gov.au). More than one-third of casual workers are working in retail areas and accommodation, and one-ninth in areas of health care and social assistance.

9 Australian Bureau of Statistics, *Employee Earnings and Hours May 2021*, released 19 January 2022, Employee Earnings and Hours, Australia, May 2021 | Australian Bureau of Statistics (abs.gov.au), 63060DO005_202105 Employee Earnings and Hours, Australia, May 2021, Table 2. Author calculations. No split between full-time and part-time employees given. The average rates are pulled up by some very high earnings at the top. 6333.0. Characteristics of Employment, Australia, August 2021, Table 8.2, author calculations. This is shown in the median rates (half earn more, half earn less) being lower. The highly unequal concentration of casual workers in lower pay rates is highlighted in the median gap, with employees with paid leave entitlements median at $39.50 per hour, 36% higher than the $28.00 per hour median for employees without paid leave entitlements. Workers earning below median pay (half earn more, half earn less) are by far less likely to have paid leave entitlements, particularly in the lowest quartile (56% without paid sick leave) and decile (76% without paid sick leave). Working arrangements, August 2021 Australian Bureau of Statistics (abs.gov.au), author calculations. The proportions in those lowest parts of the earnings distribution without paid holiday or parental leave are even higher. The inadequacy of the 25% leave loading in compensating for the loss of entitlements is shown, in that permanent full-time rates are 62% higher and permanent part time rates 36% higher than casual rates with the 25% loading removed.

10 COVID-19: Impacts on casual workers in Australia—a statistical snapshot – Parliament of Australia (aph.gov.au). ABS Characteristics of Employment for August 2019 and author calculations.

11 The numbers of part-time owner managers without employees (OMWOEs) have grown faster than other types of employment, by nearly three times, over the thirty years since 1991, and almost four-fifths of those are unincorporated. ABS 2022 6291.0.55.001 *Labour Force, Australia, Detailed*, Table 13, status in main job February 2022. OMWOEs are included in owner managers of incorporated and unincorporated enterprises without employees, the category most likely in effect to get treated like employees but with weaker recourses. OMWOEs may be working for the same employer over a long period, while the protections that can be available to employees are not being applied. There were about 1.4 million OMWOEs at February 2022, more than one in eight of all people employed. More than 1 million of these are 'owner managers of unincorporated enterprises without employees', Working arrangements, August 2021 Australian Bureau of Statistics (abs.gov.au). 'Employed persons' includes employees and owner managers. A conservative estimate is that 1 million OMWOEs are contracted to one employer and are in effect working as employees. This is also consistent with the ABS Forms of Employment data of around 1 million for 'independent contractors' at August 2021, around one in twelve of the total workforce.

12 ABS, *Employee Earnings and Hours May 2021*, released 19 January 2022, Employee Earnings and Hours, Australia, May 2021 | Australian Bureau of Statistics (abs.

gov.au), 63060DO005_202105 Employee Earnings and Hours, Australia, May 2021, Table 5.2. Author calculations. It is assumed that 'independent contractors' correspond approximately to owner managers without employees. Data is available from the ABS for median earnings for owner managers of *incorporated* enterprises without employees of $35.00 per hour, which can be compared with employees with paid leave entitlements earning $39.50 – 12.8% more. However, the corresponding data for median earnings of owner managers of *unincorporated* enterprises is not available, nor is data for the corresponding averages (means). If casuals on award pay were paid at average hourly EBA permanent rates for full-time they would earn $48.60, or 63% more; or for part-time $40.40 per hour, or 36% more.

13 ABS 2022 Employee Earnings and Hours Table 5.2, ABS 2021 Characteristics of Employment, Tables 8.1 and 8.2, author calculations.

14 GPG is based on averages (means), or on medians (half earn more, half earn less) of earnings (or can be applied to assets, wealth). It reflects a multitude of factors, including the concentration of women in lower-paid industries. Francine D Blau & Lawrence M Kahn, 'Understanding International Differences in the Gender Pay Gap', *Journal of Labor Economics*, 21 (1), January 2003; Miles Corak, 'Income Inequality, Equality of Opportunity, and Intergenerational Mobility', *Journal of Economic Perspectives*, 27(3) 2013: pp. 79–102. DOI: 10.1257/jep.27.3.79. A key strategy for reducing the GPG is in raising wage floors and improving protections underpinned by representative tribunals.

