Australian Institute of Employment Rights

The Debate: Decent work, decent society

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Decent work for a decent society

Was Tony Abbott's declaration on election night that Australia was "under new management" and "open for business" a statement revealing in whose interests his Government would rule?

On the morning of the election, Fairfax newspapers, in anticipation of a likely Coalition victory, carried a story that according to "a wide coalition of business groups... action must be taken quickly to cut weekend penalty rates". Commentators noted that the support of an incoming coalition government for such a move in the Fair Work Commission could be "very persuasive".

While industrial relations proved to be a low key issue in the federal election campaign it remains an issue of great importance to all Australians, employers and employees alike. Work is a central activity for most adults and enterprises are the driving force of economic well-being for society as a whole.

The theme of this issue of *The Debate* is "decent work, decent society". Decent work has been a major focus of the tripartite International Labor Organisation [ILO] for some years now.

The ILO defines decent work as:

"Productive work in which rights are protected, which generates an adequate income, with adequate social protection. It also means sufficient work, in the sense that all should have access to income-earning opportunities. It marks the high road to economic and social development, a road in which employment, income and social protection can be achieved without compromising workers' rights and social standards"

Central to this concept of decent work, therefore, is the concept that work should be performed in an environment of freedom, equality and security.

Achieving decent work is important whether or not we live in relatively prosperous and secure Australia or in a country like Bangladesh where access to a safe job with decent working conditions and pay is a rarity.

The centre-piece of this issue is an article by former ACTU President Sharan Burrow, now General Secretary of the International Trade Union Confederation [ITUC], the worldwide peak union organisation. Sharan provides a sobering reflection on the state of the world's working people suffering under the austerity measures imposed by governments and international financial institutions in the wake of the global financial crisis. Sharan is in a unique position to take a global view of these issues while at the same time reflecting on the implications for the Australia and I recommend her article highly.

Also writing from Europe is Professor Keith Ewing of Kings College, London and also President of the UK based Institute of Employment Rights, a sister organization of AIER. Keith visited Australia earlier this year and spoke to AIER and ALLA members on the legislative developments impacting on employment rights in the United Kingdom. Keith's article deals with the experience in the United Kingdom under the British Coalition government in de-regulating employment making jobs more insecure. Keith argues passionately and persuasively that the English experience means that Australian workers should be very wary of similar moves in the future by the Australian coalition government.

"Central to this concept of decent work, therefore, is the concept that work should be performed in an environment of freedom, equality and security."

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Wages, especially minimum wages, are a key element in ensuring decent work. Brian Lawrence, Chairman, Australian Catholic Council for Employment Relations, provides an excellent analysis of the effect of minimum wage decisions of industrial tribunals over recent years.

Brian draws attention to what he calls "systemic failures" of minimum wage setting bodies over the last dozen years to protect the income of low paid workers in this country. The position of award dependent workers has been worsening, real wage incomes have fallen in some cases, and employees on award wages have not benefitted from their own improving productivity unlike workers on workplace agreements. Minimum wage workers are now much worse off than in 2000, falling well below the poverty line, Brian reports.

In an interesting and original piece of research, Keith Harvey, Editor of *The Debate*, looks at employer pattern bargaining and the apparently inconsistent treatment of largely identical agreements by Fair Work Australia, making some recommendations for future action.

Work is of course only one determinant of a fair and just society: education, social security, health and welfare and community services all play their part. These matters are generally beyond the purview of AIER but an important new book "Pushing our luck – Ideas for Australian progress" has brought together several strands of public policy to consider how Australia can sustainably be a decent society and Keith Harvey looks at aspects of this book relating specifically to the workplace.

What does the future hold for Australian employers and employees? The incoming Government has promised a Productivity Commission inquiry into industrial relations legislation. The review of the Fair Work Act requested by the previous Government, chaired by AIER patron Professor Ron McCallum AO, did not find a strong link between industrial law and productivity.

Many academics and other industrial relations experts believe that after 10-15 years of nearly constant change in industrial relations the pendulum had settled towards the middle of the spectrum. In AIER's view more focus is required on building good workplace cultures than on legislative change.

A positive workplace culture is vital to delivering secure and productive workplaces, the foundation of a just and decent society. AIER remains committed to providing a voice advocating employment justice and rights for all employees and employers to help build a decent society.

AIER cautions against strategies, such as those proposed by a number of employer groups during the election campaign, that rest on removing workplace rights in the name of productivity and efficiency. Competing in a race to a bottom on workplace rights is not the way to ensure Australia is a just and decent society.

Lisa Heap, Executive Director, AIER

“A positive workplace culture is vital to delivering secure and productive workplaces, the foundation of a just and decent society. AIER remains committed to providing a voice advocating employment justice and rights for all employees and employers to help build a decent society.”

The failure of minimum wage decisions to tackle poverty

The level of minimum wages is a key determinant of living standards for the lowest paid workers in our society. It has been a key issue in wage-fixing since the earliest days of Australia's industrial history. In this article, Brian Lawrence, Chairman, Australian Catholic Council for Employment Relations, looks at how minimum wage workers have been faring and finds many reasons for concern.

In the *Safety Net Review Case 2003*, Frank Costigan QC, who appeared for the Australian Catholic Council for Employment Relations (ACCER), submitted that, in order for the Australian Industrial Relations Commission (AIRC) to satisfy its statutory obligation to have regard to the needs of the low paid when setting wages, it needed to ensure that wage rates do not fall below the poverty line. He continued:

"And we would say simply, and stress, that it is a fundamental need of the low paid not to live below the poverty line. Now, in one sense, that is a statement that is easily made, but there are a number of complex issues in it."

Mr Costigan then went on to pose a number of questions about poverty and the adequacy of the Federal Minimum Wage, as the National Minimum Wage (NMW) was then known. His questions *"what are needs, who are the low paid, what is the poverty line, what is living in poverty and how does the federal minimum wage compare to the poverty line?"* have been central to ACCER's submissions over the past decade, with primary emphasis being given to the position of low paid workers with family responsibilities.

