12th annual

Ron McCallum Debate

Transcript

Wesley Conference Centre, Sydney
24 October 2022

(Auto-generated transcript)

James Fleming:

Hello and welcome to the 12th annual Ron McAllen Debate on industrial relations. I'm James Fleming and I'm the executive director of the Australian Institute of Employment Rights. The AIER. I'd like to begin by acknowledging the traditional custodians of the land and to pay my respects to their elders past and present the aier aims to promote better industrial relations in the public interest and is inspired by the tripartite structure of the International Labor Organization. We aim to promote fundamental labor standards and corporation and social dialogue between unions, business and government, and try to present new and bold ideas for debate and IR report. Tonight's debate is in front of a live audience at the Wesley Conference Centre in Sydney, and also being webcast to around 500 registrants around the country. So, welcome everybody, and thanks for coming. Thank you also to our esteemed debate participants and keynote speakers, and to our main sponsors tonight, Harmers Workplace Lawyers.

Just a note that Michael Harmer, chairperson of harmers and president of the a AIER, uh, who was to be part of the debate panel tonight has unfortunately fallen ill. So Mark, per one of our vice presidents, will, step in on the debate panel in his place. As you know, tonight's debate topic is, how can we future proof work relations in these times of crisis and change to add to the growing divide on the labor market between standard and non-standard workers and the economic disruption of the digital revolution. It seems we're facing catastrophic climate change, the war in Ukraine, high inflation and growing global economic and political instability. How can we future proof ir against these and other crises and the major challenges and transitions ahead of us? That's what we're looking at tonight. We've just seen that after the jobs and skills summit, the government has released a major industrial relations reform bill and reformers in the air.

So, some of the themes we've put to the debate as to think about beforehand are the new rules of work for a new era. How do you think we can move permanently ahead of the future of work and changing business practices? How can we best manage accelerating change and dig digital disruption? How can we make work relations fit for the challenges of climate change, pandemics and a more volatile world? How can the rules of work help make for a fairer more agenda equal, secure, prosperous and sustainable future? Before we get into it, I'll give a quick rundown on the order of proceedings. The debate itself is named after emeritus Professor Ron McCallum, who you'll hear from soon. First as a keynote speaker, and then at the end of the debate he'll give his customary reflections. But for those who weren't here last year, I'd just like to say a few words about Ron.

Ron is the AIER's patron and one of Australia's top labor law experts and one of the world's leading disability advocates. He is a past chair of the United Nations Committee on the rights of Persons with disabilities. Ron is also the first totally blind person to have been appointed to a full professorship in any field at any university in Australia or New Zealand. He's a former professor and Dean of law at Sydney University and was senior Australian of the year in 2011. The debate is named after both him and his work, his life's work on promoting justice at work. Uh, but first tonight we're gonna hear from John Ritchotte from the International Labor Organization. John will help set the scene internationally. He's a specialist in industrial relations and Labor administration and joined the ILO in Geneva in 1999. Since 2009, he's been in the ILO decent work team in Bangkok with John’s responsibility for various countries in Southeast Asia and the Pacific.

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You're then gonna hear from Ron and Ron's also gonna introduce our new book, which he's launching today, called A New Work Architecture, The AIER Model for the Future of Work. And a copy of that book was given to all the participants in lieu of a background paper this year. The book is available from all good bookstores from 1st of November and from our website now. And just to let you know, for those of you in the room, there's a discount code on the flyer on your chair. After Ron, we'll hear from the Honorable Tony Burke, Minister for Employment and Workplace Relations and Minister for the Arts. Also in no need of introduction is Justice Ian Ross, president of the Fair Work Commission. And he'll take over from there, introduce our debate panel and moderate the debate. So now I'd like to go ahead and welcome John Ritchotte from the ILO The Floor is yours, John. Thanks.