15 Higher GPGs are associated with higher wage inequality in general and also promote intergenerational inequality, with lower intergenerational wage mobility at the lower wage levels. Miles Corak, 'Income Inequality, Equality of Opportunity, and Intergenerational Mobility', *Journal of Economic Perspectives*, 27 (3): 79–102, 2013. DOI: 10.1257/jep.27.3.79, p. 82. Australia has been found to have relatively high income inequality, as measured by the gini coefficient, and disproportionately low intergenerational wage mobility. See also Francine D Blau & Lawrence M Kahn, 'Understanding International Differences in the Gender Pay Gap', *Journal of Labor Economics*, 21 (1), January 2003.

16 For median full-time earnings, Australia's GPG is larger (12.3%) than the OECD average (11.6%) and well above Norway (4.8%), Denmark (5.1%) and Sweden (7.4%), WEF_GGGR_2021.pdf (weforum.org), p.10. Average earnings GPG from Earnings and wages - Gender wage gap - OECD Data, OECD (2022), Gender wage gap (indicator). doi: 10.1787/7cee77aa-en (Accessed 19 May 2022). The commonly cited GPG in Australia is based on AWOTE and was 13.8% at November 2021, Average Weekly Earnings, Australia, November 2021 | Australian Bureau of Statistics (abs.gov.au), November 2021, Table 2, most recent. The median GPG is slightly lower, at 11.7%, consistent with the general observation that female and male earnings are closer together at lower levels, with the gap increasing as earnings increase. Characteristics of Employment, Australia, August 2021 | Australian Bureau of Statistics (abs.gov.au), August 2021, Table 1a.1.

17 49.6%, Characteristics of Employment, Australia, August 2021 | Australian Bureau of Statistics (abs.gov.au), August 2021, Table 1a.3.

18 Characteristics of Employment, Australia, August 2021 | Australian Bureau of Statistics (abs.gov.au), August 2021, Table 1a.3, Average Weekly Earnings, Australia, November 2021 | Australian Bureau of Statistics (abs.gov.au), November 2021, Table 2, most recent. The estimate is for average adult earnings, which excludes the lower rates for junior employees and also other employed persons.

19 OECD data.

20 Assuming no constraint on obtaining the employment.

21 2022-23 Budget Snapshot – Parliament of Australia (aph.gov.au); Janine Dixon, 2020, A comparison of the economic impacts of income tax cuts and childcare spending Briefing Paper for The Australia Institute, October 15, refers to reducing labour turnover, increasing female (and male) participation, raising household income and adding to GDP.

22 'Child care was the most significant rise (contributing 0.9 percentage points to the headline CPI quarterly movement), following the end of free child care on 13 July.' Consumer Price Index, Australia, September 2020 | Australian Bureau of Statistics (abs.gov.au). This is despite impacting only that fraction of households that had children accessing childcare. Anecdotal reports said that the saving enabled some people to put down a deposit to buy a dwelling.

23 $1 billion of which came from Job Keeper, for a reduced attendance during COVID lockdown. Michael Klapdor, 'COVID-19 Economic response—free child care', Coronavirus response-Free child care – Parliament of Australia (aph.gov.au), Australian Parliamentary Library, 6 April 2020. This is consistent with our estimates for fully funding free childcare and offers a significant fiscal stimulus. Max Grudnoff & Richard Denniss, 2020, 'Participating in growth: Free childcare and increased participation', The Australia Institute, Female-participation-with-free-childcare-WEB-1.pdf (australiainstitute.org.au). 'As such families tend to have a very high "marginal propensity to consume", stimulus provided in the form of free childcare is likely to have a larger impact on consumer spending than many other forms of stimulus spending.' The estimates here are comparable with those by Grudnoff & Denniss (2020): 'If Australia had the same labour force participation rates as Nordic countries do, then the economy would be $60 billion, or 3.2 per cent of Gross Domestic Product (GDP), larger. If Australia had the same participation rates as Iceland, the Nordic country with the highest female participation rates, then Australia's GDP would be $140 billion, or 7.5 per cent, higher.'