Over the decade, the greatest threat to a decent wage was the *Work Choices* regime. The *Fair Work Act* of 2009 promised reform, but has failed to deliver. In the 2013 *Annual Wage Review* ACCER argued that the Act had failed workers employed on or near the rate set by the NMW and had not reformed the minimum wage-setting so as to overcome the systemic unfairness that has been evident since 2000, and earlier.

There are various reasons for these conclusions. First, in the 12 years to December 2012 there had been a cut in the real value of classification rates then paying more than $767.00 per week. Taking into account the distribution of wage classifications, on average the real wages of safety net-dependent workers have been barely maintained.

Second, safety net rates had not been adjusted to reflect the substantial productivity increases across the national economy. Unlike other workers, safety net workers have been denied the benefit of the increases in their own productivity.

Third, in considering relative living standards, successive tribunals have given inadequate attention to community wage movements. Compared to the rest of the workforce, in 2012 all safety net workers were relatively worse off than they were in 2000.

Fourth, as a consequence of these matters, workers and their families had fallen below rising poverty lines. The changes, as measured by the 60% relative poverty line, were dramatic. After being only $1.03 per week under the poverty line in December 2000, the NMW-dependent family of four (including two children) had a poverty gap of $109.46 per week in December 2012.

Many more families fell below the poverty line. Even a trade-qualified worker on the C10 wage classification, whose pay we would have assumed could support a family of four, saw the family's position fall from 11.4% above the poverty line to 2.8% below it. The deterioration would have been worse but for increased family payments. Without those payments, the single NMW worker's margin over poverty fell from 30.7% to 14.1%.

Despite the social inclusion objective in the *Fair Work Act*, the decisions since 2009 have failed to give due recognition of the importance of the social inclusion objective and the *social value* of wages. The effective promotion of social inclusion requires the setting of wages that will avoid poverty and social exclusion and will enable workers and their families to participate in their society.

The Fair Work Commission (FWC) did not even refer to poverty in its 2012 decision, despite relevant material and submissions being put to it. Its 2013 decision, however, contained a marked departure, with the following echo of Mr Costigan's point:

"We accept the point that if the low paid are forced to live in poverty then their needs are not being met. We also accept that our consideration of the needs of the low paid is not limited to those in poverty, as conventionally measured. Those in full-time employment can reasonably expect a standard of living that exceeds poverty levels."

"There are two classes of workers and families in Australia. The difference is not in the work that is done, but in the industrial capacity to bargain. The class that now depends entirely on the FWC has been let down by past wage decisions. Fairness for these marginal workers requires a change. More of the same will not do."

These are welcome words. Whether we are we any closer to decisions that will provide a standard of living that avoids and exceeds poverty depends on several matters.

It is not clear what the FWC means by its reference to the conventional measure of poverty. The FWC also noted that there was no "robust contemporary poverty line". The conventional measure of poverty is found in relative poverty lines, but those poverty lines may be set at different percentages. The FWC uses the 60% poverty line, as did the Australian Fair Pay Commission (AFPC) before it. Some researchers use the 50% relative poverty line.

The FWC will have to clarify what it means by the conventional measure of poverty and what it estimates the dollar values to be. The way in which it has approached the issue suggests that it has used the 60% relative poverty line, possibly as a measure of a "poverty plus" standard. Clarification is of vital importance in the targeting of poverty, especially among children in wage-dependent families.

The FWC's reference to full-time workers having a reasonable expectation of a standard of living that exceeds poverty levels raises important questions about the position of workers with family responsibilities. Family transfers do not fill the poverty gap and are not intended to do so. Whether a sole parent or partnered, ACCER has argued that the worker's position should be assessed on the basis of two children.

In one of the early consultations conducted by the now abolished Australian Fair Pay Commission (AFPC) I was making a submission about the plight of single-breadwinner working families living below the poverty line when a member of the AFPC interjected "But it's their choice to live in poverty". The point that the AFPC member was making was that if the second parent got a job the family would not be living in poverty. Whether that attitude influenced the AFPC is unclear. It should not have. The second parent should not be obliged to get a job (or to seek a job and qualify for the Newstart allowance) in order for the family to avoid poverty. Parents should not be denied an effective choice as to how they will exercise their parental responsibilities.

As the poverty lines show, there has been great and increasing financial pressure on both parents to work in low income families. This cannot be a reason to question the single-breadwinner approach or an excuse for inaction in the setting of an appropriate wage; and the FWC should say so.

A fair safety net has to also protect sole parent workers who do not have the capacity of "in house" child care. The cost of child care can drive a low paid sole parent and his or her children into poverty. Sole parents should not have to resort to latch key arrangements for their children in order to avoid poverty. Yet repeated submissions about child care costs have been ignored by both the AFPC and the FWC.

The FWC has been provided with more than sufficient evidence to show that children of low paid full time workers are living in poverty and that the level of the NMW and some other wage classifications are responsible. Giving priority to the targeting of poverty means that extra wage increases should be awarded.

In each of the last two years ACCER has asked for an extra $10.00 per week in the NMW, as a very modest first step for those in most need. It has foreshadowed subsequent claims working towards, at least, the base rate for cleaners, now $42.40 per week above the NMW. In each year the claim has been rejected without any reason being given. The NMW has been increased by the same amount as award increases.

The FWC has adopted a policy of increasing the NMW by the same amount as the increases in award rates, regardless of the relative needs of the lowest paid. If it continues poverty will not be targeted and we will be wasting our time in discussing poverty and collecting evidence about it.

It is clear that the unspoken reason for refusal of a "bottom up" targeting of poverty is the design and operation of the award system. A number of awards have classifications that deliver a poverty wage. As we have pointed out to the FWC, these classifications will need to be amended to provide a wage that is not below poverty.