John Ritchotte:

Thank you very much, James. Minister Burke, Justice Ross, Professor Ron McCallum, panelists and participants, uh, thank you, uh, to the Australian Institute for Employment Rights for inviting the ILO to give opening remarks at today's important Ron McCallum debate. Uh, as mentioned, my name is John Ritchotte. I'm the labor relations specialist for the ILO based in Bangkok covering countries in Southeast Asia Pacific. Uh, I would like to note at the outset, uh, the, our close collaboration over many years with both the Fair Work Commission and the fair work ombudsman, uh, which has been a great benefit for the ILO and, uh, more importantly for our tripartite constituents, uh, in throughout the region.

As James mentioned, we know that societies and economies around the world are facing enormous difficulties brought about by the pandemic and the war in Ukraine, including unemployment, inflation and supply chain pressures. In 2020, the ILO estimated that the equivalent of 255 million full-time jobs were lost compared to 2019. And in the most recent estimate, uh, including some recovery globally, the figure is over 100 million full-time jobs. The IMF estimates that global inflation rate will increase from 4.7% in 2021 to 8.8% this year. These issues have been well documented, though it's important to note the unequal impact across the globe, poorer countries and even some middle income countries have been disproportionately affected by these crises compared to wealthier nations. And the recovery together with the food and energy crises is still a major challenge in these countries.

On top of this, we of course have the preexisting issues of wealth and income inequality, climate change, and a just transition towards a green economy and the challenges raised by the informal economy and gig and platform work. However, we know that there are ways of addressing the labor market impact of these issues, and one tool that can help is the use of collective bargaining. I've been asked to talk today about, uh, multi-employer bargaining in my remarks to start the, the level at which negotiations take place is a crucial consideration for any country. The collective bargaining framework needs to enable employers, employers, organizations, and trade unions, as well as their federations and confederations to conclude collective bargaining agreements at their chosen level of negotiation. We know, of course, that bargaining can take place at any level at the workplace or the establishment at the enterprise, at industry, sector or branch level, territorial level, municipal or regional, uh, by occupation or profession at the national level, or a combination of these crucially bargaining should be possible at any level.

Research and experience have shown that multi-employer bargaining is most effective when there is coordination between the different levels. Coordination can take place in a number of ways, either by the parties themselves, by bargaining at the sectoral or professional level through upper level organizations or by, by pattern bargaining, bargaining coordination. And the coverage of collective bargaining across an economy play a crucial role in reducing wage inequality and improving the functioning of labor markets with respect to employment research by the O E C D, by the ILO and others, as demonstrated that higher levels of collective bargaining coverage contribute to lower levels

of inequality, collective agreements can advance equality by more closely linking wage growth with productivity growth by boosting the wages of lower income workers and promoting gender equality and the inclusion of women, young people, migrant workers, and other vulnerable categories of workers.

Related to this is the importance of vertical coordination, the application of the favorability principle in respect of law and collective agreements and adaptability provisions in multi-level bargaining systems. One way of achieving higher coverage of collective agreements is through, uh, extension mechanisms. Agreements can be extended through er OES provisions to all workers or by extension to all enterprises. One of the advantages of regulating terms and conditions of work through collective agreements is that they have been negotiated by mandated representatives of employers and workers organizations. They are thus more likely to reflect the prevailing conditions in an enterprise branch or industry.

One approach adopted by public authorities in countries with industrial or branch level agreements is to declare some or all of the provisions in collective agreements generally binding these declarations of general applicability extend the coverage of collective agreements beyond the signatory organizations to all enterprises and workers in an industry branch or territorial area. Declaring collective agreements generally applicable can be an important way to promote collective bargaining. First, it establishes a floor and ensures that employers who bargain collectively are not placed at a disadvantage vis-a-vis thoses who are not found by the terms of the agreement. Second, it extends the protections and benefits afforded by the collective agreement to all workers in a sector, including those in vulnerable categories of work such as temporary workers.