24 Having fallen from 12th to 70th place in the World Economic Forum (WEF) ranking, WEF_GGGR_2021.pdf (weforum.org), Table 1.2, p. 18. Despite having the second-highest educational attainment rates, 'on average, women who were

able to maintain full time employment until they reach age sixty-five accumulate $463,101 in wealth assets and men who maintain full time employment accumulate $946,557'. Emily Callander, 26 April 2022, CEDA - The gender wealth gap is a critical barrier to Australia's economic growth.

25 A shocking 37th overall out of 41 OECD countries for childcare, Which countries have the most generous child-care policies? | The Economist, 1 July 2021, based on UNICEF data, where-do-rich-countries-stand-on-childcare.pdf (unicef-irc.org), June 2021, 37th out of 41 for parental leave (full pay equivalent, male and female, 2018), 34th out of 41 for access to ECE (early childhood education), 34th out of 40 for affordability after government subsidies, and 12th out of 33 for quality (based on training), Which countries have the most generous child-care policies? | The Economist, 1 July 2021, based on UNICEF data, where-do-rich-countries-stand-on-childcare.pdf (unicef-irc.org), June 2021, pp. 6–7.

26 Parental leave | WGEA, accessed 8 May 2022. The means testing in the current model further supports highly gendered care, with males more likely to earn more than the threshold of $150,000. 'According to 2020–21 WGEA data, 3 in 5 employers (60%) offer access to paid parental leave (either to both women and men or to women only), in addition to the government scheme.

27 Enhancing work-life balance (assets.kpmg) (April 2021) cites a range of academic studies, p. 4; increased PPL benefits would include:

- 'a higher standard of living arising from increased productivity and participation, and for mothers a reduction in the gender pay, income and superannuation gaps', also reducing the gap in unpaid domestic work and increasing the recognition of equal parental responsibility
- for fathers, 'benefit from greater involvement in their children's lives with more personal satisfaction and a deeper understanding of the responsibilities associated with caring for young children', leading to a better work–life balance and more fairness in relationships
- for children, benefit from long-lasting improvements in emotional and physical health and more diversity
- for employers, 'gain from greater understanding by employees of the position of clients and customers, with improved retention and rising morale'.

See also Serena Canaan, Anne Sophie Lassen, Philip Rosenbaum & Herdis Steingrimsdottir, 'Maternity Leave and Paternity Leave: Evidence on the economic impact of legislative changes in high income countries', IZA DP No. 15129, March 2022. The findings also suggest the benefits may be sensitive to the basis on which the leave is paid and how that affects female and male decisions differentially at different wage levels. Studies relating to the economic impact of maternity leave and paternity leave legislation in high-income countries are scarce and highlight the heterogeneity of measures across countries. Exploiting the potential benefits to households, children and longer-term labour market and productivity impacts

requires that males participate much more equally in PPL, especially when the period of leave is extended.

28 ABS 6239.0 Barriers and Incentives to Labour Force Participation, Australia, 2018-19 financial year | Australian Bureau of Statistics (abs.gov.au), released August 2020 (biannual), Table 2.1. Also, more than 200,000 people who wanted to work or to work more were caring for people with disabilities. Offering childcare for parents who are *not* working further enables increased opportunities for access to education and respite and to join the workforce. Free childcare would address 'the most common reason', given by 48% of the women who were unavailable to start a job or work more hours within four weeks. It would address the most important incentive needed to join or increase participation in the labour force given by 52% of women: 'Access to childcare place'; while 'financial assistance with childcare costs' was also given by 51% of women and 37% of men, ABS 6239.0, Barriers and Incentives to Labour Force Participation, Australia, 2018-19 financial year | Australian Bureau of Statistics (abs.gov.au), released August 2020 (biennial). Just under half of children aged five and under attend childcare, and about one-third of children aged twelve and under attended out-of-school-hours care. DESE Quarterly Reports on Childcare in Australia; for example, the most recent Child Care in Australia report June quarter 2021 - Department of Education, Skills and Employment, Australian Government (dese.gov.au).