Clearly, the FWC does not want to embark on such a course, perhaps because of "reform fatigue" among parties and the tribunal. But justice and the terms of the legislation require that the FWC set a fair NMW without being constrained by an award system that provides a number of poverty-inducing wage rates. And a fair award system requires that they be changed.

ACCER's principal concern is for the one in six workers and their families, especially low income families, who do not have the capacity to bargain for higher wages and a way out of poverty. The Australian Council of Trade Union's website states that workers who "are under a union collective agreement earn on average $100 a week more than other employees".

There are two classes of workers and families in Australia. The difference is not in the work that is done, but in the industrial capacity to bargain. The class that now depends entirely on the FWC has been let down by past wage decisions. Fairness for these marginal workers requires a change. More of the same will not do.

Alarming decent work deficits in an ailing global economy

Decent work translates into a decent society. One Australian who is in a unique position to observe the truth of this statement is former ACTU President, Sharan Burrow, now General Secretary of the International Trade Union Confederation. In this important article, written specifically for *The Debate*, Sharan Burrow looks at the issues of decent work and decent societies with a global perspective.

The global economy is no more stable today than it was six years ago and the scourge of unemployment and inequality is driving economic instability and social despair.

In 2010 global growth stood at five per cent and it was described as the 'green shoots' of recovery, but in hindsight it was the height of concerted action. In July, the IMF again, for the seventh consecutive time, revised down global growth projections to a mere 3.1 percent.

With the Eurozone in continued recession and slow growth in the US, the drag on the BRICS countries[1] is the latest casualty. With projected growth for Brazil at 2.5 percent and with another percentage point off China's growth there is an urgent need for leadership. No nation is an island in today's globalised economy.

At best, the world is facing an era of prolonged stagnation. Adding to this is the increasing failure of multilateralism, when from the IMF to the UN, the EU and the G20, the failure to understand that the global economic crisis, caused by greed and inequality, required a social response of equal or greater urgency to that of bailing out the financial sector, simply underscores the leadership crisis.

The state of the world for working people and their families is very bleak. Unemployment is again rising above 200 million and youth unemployment is a problem in every nation. For crisis countries and developing nations – facing continuing unemployment with youth unemployment levels of 30 to 60 percent – societal tensions are in ferment.

The International Labour Organisation (ILO) estimates a need to create 600 million new jobs in the next 10 years. Without a determined approach to rebuilding economies with sustainable jobs and social protection at the core of a coordinated global effort, we are facing an economic and social time bomb.

In the global workforce there are around 2.9 billion workers. The global economy has a formal sector of just 60% and more than 50% of workers have some form of irregular employment contract.

Growing informal sector

The informal sector is therefore around 40% of the global economy and growing. Here there are no rules: it is the sector of desperation where the dominant profile of workers includes migrants, women and young people. The formal business sector and decent work is withering. It is no longer a north/south divide as even within G20 countries the informal sector is between 25% and 85% in individual nations.

Seventy-five per cent of the world's people have no social protection. The decent work deficit is increasingly characterising the global economy and its supply chains.

There have been some gains. The ILO's new standards for domestic workers and the social protection floor have provided organising tools. In 2014 there will be standard setting for formalising the informal sector and the hope of a protocol to accompany the standard on forced labour. There has been some progress in supply chain disputes with the 'Bangladesh Accord', at least from the European brands, but it is not enough.

Inequality is increasing in almost every country. The OECD report 'Growing Unequal'[2] shows that while disposable income grew annually on average by 1.7%, between the mid-1980s and the late 2000s, the distribution of this growth was very unequal. The top decile grew annually on average by 1.9% while the bottom decile did so only by 1.3%. As a consequence, the average OECD Gini coefficient,[3] which stood at 0.29 in the mid-1980s increased by almost 10% to 0.316 to 2010.

This unbalanced growth was much stronger in some countries, namely in Germany, the UK, Sweden, and the Netherlands but particularly in the US. In the UK, disposable income is now back to 1987 levels and in the US the wage share is at a 30 year low.

Rosnick and Baker (2012)[4] calculate that between 1985 and 2006, the 0.01 percentile of top earners had in some countries, like in Australia, Canada, Portugal, Sweden and the US, an average annual growth rate of around 6%.

In the US the growth of the top 0.01 percentile was extreme, growing by 293% over this period – more than 6.7% per year. They further highlight that between 1973 and 2010, the bottom 90 percentile of wage earners across the OECD have seen their wages growing at below average rates. The highest 0.01 percentile of wage earners increased their salaries by 4 percentage points above the average growth rate.

The OECD (2011) concluded: "Increases in household income inequality have been largely driven by changes in the distribution of wages and salaries, which account for 75% of household incomes among working-age adults... This was due to both growing earnings' shares at the top and declining shares at the bottom, although top earners saw their incomes rise particularly rapidly." [5]

Inequality continues to grow

The most recent report of the OECD (2013) with updated inequality data into crisis years until 2010 shows no reversal of the inequality trend – quite the contrary. Market income inequality increased further and more rapidly than ever before. The increase between 2008 and 2010 was as strong as in the twelve years prior to the crisis.[6]

While we have seen improvements in some of the BRICS countries including Brazil and China it is slowing with declining growth and the challenge of poverty eradication remains enormous. The data for developing economies is weaker but the trends are the same with often cited growth in Africa being largely jobless. No growth in aggregate demand is possible with these realities. Inequality is now both an economic and social poison.

The ITUC presented to the G20 Labour and Finance Ministers joint meeting in Moscow an economic and social outlook based on the ITUC's 2013 Global Poll, inclusive of China and India, and covering more than half of the world's population. It paints a frightening picture.

More than half of the world's population say their incomes have fallen behind the cost of living, in the last two years. Almost two out of three people rate the current economic situation in their country as bad. Global citizens feel abandoned by their governments because they are seen to be failing to tackle unemployment and to prioritise business interests over the interests of working families.