Third, it encourages membership in employers organizations since it is preferable to have an influence over the terms of a contract that will bind them. The practice of extension of collective agreements is mainly found in countries where industry or branch level collective bargaining is prevalent. Legislative provisions generally establish a number of conditions for such extension, such as the prior request by one or both parties to extend an agreement, the representativeness of the parties to the agreement in relation to those to whom it would be made applicable, and the opportunity for those to whom an agreement will be made applicable to provide their observations prior to extension

Provisions may also be made for exemption for some or all of the applied provisions for enterprises experiencing difficulty or for small businesses in one of the most comprehensive reviews of collective bargaining and collective agreements around the world. A recent ILO flagship report published in 2022 contains some up to date findings, while practices, uh, naturally differ widely across country cross countries. The report finds that where collective bargaining takes place on a single employer basis, an average of 15.8% of employees are covered by collective agreements where it takes place on a multi-employer basis. It is more encompassing with an average of 71.7% of employees covered.

Multi-employer agreements are also more likely to offer a more inclusive form of labor protection covering migrant workers and workers in diverse forms of employment, as well as complimenting social protection such as unemployment, insurance, healthcare, and pensions through the pooling of funds and better portfolio management. In this way, collective bargaining conserve as a public good. These bargaining institutions are also more likely to be more responsive, including through adaptability provisions such as exemptions for small businesses and temporary delegations and hardship clauses that can be invoked when circumstances change. Moreover, in many countries where professional or sectoral organizations of workers and employers negotiate agreements, it is very common to require consultations or negotiations at the enterprise level on a wide range of issues, thus providing greater flexibility to adapt to local needs and circumstances. I would, uh, note that if you would wish to learn more about

this recent report, you can, uh, search under ILO flagship report on collective bargaining and it should appear, uh, at the top of the screen. Uh, ladies and gentlemen, uh, thank you for attention and may I wish you all the success in your debates today. Thank you over.

James Fleming:

Thank you very much, John. Now hand over to Ron McCallum,

Ron McCallum:

In December 2012, sorry, writing in December, 1912, Vladimir Ilyich Lennon said, decades go by where nothing happens and suddenly weeks go by and decades happen. That's the way I feel it present. Now, I'm not suggesting that Vladimir could have predicted the first World War or Russian revolution, but I think you hit on a point that there are waves in history or waves in the way we move from one era to another. And I feel that we've been caught in a wave that perhaps began with the so-called financial crisis in 2008, but has sort of spiraled out of control with, um, former President Trump perhaps seeking another term. No one quite knows who will be British Prime Minister. We've had c we've had the war in Ukraine. We have huge inflation, and it's very clear that our labor relations system is broken and not equipped to deal with the present situation in Australia. We have a third of the workforce whom I would regard as being precarious forms of casual employment and also independent contractors, if you like, um, to use the title of an American book. We are seeing the fissuring of the Australian workplace

What to do. Well, we in the Institute of Employment Rights, and I'm honored to be it's patron and I'm sad that our president Michael Harmer cannot be here today, but I'm hope he watching at home. We've just published a book edited by James Fleming, the executive director who introduced the debate this evening, and it's called a new Work Relations Architecture, The A I E R model for the Future of Work. Well, the whole group of us who wrote the report or the book, and we had many discussions, uh, particularly early on from 2016 onwards as the world was falling apart around us. And I mean that clearly.

We had two ideas that grounded the re the book, um, both in a sense emanating from Michael harm and discussions we had together. First concept we call the Robens concept, and the second concept directed devolution. For those of you who aren't familiar, in 1974, the Robens committee in England said, We've gotta solve the problem of our safety and health laws. We have too many regulations that no one understands and too little coverage. And the robens philosophy was to make everybody in the workplace responsible for safety and health. And we enacted those laws following on from Britain and Canada. And in 2008, because of successful consultations, we have ensured that in all states and territories except for Victoria, there is a model Work Health and Safety Act. And the idea is that a pc, C b a person conducting a business or undertaking is responsible for everyone in the workplace, whether they be contractors, uh, whether they be consultants, whether they be employers, whether they be casual, because we're all in this together and we all have to look after one another's safety.