29 Barriers and Incentives to Labour Force Participation, Australia, 2018-19 financial year | Australian Bureau of Statistics (abs.gov.au), released August 2020 (biennial), most recent.

30 J Dixon, 'A comparison of the economic impacts of income tax cuts and childcare spending', Centre of Policy Studies, Victoria University, briefing paper for The Australia Institute; ABS 6239.0, 15 October 2020, p. 3.

31 Dixon (2020). It is significant that the findings are so positive given that the computational general equilibrium modelling approach used tends towards conservative findings. It assumes magnitudes of economic activity trade-offs such that the spending multipliers implied are quite small and slow to wind out including for capital expenditure and government budgetary impacts. The addition to GDP would be far greater than the average additional childcare costs averaging $3.1 billion per year indicated.

32 Child Carers | JobOutlook.

33 More than half of childcare revenue appears to come from subsidies, which have increased to around $9.5 billion per annum, with fees charged to households of an average $10 per hour per child making up the remainder, and significant profits and surpluses. According to IBISWorld, revenue for about 13,500 businesses in the childcare services industry in Australia is $13.7 billion at 2022, with the key driver of the increase being the level of social assistance, indicating its dependence on public funding. The industry grew by an average 2.1% per annum from 2017 to

2022, and is anticipated to grow 2.8% in 2022, the first key driver being 'the level of social assistance'. The largest provider received about one-thirteenth of total revenue in 2018–2019 – half from government capital grants and massive operating subsidies. Child Care Services in Australia - Market Size | IBISWorld, February 2022, and company annual reports. Focus on childcare bottom dollar leads to more safety breaches, report finds (smh.com.au), 6 October 2021.

34 'Workplace bullying constitutes offensive behaviour through vindictive, cruel, malicious or humiliating attempts to undermine an individual or groups of employees. Such persistently negative attacks on their personal and professional performance are typically unpredictable, irrational and unfair.' International Labour Organization, *Violence at Work: A major workplace problem*, 1 January 2009. Figures from House of Representatives Committees – ee bullying report chapter1.htm – Parliament of Australia (aph.gov.au), 2012.

35 Productivity Commission, *Benchmarking Business Regulation: Occupational health and safety*, March 2010, cited in House of Representatives Committees – ee bullying report chapter1.htm – Parliament of Australia (aph.gov.au), 2012.

36 The economic costs of sexual harassment in the workplace (deloitte.com), released March 2019.

37 op. cit., p. 5.

38 Due to the COVID-related payments to many employers and lower-paid workers exiting the labour market. ABS 5206024, 6401, and author calculations.

39 For instance, Treasurer Scott Morrison, 2017, Address to Bloomberg, Sydney | Treasury Ministers, 31 August.

40 Statement on Monetary Policy (rba.gov.au), May 2022; see, for example, p. 65.

41 'Wage growth in industries with a higher share of enterprise bargaining agreements have the lowest wage volatility [of the methods of setting pay], as the typical length of an agreement is around two and a half years. While changes in wage growth and labour market outcomes by pay-setting may reflect differences in wage flexibility or bargaining power, these can be difficult to distinguish from a wide range of other determinants of wages, including variation in industry performance, the balance of demand and supply for different skills, and productivity.' James Bishop & Natasha Cassidy, 'Insights into Low Wage Growth in Australia', *RBA Bulletin*, March quarter 2017.