Eighty percent of all respondents say their government has failed to effectively tackle unemployment. Even significant numbers of people in the BRICS countries and in Germany say their governments have failed to tackle unemployment. Only thirteen percent of voters believe their government is focused on the interests of working families.

Over half the world's population don't feel they have legal protection for job security. Sixty-six percent don't feel they have legal protection for fair wages. In Spain, China and Japan, the majority of people think they do not have protection for reasonable working hours.

Of critical concern is that only thirteen percent of people feel that their governments are acting in the interest of people and even more worrying is that almost 30 percent of people say their governments are not acting in the interests of either people or business.

Couple this with the 2012 findings of the ITUC Global Poll that only thirteen percent of people believe that they have any influence over the economic decisions of their governments, and marry such with increasing social unrest, then the disenchantment and the disengagement is undermining

confidence in democracy. The loss of trust is serious and must be addressed.

Our message is obvious. We need a plan – we need hope. This requires jobs, jobs and jobs; decent work, decent wages and social protection.

Tragically, the demand for jobs, while recognised in words and communiques by both governments and international institutions has gone unheeded in terms of the co-ordinated action required. Despite the anger and frustration many feel concerning the perpetrators of the crisis and equally failed austerity policies, the reality is we need to rebuild our economies with jobs – income led growth in a cleaner and greener future – if we are to secure an inclusive and sustainable global economy.

Business and labour addressing the G20, through the Business 20 and the Labour 20 are united in a call for investment in infrastructure, particularly enabling green economy infrastructure, for action on the informal economy and for scaling up apprenticeships to make some inroads into the labour market exclusion of young people.

Rights are the key to fairness

However there is no recognition from employers that without the labour rights that generate fair wealth distribution – social protection, a minimum wage on which people can live and collective bargaining – there is no sustainable growth.

On the contrary, there is an orchestrated campaign for labour market 'flexibility' and indeed an attack by employers on the ILO supervisory mechanism that respects the jurisprudence of the independent 'committee of experts'.

This is despite the evidence based conclusion in Chapter 8 of the World Bank's Development Report 2012[7] that absent extremes of power or regulation, labour market regulation has very little impact on jobs.

Indeed, decent work is a driver of confidence, opportunity and growth yet employers are still more interested in short term profits than longer term sustainability. The ITUC has called repeatedly for a new investment model. With 25 trillion dollars of workers capital invested in the global economy money should be taken out of the speculative economy and put into patient capital. It is time to push the reset button on our pension funds and draw a line between investment and speculation.

The emergence of the G20 leaders group gave some optimism in London and Pittsburg. London drove new levels of ambition. Gordon Brown was a G20 activist and had the support of the majority of leaders, including Australia's then Prime Minister, Kevin Rudd. The original Sherpa's text was cautious but the leaders themselves were not and the outcome was optimistic.

Readers will recall that famous quote from Gordon Brown, echoed by others that 'never again will the financial sector be in control of the real economy.' The ambition was there: financial regulation, jobs, the green economy and the inclusion of the ILO and the OECD in addition to the IMF. London indeed set a tone of optimism for global leadership.

Pittsburgh was equally ambitious with Obama's commitment to jobs: 'quality jobs will be at the heart of the recovery' was his rallying call. He had sponsored the first G20 Labour Ministers meeting with both business and labour gaining consultative status and heeded their advice. But just six months later in Toronto key leaders had gone or were distracted and the policy of austerity was born.

Despite global unemployment deepening tragically, the nations of Europe heeded the demands of the international institutions. They effectively went to war on their own people with jobs slashed, wages and social protection cut and rights reduced unilaterally in the face of constitutional and legislative guarantees.

The misery is undeniable in all crisis countries and the global economic slump is now playing out even in the BRICS and now the first signs are emerging in the Asia Pacific.

Austerity rules

Instead of containment, the orthodoxy of IMF and EU conditionality simply embedded the contagion and the social and economic crisis we see in Southern Europe and increasingly in Central and Eastern European countries today. Rather than recovery in crisis countries, the evidence is a slump in GDP, unemployment at crisis levels, a lost generation of young people, social unrest and higher debt to GDP ratios.

The old IMF was reborn and the ILO/IMF commitments of Oslo abandoned. New partners, the European Commission and the European Central Bank emerged in the now infamous 'Troika', as enemies of jobs and rights.

The tragedy is that there is little financial regulatory reform with any positive short term effect. Speculation has not diminished. The cowboys in the financial sector who caused the crisis got off scot-free. No one went to jail for perpetration of fraud relating to toxic products and banks were bailed out with taxpayers' funds. Working people and their families found themselves on the frontlines of the imposition of failed 'structural reforms'.

Our assessment is stark. International institutions have failed; austerity and conditionality have created impoverished nations with increases in both unemployment and inequality and an open attack on workers' rights. Institutions appear to have conveniently forgotten they failed to prevent a financial sector crisis which became a debt crisis because of their insistence in using tax payer dollars to fund private sector failure; only to then demand that the successful social contract emerging from the great depression

and world war two be torn up with no negotiation and no eye to the resulting social or economic impact.

Economic crisis has, at the hands of these institutions, bred economic dictatorship with no respect for rights and no signs of recovery. Despite promises, the new IMF is the old IMF. Even the IMF's own research shows that austerity in not working. While fiscal consolidation over time is prudent management, the social and economic destruction wrought by pro cyclical austerity lacks even a credible academic base.