The second element really is I, I would sing list to merit my old friend, Meritus Professor David Petes directed devolution. We really do not want to overregulate labor relations. We can have high level regulations from parliament and also from tribunals, but then we need to get into the workplace to make sure that any form of regulation is adaptable and appropriate. So what we did, we, in our discussions, we thought let's, let's think of a Greek building. This is my fascination with the Greek mythologies. Um, the floor is going to represent, um, our notion of fairness, the fair go all round to use lot's case, which has been the hallmark of our arbitration system for now,

more than almost a century and a quarter, the roof was going to be justice and the instruments that keep justice going, the courts, the Fair Work Commission and similar tribunals.

And in chapter one of the book, Michael Harmer looks at the concept of fairness and why to future proof work, we must ensure that fairness is at the center of our workplace relations. In chapter two, Meritus, Professor David Petes looks at directed devolution. He puts a few shots across the bows of the Fair Work Commission and, and says, really, that we must ensure that appointments are balanced and that we have some system of appointments to ensure confidence in tribunals between the parties or parties. In chapter three, I explore the whole area of robens and how we got model laws and how these laws operate, but I also argue that there've been a series of weaknesses as we've moved from large employers to small employers. Many small employers don't have committees or health and safety representatives to ensure directed devolution. Um, I also look at the problems of climate change and of environment.

If you think about temperature changes that will alter a lots of patterns of work around Australia. In chapter four, our editor James Fleming, looks at work and security and he's quite a philosophical guy and he looks at a lot of theorists, but a lot of practicalities, particularly the way, um, that parental leave and childcare systems operate in Europe and how they allow an increased female workplace participation. Marilyn Pitard, Professor Marilyn Pitard, immediate past president of the Australian Laborer Association, looks at in chapter five at workplace, um, benefits, um, wages, remuneration, unfair dismissal, and how do we broaden those out to ensure that precarious workers are not left out. In Chapter six, Professor Anna Chapman from the Melbourne Law School who's here with us tonight, rights eloquently about our laws on discrimination, harassment, um, sexual harassment, general harassment at work. Now I'm pleased to see that the current government are now going to legislate a duty.

It's like a roben style duty on employers to prevent harassment and discrimination as far as possible. In chapter seven, Mark Perica, on my immediate left examines what I call the issue of voice at work, or if you like, industrial democracy, how do we establish committees? How do we ensure the inclusion of all workers in businesses or undertakings? In chapter eight, Keith Harvey, who's been a great long supporter of the A I E R and Ben Redford look at multi-employer bargaining, and I'm going to leave that because I think Mark Perica will talk about that later. Chapter nine, uh, Professor Joel Ellen Riley Monton, who's also here this evening, writes in her very clear pros about the problems of all the actors in the workplace and how we must design our laws to ensure that people who are contractors not working on their own account and consultants and casual employees, et cetera, are all given a fair go, are all able to participate in workplace committees.

In chapter 10, we have, um, more discussion, um, and I that's sort of escape me Chapter 10, <laugh>, No, I can't remember. Uh, he's gonna tell me this is old age, right? Oh, this is Margaret McKenzie. Margaret McKenzie, yes. That this is because I'm not an economist. Dr. Margaret McKenzie, we asked her to write something. What would happen if we modified our laws, if we, for example, increased the wages of Deliveroo drivers and others who aren't working their own businesses? And she shows that, um, it really isn't going to make, uh, an, uh, a huge difference to our GDP that we can certainly manage that. And the benefits of fairness and collectivity, uh, outweigh any problems with, um, the gdp. Given all the inflation and the money we use during pandemic pandemic, it's hardly a problem. In chapter 11, we have Emeritus Professor David Petes and the Honorable Paul Monroe Am who's here tonight, former, uh, senior Deputy president of the Fair Work Commission, and they look about how we should be able to transfer.