42 'There is growing evidence to suggest that wage adjustments of 2 point something per cent have now become the norm in Australia, rather than the 3–4 per cent wage increases that were the norm prior to 2012. The rising prevalence of wage outcomes in the 2s can be seen in the official data and in the Bank's liaison with firms. One notable example is the large increase in the share of enterprise bargaining agreements that provide annual wage rises in the 2–3 per cent range. The share of such agreements has risen from around 10 per cent over the 2000s to almost 60 per cent in 2019. Over the same period, the proportion of agreements

providing wage increases of 3 per cent or more has fallen sharply.' Guy Debelle, deputy governor of the Reserve Bank, 'Employment and Wages', speech to the Australian Council of Social Service national conference, November 26 2019, RBA rba.gov.au/speeches/2019/sp-dg-2019-11-26.html 15/21, p. 21.

43 Jelle Visser, 'What happened to collective bargaining during the great recession? *IZA Journal of Labor Policy*, vol. 5, Article no. 9 (2016). It is difficult to separate the effect on wages of increasingly restricted collective bargaining from the noise of a multiplicity of changing factors over a half century, including the mining boom.

44 Bernd Brandl, 'Everything we do know (and don't know) about collective bargaining: The Zeitgeist in the academic and political debate on the role and effects of collective bargaining', *Economic and Industrial Democracy*, 1 April 2022, doi.org/10.1177/0143831X221086018; Peter Gahan, Cabinet papers 1992-93: the rise and fall of enterprise bargaining agreements', The Conversation, 1 January 2017; 'This can make raising compensation and maintaining high standards challenging because employers can often find ways to avoid coverage, particularly in heavily fissured industries that have layers of contracting and many very small employers.' David Madland, The Re-emergence of Sectoral Bargaining in the US, Britain, Australia and Canada, 22 April 2021, OnLabor.

45 David Madland, ibid.

46 wcms_842807.pdf (ilo.org), 2022, p.16. In '10 out of the 14 countries in which the collective bargaining coverage rate is above 75 per cent, the regulatory coverage of collective agreements is shored up by measures that apply collective agreements either to all workers in an enterprise or bargaining unit, irrespective of whether they belong to the signatory trade union (*erga omnes*); and/or to all enterprises in a sector, irrespective of whether they belong to the signatory employers' organization (the extension of collective agreements).' The ILO 'finds [across countries] that where collective bargaining takes place on a single-employer basis at the enterprise level, an average of 15.8 per cent of employees are covered by collective agreements. Where it takes place in multi-employer settings, there is greater opportunity to shape inclusive regulatory coverage, with an average coverage rate of 71.7 per cent.' wcms_842807.pdf (ilo.org), p. 79.

47 ABS 6306.

48 ABS 2021, *System of National Accounts 2020-21* 5204.0, 29 October 2021, Table 6. The costs of less restrictive bargaining are faced by all businesses, as is the case for any regulatory framework, with economies of scale compared with those incurred in enterprise bargaining. The costs would correspond to those that prevailed earlier in Australia and that are current in, for instance, most other OECD countries where wider bargaining is not restricted. The reason that businesses can bear any wage costs incurred from implementation is the same reason that high-waged countries prosper, through the stimulus to spending (especially for low-income households) and to higher productivity. Sector bargaining will also reach the one

in six workers in the economy who are also employed on a casual basis and paid by award only or by individual arrangement. ABS 2022, *Employee Earnings and Hours May 2021*, 19 January 2022, Australian Bureau of Statistics, 'Employee Earnings and Hours, Australia, May 2021', 63060DO005_202105, Employee Earnings and Hours, Australia, May 2021, Table 2. Author calculations.

49 Australian Bureau of Statistics, Numbers exceeding for the first time those on 'collective agreements'. *Employee Earnings and Hours May 2021*, 19 January 2022, 'Employee Earnings and Hours, Australia, May 2021, 63060DO005_202105, Table 1. Author calculations.

Chapter 11 – Transition

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2 Commonwealth of Australia, *Full Employment in Australia* (Australian Government Printer, 1945).

3 Tim Rowse, *Obliged to Be Difficult: Nugget Coombs' Legacy in Indigenous Affairs* (Cambridge University Press, 2000), pp. 210, 211.

4 Troy Bramston, *Bob Hawke: Demons and Destiny – The Definitive Biography* (Viking, 2022), pp. 296–7, 300–303.

5 ibid.

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