Sharan Burrow, General Secretary, ITUC

Policies that work

Several nations have invested in policies that work and Australia's has been one of them. There are key areas of policy and governance where Australia's experience demonstrates pathways for successful outcomes. These include:

Government action to prioritise jobs at the onset of the 'great recession'

- Youth inclusion including the youth guarantee, apprenticeships, skill management and industry partnerships
- Productivity and industry policy vs competitiveness
- A demand floor with minimum wages and social protection
- Collective bargaining coverage and compliance through Fair Work Australia
- Climate justice, and
- Just taxation measures

But people know what works. The ITUC Global Poll 2013 tells us the world's people support a five point plan towards reducing uncertainty and inequality that is very much in line with these areas of focus – a plan offering hope for billions of workers:

1. **Jobs:** Investment in infrastructure, new green technologies and industries.
2. **Fair wages:** ensure reasonable wages through fair prices.
3. **Strong labour laws:** including the right to strike supported by 99 percent of people, a minimum wage, the right to collectively bargain and the right to join a union.
4. **A social protection floor:** governments must step forward and protect the interests of workers and their families.
5. **Make large companies pay their taxes.**

The dominance of the current model of globalisation based on corporate greed must be overturned.

We need a new growth model and a new investment model that will generate jobs – decent work – and see the transition to a sustainable future where a living planet and social justice equally feature.

The alternative is frightening.

Endnotes:

1 BRICS is the acronym for an association of five major emerging national economies: Brazil, Russia, India, China and South Africa.

2 OECD (2008), *Growing Unequal?: Income Distribution and Poverty in OECD Countries*, OECD Publishing.

3 The Gini coefficient is a measure of statistical dispersion. It measures the inequality among values of a frequency distribution (for example levels of income).

4 David Rosnick and Dean Baker, *Missing the Story: The OECD's Analysis of Inequality*, Centre for Economic and Policy Research, July 2012.

5 OECD (2011), *Divided We Stand. Why Inequality Keeps Rising, An Overview of Growing Income Inequalities in OECD Countries, Main Findings*, page 22

6 OECD (2013), *"Crisis squeezes income and puts pressure on inequality and poverty"*

7 "World Bank (2012). *World Development Report 2012: Gender Equality and Development.*

Lessons from Britain on changes to labour law.

Australian politicians still often look to the United Kingdom for ideas which might be applied in Australia. In this article, Professor Keith Ewing, President of the UK Institute of Employment Rights, a sister organisation to the AIER, looks at what has happened to worker rights under the UK's Coalition Government and observes that Australian workers should be wary of any similar moves by the new Coalition government in Canberra.

Watching with interest from London, employment rights do not appear to have been a major issue in the recent federal election. Indeed, an uneasy truce seems to have broken out around Labor's Fair Work settlement, the Australian election bearing remarkable similarities to the British election in 2010.

At that election the United Kingdom elected a Conservative-led Coalition government for the first time since the Second World War. But although labour law questions hardly registered in that campaign, the three years of Coalition government have been marked by the most vigorous anti-worker agenda.

Real wages have fallen faster than almost everywhere else in Europe, and working conditions have deteriorated (in a country with an hourly minimum wage of only £6.19 (AUD $10.42). If the British experience is any guide, Australian trade unionists should be cautious, very cautious.

Anti-worker agenda

The most notable feature of the erosion of British workers' rights is that it is being done by stealth. It is death by a thousand cuts rather than a major legislative assault on the legal framework inherited from Labour (such as it was). But although the tactics have eschewed any major structural changes, they have nevertheless been just as significant.

But before examining some of these measures, it is important to note the sins of omission. The government is permitting to flourish a range of practices that wholly undermine worker protection, and in different ways greatly extend managerial power. Businesses are increasingly seeking to manage labour as efficiently as possible, in a manner indistinguishable from other commodities.

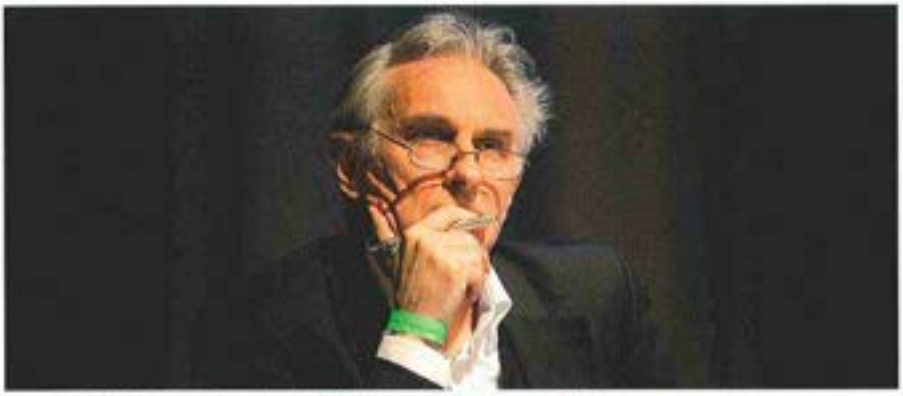
"In this permissive climate other forms of flexibility have also emerged for the core workforce. We are already picking up the existence of what might be called 'master and servant' contracts, under the terms of which employees 'agree' at the point of recruitment that the employer may change unilaterally any term of their contract of employment."

Labour law contributes to this by permitting exploitative working relationships, such as casual employment, agency employment, and now so-called 'zero-hours' contracts. The latter are the latest labour market scandal to break in the United Kingdom, it being revealed that there are now at least one million workers on contracts with no guaranteed hours and no guaranteed earnings.

By permitting these contracts, labour law also provides incentives to use them for those companies that have adopted the commodification of labour as part of their business model. This is because workers engaged in these forms of employment are usually said by the courts not to be employees and therefore unprotected by employment law: they have no security and few rights.

In this permissive climate other forms of flexibility have also emerged for the core workforce. We are already picking up the existence of what might be called 'master and servant' contracts, under the terms of which employees 'agree' at the point of recruitment that the employer may change unilaterally any term of their contract of employment.