And I perhaps wanna finish by focusing upon this, how do we alter our laws? It seems to me that ever since 1992 with bargaining, we've had a to and fro tennis match between the government and opposition. Um, liberal national on one side and labor on the other where certain changes are made to make it more easier for employers and then

the other side comes back, but they're still ringing the changes. How do we move to an all-encompassing area of directed devolution, of roben style approach to all workplaces? And we can only do that by consultation. It's a bit like the voice to parliament for indigenous persons. This isn't easy, it's hard, but if we are serious and we want to workplaces for our children and grandchildren, that's what we need to do. And they give examples of successful consultations. And in fact, I don't think we have enough consultations in this country. You can get, you can get called in by governments to be cons to consultation and they simply talk at you. Consultation means listening and understanding.

120 years ago, our ancestors decided that the old contract of employment was not relevant for an Australia of the 20th century. And we developed compulsory conciliation and arbitration along with New Zealand, through consultation, through discussion, and through meaningful debate. And that lasted us for a good six or seven decades. It's time now to rethink our laws, not just ringing the changes of the current laws, but looking at a new way to cover all workplaces and all persons undertaking remunerative work because most of us spend most of our waking hours at work. It's for our dignity, support of our families, and the good of the nation. Thank you very much.

James Fleming:

Thank you, Ron. So now here I believe from, uh, Minister Burke, uh, minister for a workplace relations employment and the arts. They're just having a bit of trouble logging into the teams meeting, so I just want to check that they're still there.

Hon Minister Tony Burke:

Okay, fantastic. Uh, I'm, uh, acknowledge the traditional owners of, of where I am and, uh, the different lands that people are joining from and elders past and present. Uh, I wanna acknowledge, uh, just see and Ross, uh, Ron McCallum, uh, John Ritchotte and the panelist, Melissa Donnelley, Nareen Young, Denita Wawn, Liam O'Brien, Stephen Smith, Anna Chapman, and Michael Harmer. Uh, it's great to be, to be back with you, uh, in a different job to when I last spoke to you 12 months ago. Uh, a job fair to say I prefer, uh, but a task, which is huge, and I think the conversation that you've, you're dealing with tonight, uh, really nails part of the challenges that we're dealing with, uh, where you say future proof. How do you proof workplace relations? Part of what we are dealing with in Parliament at the moment and the legislation that I'll introduce in the first trench, uh, on Thursday of this week, uh, the Secure Jobs Better Pay Bill, and similarly in what I'll be introducing in the second charge when that happens next year, is because the Fair Work Act was not future-proofed.

Uh, and there are some things which you can't plan for into the future. Uh, for example, we had no way of, of knowing when the Fair Work Act, uh, went through in 2009, what the gig economy would become, uh, all the way there would be a change in the operation of, of labor hire, Uh, or the way that job security, which traditionally had been viewed as to whether you're a permanent employee or a casual, would start to be whether or not you were instead, uh, on a short term contract. Uh, and all of these different processes started to come in. We also had no way of knowing some of the legal decisions that would be made. Uh, and you know, with tax law, we come through this place five to eight times a year, and when we do that, we update the tax law because somebody has found a loophole and we need to act very quickly to be able to protect the revenue for government when a loophole is found that attacks the revenue in someone's pay packet.

Uh, the Parliament for the last 10 years hasn't been updating legislation. So there are some things with future proof you can do in the total systems, and I'll get to some things that we are doing there. But it's also true that part of

future proofing is a willingness of the Parliament to continue to update legislation. What I'll be doing on Thursday is about updating legislation, what I'll be doing next year, uh, with the legislation that'll deal with things like same job, same pay, and the regulation of the gig economy will again be about bringing the legislation up to date with the needs of the modern workforce. If I start with the, the gig economy, the old fights that have happened for a long time in terms of sham contracting have taken on a completely new part of the workplace with the gig economy, it should not be the case that it's politically contested as to whether low paid workers should be at least paid the legal minimum rates in Australia.

And yet that became one of the most controversial topics during the election campaign that we've just had. The people who use the gig economy, and I'm one of them, want the technology, but 21st century technology should not demand 19th century working conditions. And we do need to find a way that we can keep the technology, and yet people can have some minimum standards and some minimum rights. The, and if I just give two examples as to the real life expectations here, uh, at an Iftar during Ramadan, in the suburb where I live in Punch Bowl, a couple of years ago, I met a number of overseas students from Pakistan. They referred in passing to the name of somebody who I'd heard that same name from the Transport Workers Union, the name Bij Paul, uh, Bij Paul had been a delivery rider in the, in the gig economy.

He had died on the road and the platform had claimed that his death had nothing to do with them because he wasn't an employee. The students I was meeting with were the people who had paid for his funeral. There was no sense of obligation from the platform to the people who they controlled, who had no say over their paying conditions. Similarly, I met a fruit picker by the name of Kate Sue. She was working for a labor hire company in fruit picking, and she had photos to show me how she was able to eat, uh, when she was eating. What she was doing was, and the, the photos were, it was horrific to see, uh, was going into the dumpster bins at the back of supermarkets to find her meal each day. Uh, this was happening for the very simple reason that the rates of pay she was receiving in the order of about $4 an hour were happening in Australia.

These are all loopholes that need to be closed. Uh, so if I then go through some things that can be done now as well as the loopholes, but things that can be done as well as the closing of loopholes, things that can be done now that structurally will make an ongoing difference to the capacity of the Fair Work Commission to be able to, uh, deliver minimum protections that we want to be there for the future. Uh, the first is the two panels, The panels that we'll be establishing on the Fair Work Commission in the legislation that I introduce on Thursday will be panels with expertise in pay equity and a panel with expertise, uh, as well, uh, in the care and community sector, a sector where low rates of pay have principally been related to government funding as well, and a need to be able to get the funder into the bargaining negotiation.

These panels create a situation where we will be able to have ongoing specific expertise to deal with the expectations of the modern economy, where there is an expectation now that the work in feminized sectors should no longer be undervalued, that we do want to see pay equity across the economy, and that the 14.1% gender pay gap is viewed as unacceptable. These sorts of structural changes will allow things to be done immediately, and they'll also provide a level of expertise for the opening up of access to, for multi-employer bargaining for those areas that have not had the same industrial strength once again, largely feminized, uh, parts of the economy where pay rates have been held back. So in this way, you put the structures in place that will allow the challenges of today to be dealt with, but will also provide structures that the Fair Work Commission will be able to draw on into the future.

It's just that same sort of structural strength that we saw where the Fair Work Commission earlier this year was able to deliver an annual wage review when a whole lot of the commentators were saying it would be outrageous if

people were able to keep up in any way with what the inflation rate was at the time. And the Fair Work Commission made a decision that has changed people's lives when these structures are put in place, the help is immediate, but the reform allows some of that future proofing to go on into the go on into the years to come. Uh, it's a pleasure to be here. Uh, further on Mc Callum debate. Uh, I've got the deepest respect, uh, for you, Professor McAllen and of course for the president of the Fair Work Commission Justice Ross. Uh, and I hope these opening remarks lend something to the discussion on the panel that'll come from now real pleasure to be with you.

James Fleming:

Thank you, Mr. Burke. And I apologize for the problems we had there with the vision, but hopefully the audio came through. Okay, so I'll now, um, hand over to Justice Ross, who's going to moderate the main debate.

Justice Iain Ross:

Um, look in briefly introducing the debate, it did strike me that it's a, a very challenging topic. Uh, how can we future proof workplace relations in these time of crisis and change, and how do we move permanently ahead of the future of work? Um, and I was very interested in the idea of rather than having detailed IR rules that might quickly become obsolete, moving to some sort of broader roben style, uh, set of objectives underpinned by standards. It did make me think back to the first iteration of legislation in our system back in the early 19 hundreds when the act consisted of 26 pages. Uh, there was one, a one page schedule dealing with registered organizations, uh, those for the days. Um, now I'm reliably informed there are 2,500 pages of regulation. I haven't actually personally counted them, but I'm, uh, pretty sure Andrew Stewart did.