Although applying to fundamental terms of the employment relationship such as pay and working time, the courts have upheld these terms in cases involving workers as diverse as supermarket staff and airline cabin crew. Employers are thus choosing not only the nature of the employment relationship they will have, but also whether they will be bound by the contractual terms they accept.



Professor Keith Ewing, President, UK Institute of Employment Rights

Beecroft Report

It is into this very permissive environment that the government's programme of deregulation by stealth has been dropped. The starting point is the review of employment law controversially commissioned by the Prime Minister's Office shortly after the election in 2010, to be conducted by venture capitalist Adrian Beecroft.

Mr Beecroft attracted some notoriety as a result of his connections with the 'pay day lender' Wonga, which lends money at interest rates reported to be an eye watering 5,853%. He also attracted some scorn, producing proposals for a radical revision of employment law heavy on prescription and light on evidence.

Indeed, Beecroft was said to accept 'the accusation that my views on whether or not this would improve the efficiency of people working in businesses is based on conversations, not a statistically valid sample of people' (*Daily Mail*, 21 June 2012). Untroubled by the need for such evidence, one of Mr Beecroft's most radical proposals was the effective abolition of unfair dismissal.

Thus, unfair dismissal would be removed from every worker to be replaced with the employer's right to 'compensated no fault dismissal'. Workers could be sacked for any reason or no reason. If the employer no longer liked the cut of the worker's jib, it would be 'thank you, good night and goodbye'. Provided the employer made an enhanced severance payment, there could be no comeback.

In making proposals to roll back employment rights to the 19th century, Beecroft accepted that 'some people would be dismissed simply because their employer did not like them'. But while this was 'sad', nevertheless it was 'a price worth paying', in what was only one of a number of proposals to rein in the law of unfair dismissal.

But the Beecroft Report was not only about unfair dismissal. Its 24 pages of poison contain many other threats that avoided detailed media discussion. These include proposals on discrimination law, parental leave, and flexible working, as well as a reduction in the redundancy consultation procedures to enable workers to be fired more quickly.

Removing Rights by Stealth

Beecroft's core idea of compensated no fault dismissal may have been extreme. But it did have the virtue of honesty. His report stands as a manifesto on employment law should Britain again elect a Conservative-only government. But it was too much for a Conservative-led coalition government, which has taken other steps to achieve the same policy objectives.

At the core of these is a dismantling of unfair dismissal rights, with the first step being the doubling to two years of the qualifying time in employment with a particular employer before an employee may bring an unfair dismissal complaint. But why stop at two years, with Mr Beecroft asking why not three, four or even five years?

Secondly, where employees do qualify to bring complaints, legislation is making it harder for them to get access to tribunals. There is now a formal statutory obligation to seek a conciliated settlement to an unfair dismissal claim, which may now proceed to a tribunal only if the employee has a certificate from a government conciliation officer to the effect that conciliation has failed.

But conciliation is unlikely to lead to much more than an elaborate game of brinkmanship. The reason for that is that thirdly, a pernicious new fees regime has been introduced for employment tribunals. An employee will have to pay a filing fee of £160 or £230, depending on the nature of the complaint (at the lower end for unpaid wages and at the higher end for unfair dismissal).

If the case proceeds to a hearing, an additional hearing fee of £230 or £950 will have to be paid, which will put access to industrial justice beyond the means of most workers. It is true that the government has introduced a system of fee remission for low income workers. But it remains the case that the fees will be a major disincentive to claims being brought.

> **"Australian workers have no cause for complacency, whatever may have been said by politicians during the election campaign."**

By far the great majority of employment tribunal applications are unsuccessful, with workers entitled to recover only if they win. Very often the fees will exceed the value of the claim, which means that claims – such as claims for unpaid wages or unpaid redundancy payments - will simply not be made. There is more than one way of stripping workers of their rights.

Conclusion

But this is only the start. The period of redundancy consultation has been cut from 90 to 45 days, making it easier to fire workers (and fire and rehire on inferior terms). The occupational pensions of public service staff have been slashed, and new restrictions have been introduced on the workplace facilities of public sector trade unions.

The cumulative effect of all this is clear - it takes Britain closer to the employment contracts model discredited in New Zealand. By the failure of regulation employers can – and do - choose exploitative employment relationships. Where employers choose standard contracts, they can impose flexibility clauses. Where employers neglect to impose flexibility clauses, they now have help to change contracts unilaterally.

Why has this been done? Partly because of the UK's national debt and the need to reduce government spending. But partly also because of a misplaced belief that low wages and a permissive regulatory environment will encourage job growth and help small businesses to develop. The same ideological logic prevails in Australia, despite more favourable economic conditions than in the United Kingdom.

Australian workers have no cause for complacency, whatever may have been said by politicians during the election campaign.

Employer pattern bargaining – the tribunal and template agreements in the restaurant sector.

The Fair Work Act effectively outlaws 'pattern bargaining'. More precisely, it provides that protected industrial action cannot be taken where pattern bargaining occurs. So why can employers pattern bargain by using template agreements? What is the role of the tribunal is scrutinising these agreements? Research undertaken by AIER's Keith Harvey has identified that there are some real problems of consistency in the way the tribunal has handled these matters.

This article considers the role of Fair Work Australia [as it then was] in approving a number of 'template' enterprise agreements in the restaurant sector in 2011 and 2012. The research supporting this article is based on the text of the agreements approved by Fair Work Australia and the decisions of individual Commissioners in relation to these agreements, documents which are all publicly available on the tribunal's website.

AIER has chosen not to identify the particular enterprises or agreements or the Commissioners concerned. AIER considers that this would be a distraction from the main issue, which is a public policy issue involving questions of the process and outcomes of agreement approval in certain sectors. A number of recommendations are made at the conclusion of the article.

Section 412 of the Fair Work Act defines pattern bargaining as a course of conduct in which a bargaining representative for two or more agreements seeks common terms to be included in two or more of the agreements. The prohibition on taking industrial action in support of pattern bargaining was designed to prevent unions flowing agreements won at one enterprise to other enterprises in a particular industry.