Um, and so there is an initial attraction with, well, um, how do we, how do we move from that level of complexity to something simpler? Um, and, uh, certainly the notion of, uh, uh, empowering the tribunal with a broader range of discretions and powers is, um, at least for me, intrinsically attractive. Um, uh, but, um, I think we also have to bear in mind that whenever you invest a body with a a broad discretion, you're gonna get a range of acceptable outcomes within that scope of the discretion. So how do you balance flexibility with certainty? How do you match those sorts of things? I think, um, uh, one way, um, is as Ron's indicated to have, uh, deep and ongoing consultation with the broad community stakeholders about what that looks like. What do we want the system to deliver? And then to look at evidence based policy.

Once you've established a consensus around what's the objective, then you try, let's see if this works. Um, and then you evaluate it and review it, uh, and see whether it's delivered on the expectation. It's a point the minister made that it's a willingness to update. I think it's a willingness to continue to learn and that this is an iterative process. I hope that the Parliament gets it right the first time. Um, but, um, you know, history would suggest that it's gonna need some tweaking over time. And having an evidence based policy lens through it, I think is one way of moving it forward. Now we have seven speakers have each been allocated three minutes. There's a, there's a set order, uh, mark's kindly, uh, uh, agreed to, uh, act as the chop off on the time. Um, and I'll briefly introduce each speaker as we go. Uh, to them, our first speaker is Melissa Donnelley, the National Secretary of the CPSU, Melissa.

Melissa Donnelley:

Thank you Justice Ross. I'd like to start by acknowledging the traditional owners of the land on which we meet the Gadigal people of the Eora Nation and pay my respects to the elders past and present, and also acknowledge First Nations persons joining us for this debate. Tonight we come together for this debate after years of a pandemic,

which has tested every tenet of Australian life through the pandemic. We saw so many Australians at their best helping one another, working together and making sacrifices to keep each other safe. But the pandemic also confirmed that some of our key systems and frameworks are broken and failing. And nowhere is this more apparent than in industrial relations. For me, one of the most telling moments was in March, 2020 when tens of thousands of people were lining up outside Centrelink offices. As the lockdown kicked in, tens of thousands of insecure workers were suddenly locked out and ma without leaving entitlements or job security, they were left reliant on government support.

While the scenes were distressing, they also shouldn't be a surprise. Australia, of course, leads the world in insecure work. An insecure work is not limited to industries or age groups, it's teachers, it's nurses, it's public servants, it's workers in transport, manufacturing, and construction. Insecure workers permeated all industries and parts of the workforce force. Yet our industrial relations system has failed to keep up with this workplace reality or many others. For the last decade, we've seen real wages not growing. In fact, they've been in dramatic decline. Over the last decade, we've seen a collapse in collective bargaining with only one in seven workers now covered by an agreement. And unsurprisingly, when workers can't bargain collectively under a system that's fair, wages stagnate. The Fair Work Act did, did address many of the most egregious aspects of work choices. But in respect of bargaining, the numbers tell their own story agreement coverage has collapsed.

And if we want to address the problem of falling real wages, if we are serious about a fair go for everyone in the industrial relations system, we must address the system that is holding wages back. This also has a particular impact on women. Australia has one of the most gender segregated workforces in the O E C D and consistently a stubborn gender pay gap. In many highly feminized industries, like in their care and economy, enterprise level bargaining simply does not work. Changes to the bargaining system are essential for feminized industries to improve working conditions and pay. Whilst the pandemic has highlighted and accentuated some of these problems, the problems we now face have been there for everyone to see for years, yet for the last decade, we've seen silence and neglect. After years of neglect, now is the time to address those failings. It's the time to restore fairness in the system, and it's the time to act to address these problems in our industrial relations framework. Thank you.

Justice Ross:

Thank you, Melissa. And now it's might be best, might be best if you're hold to the end, otherwise you'll cut into the next speakers. Three minutes. So, um, well next go to Nareen Young, uh, the associate Dean uts Sydney Business School, Nareen.