Some employers engage in bargaining practices which if undertaken by unions, would be be described as pattern bargaining. This particularly occurs in the context of non-union agreement bargaining, especially where bargaining agents for employers promote and seek to flow 'template' agreements to a number of employers in particular sectors.

Template agreements certainly seek "common terms to be included in two or more agreements" – in fact these agreements are often largely identical in their terms. The question of taking protected industrial action in support of these agreements is not relevant as these agreements are usually proposed by employers in non-union workplaces.

Unions cannot take protected action in support of industry wide claims but there is in effect no limitation on employers proposing pattern agreements. The industrial tribunal has no role in reviewing the appropriateness of this conduct even though the use of template agreements raises concerns about whether bargaining has been in good faith.

A review of decisions of the tribunal regarding the approval of employer template agreements indicates that there are also inconsistencies in the way different tribunal members assess these agreements against the Better Off Overall Test [the BOOT].

Agreements go to individual tribunal members for consideration and approval. In the case of non-union agreements, the tribunal member has only the documentation and submissions of the employer for guidance in considering whether the agreement passes the BOOT and otherwise satisfies the requirements of the Act.

Agreements usually go to tribunal members in the State or Territory in which they will apply or where the application for approval is lodged. This means that different members potentially taking different approaches to them will be considering these agreements without reference to each other.

As a matter of public policy, consideration needs to be given to how the tribunal can ensure consistency in decision making when applying the BOOT assessment to agreements. AIER believes that the research outlined in this article demonstrates there is a problem that the tribunal should address. The original research cited here was commissioned by United Voice in 2012. The author was asked to review all enterprise agreements made in the restaurant industry in 2011 and the first half of 2012.

Template agreements in the restaurant industry

Only 25 restaurant agreements were identified, of which 14 could clearly be identified as template agreements; that is, they were largely in identical terms and/or format and had been used in similar enterprises [usually franchises using the same band name].

A key issue in the restaurant industry is the use of annualised salaries. The Modern Award allows the use of annualised salaries but on certain strict conditions; that is, that employees, other than casual employees, may be paid annualised rates provided that the rate is at least 25% above the minimum award rate and sufficient to "cover what the employee would have been entitled to if all award overtime and penalty rate payment obligations had been complied with". Records must be kept to ensure that award obligations are being met.

An examination of ten similar template agreements applying to two separate franchise operations running certain branded coffee shops and cafes across the country illustrates issues with the approval process.

Three different Commissioners in three different States approved these ten agreements. All Commissioners sought undertakings in relation to these agreements of one sort or another but not consistently with each other or consistently over time.

Commissioner A first considered one of these agreements in December 2010. The Commissioner did not seek any undertakings and approved the agreement. In the view of this author, the agreement had a number of questionable clauses but did not however have an annualised salary clause, unlike later versions.

Later the same month, in another State, Commissioner B approved a similar agreement but required undertakings in regard to no fewer than eight clauses before he would do so. However, Commissioner B did not require an undertaking regarding the operation of the annualised salary clause in this agreement which read as follows:

Option for an Annualised Salary

All Work Level 3 and Supervisor Employees can also be paid a salary (in addition to the Managerial Level Employees) provided:

It is calculated as follows:

Minimum Salary = Full/-time/part-time hourly rate x 1976."

This is clearly well below and contrary to the award provision. Commissioner B's eight other required changes greatly improved the operation of the agreement and eliminated a number of clauses clearly disadvantageous to employees.

Commissioner A considered another of these template agreements in February 2011. He did not require any undertakings but the agreement did not have certain features he later found to be objectionable.

In September 2011, Commissioner A again considered one of these agreements. He required undertakings with regard to the hours of work clauses, increasing the minimum daily engagement for full-timers, reducing the span of hours for part-timers and negating part of the part-time hours clause. He again considered further agreements in December 2011 but did not have an issue with these clauses.

Commissioner A approved two more versions of these agreements in 2012 – he did not seek any undertakings but the two agreements did not contain the provisions he found objectionable in September 2011 [but acceptable in December 2010].

In December 2011, Commissioner B approved another version of this template agreement. On this occasion, he accepted an undertaking re annualised salaries in the following form:

Level 3 and Level 4 Employees may be paid an annualised salary provided that their salary is no less than the following:

Annualised Salary = The relevant Award base rate of pay + 25%

This provision was clearly designed to match the award provision.

Commissioner B did not seek this undertaking with regard to the agreement approved in December 2010. His 2011 approval replicated part of the other improvements sought in 2010 but not all: for example, the undertakings do not deal with meal breaks and voluntary training which were subject to earlier undertakings required by him.

Commissioner C, in another State, approved one of these agreements in July 2011. He required changes to the part-time clause to bring it into line with the award and accepted an undertaking re wage rates but required no other changes – thus, other than the part time clause change, the agreement retains most of the same features Commissioner B objected to in December 2011. It also contains the version of the annualised salary clause later found unacceptable by Commissioner B.

In any event, with or without most of these undertakings, in the opinion of this author, the agreements fail the BOOT in nearly all cases. This is because the template agreements have provisions for rates of pay for "all rostered hours", that is work performed irrespective of the time or day on which it is carried out. If such rates apply to all hours worked and with regard to all employees [including casuals] and they are not at least 25% above the award rate, they could not pass the BOOT against the award.

Both employers and employees deserve consistency of approach with regard to agreement approval. It may not be obvious to individual Commissioners that they are being asked to approve agreements that are the same or similar to other agreements which have been considered previously. It would appear that the Fair Work Commission needs to consider its processes so as to ensure consistency of approach and outcome.

Recommendations

It is unlikely that the limitation on pattern bargaining by unions will be re-considered by any Government in the near future. However, it would appear that good faith enterprise based bargaining, if it is to remain part of the workplace relations system in Australia, should apply equally to employers and unions.

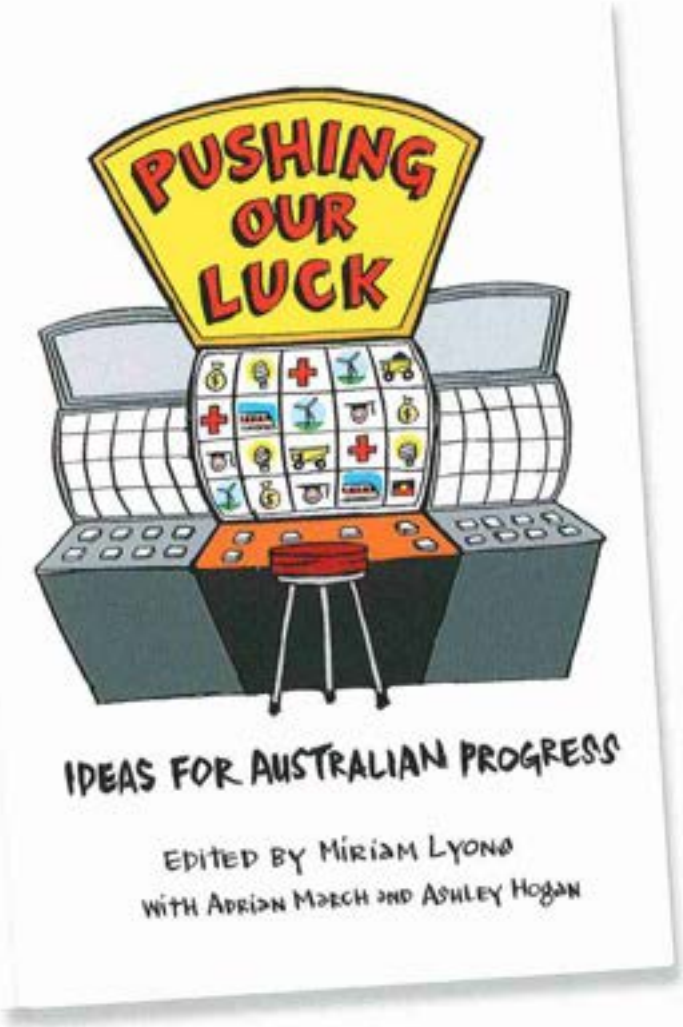
The dispersion of agreement approval applications to individual Commissioners makes it harder for them, with limited resources, to identify where template agreements are being made and lodged.

The research cited suggests this job may not be being done consistently. To remedy this, it would be appropriate for agreements in particular sectors to be considered centrally, either through the Commission panel head responsible for the industry concerned and/or for the tribunal to create a central unit to assist Commissioners assess agreements and in particular to identify where similar agreements have been previously dealt with by the tribunal.

Book Review: *Pushing our luck – Ideas for Australian progress*

In a chapter in a new book published by the Centre for Policy Development, AIER Executive Director Lisa Heap, argues for the general public to get involved in a broad discussion about what we want and need at work. The book also contains detailed proposals for how to reform education and health systems, how to pay for the society Australians want, setting a new vision for Australia, climate change response and building resilience into the economy.

Keith Harvey reviews the book looking particularly at those chapters dealing with employment issues.



This book might have been sub-titled: "pushing the envelope" as it contains structured discussions on key policy issues confronting Australia in 2013 and practical policy ideas for their resolution.

Issues related to jobs, employment, management, innovation and productivity are found in a number of chapters and the book as a whole will be of interest to those with an interest in workplace culture. Other subjects such as education, social security, health, climate change and culture also get attention resulting in a broad agenda for discussion and proposed policy directions.

In *Taking the high road: a future that works for workers,* Lisa Heap has brought together a number of employment related policy issues that have been part of AIER's agenda since its establishment in 2005.

The chapter begins with a discussion of one of the most pressing employment issues - insecure work in all its forms (casual, temporary, contract and self-employed workers, as well as workers on s.457 and student visas). Australia has high levels of insecure worker– by one measure, the second highest in the OECD after Chile – and accords those workers less employment rights than many other countries.

Lisa draws attention to the difficulties surrounding insecure work and challenges the oft-repeated claim that these workers prefer casual and other forms of insecure work. Insecure work is not only a problem for the workers, however.

Creating a class of insecure workers is largely not beneficial for the economy as a whole as such workers are often less productive and disengaged from being able to make the maximum contribution to their workplace. Casual employment should be more tightly defined, Lisa argues, so that only genuine casual workers fall into the definition.

Taking workers out of the employment relationship altogether by turning them into 'self-employed contractors' completely ends an employer's obligation to a worker, terminates all employment rights and benefits and puts all the economic and financial risk on the worker.

The solution posed in this chapter is the recasting of employment laws so that every worker regardless of the method of engagement has access to a suite of employment related rights, and access to third party assistance in resolving disputes.

Lisa argues for educating workers on their employment rights at the point of entry into the workplace, using a tool such as AIER's *Workright* program.

The role of management behavior and culture is also explored. Good management reduces insecurity and increases effectiveness and productivity as well as worker well-being. The role of good management is explored in more detail in the chapter written by Roy Green, Dean of the Business School at the University of Technology Sydney. Other themes explored by Lisa include the need to regenerate genuine tripartism at work and the important role that unions play in democratic societies.

The book is skillfully edited by CPD Executive Director Miriam Lyons who brings together the 10 chapters by well-known authors by exploring the common question running through them all - how do we make Australia a 'good society' on an on-going and sustainable basis?

This book should be seen as a foundational text for those interested in progressive social policy solutions to the big issues facing Australia today.

Pushing our luck – Ideas for Australian progress, edited by Miriam Lyons with Adrian March and Ashley Hogan, Centre for Policy Development, Sydney 2013.

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