Nareen Young:

Thank you Justice Ross. Uh, Yama. And as a descendant of Ruby Falla, who was born in Redfin and resettled, I acknowledged the Al Coastal Derg, their ongoing ownership and custodianship of this land. Elders passed and present our ancestors who walk with this and guide us daily. I acknowledge our family's ongoing relationship with this land sovereignty was never, ever seated. I wish to acknowledge Tony Burke, the Minister for Employment and Workplace Relations just as Ian Ross and many distinguished others oth distinguished others who I've fangled over for a long time, including the giant Professor McCallum and Professor Monton Riley, who I now have the extreme privilege of working with at uts. Thank you to the Institute for your Excellent proposals for a new employment framework that I'd largely endorsed. But I'd like to make, like to make suggestions that I think will improve it, um,

that go to t two key recommendations to say that when I read Professor Chapman Chapman's pillar for addressing discrimination harassment and bullying at work, my response was, Are you thinking what I'm thinking?

B2 would be a vast understatement. I have worked at the intersection of the employment and the anti-discrimination jurisdictions, um, including in one of the pr profound privileges of my life as director of the New South Wales Working Women's Center for seven years. Um, uh, that gave me that we provided a full community legal service center service run by, um, employment advocates for the Broaden and wonderful par panorama that's women in New South Wales. But it gave me experience and understanding of workplaces, especially the non-unionized ones that was both a privilege and highly revelry. Never can say that word. I understand the practical applications of these legal frameworks and impact on the development and maintenance of workplace culture. And Professor Chapman's suggestion that this proposed new architecture brings with it the potential to bring the problems of discrimination and abusive conduct from, and I quote, the margins of the legal regulation of the labor market into the center of its concerns has, is what I have been thinking be one for a long time as well.

However, I've been saying it differently that any new revamped employment legal framework must futureproof these matters currently viewed by the employment community as girly and over there and treat them as the core concerns of a very changed labor market demographic, not just in makeup, but in attitude. My experience tells me that in populist and popular community understanding of these matters, they might be girly, but they are certainly not over there. And the development of what we used to call EEO practice with diversity and inclusion programs and practice has solidified this understanding in the eyes of the people who work, whether proposed new architectural lie, they are very much core legitimate employment matters. Our legal framework should reflect that. We all know that in the practice of employment in this modern Australia, whether we like it or not, and goodness knows, I have done my part in trying to change it.

White bl key employment law is what's taken seriously and in the real politic of what happens day to day in the workplace. It's what matters to this end. And in recognition of a thousand other frustrations we watched, we constantly watch in watching other people speak for us in employment matters. Recently, the Johnana Institute where I worked until very recently, um, at uts, um, our indigenous people and work hub headed up by me formed the First Nation's Employment Alliance comprised of First Nation's employment practitioners and experts. And we do exist. So Jon Bonna, the A C T U Reconciliation Australia, the First People's Disability Network, and PWCs Indigenous Consulting, a key component of our charter is calling for an inquiry into worse place racism, a against indigenous people where we'll seek exactly this, a legitimizing of workplace racism as a legitimate employment concern. We'll also also call for an indigenous pay equity inquiry and the legitimizing of First Nations cultural matters into Australian employment, regal legal frameworks in recognition of the spirit of the truth telling and changing times we're in, we would seek that consistent with developing pro policy approaches and a developing understanding of standpoint theory and approaches.

This legal framework would be developed and influenced by the actual people affected and impacted by it. Unlike the first iteration of, um, the legal framework developed by white men with a nole bull exception of Susan Ryan, Bless her memory, First Nation's people, people from racially and culturally marginalized backgrounds, people with disability and people at all of those intersections. And of course, the requirement for a positive duty to prevent on all employers. And I am gonna finish quickly, but I actually can't wait to see the squirming of the human resources industry in response. Um, my last point, and a really important one is I support Professor Chapman's proposal for a regulatory agency that's properly resourced to deal with the implementation of this approach, but would add a key component of the role of set agency would be prescribed procedures for workplace investigations not reliant, reliant

on the nuances of the a HR approach in the particular workplace, especially as it pertains to a victim-centered trauma informed approach.

We'd argue that the investigations would be performed by the agency underpinned by understandings of various, um, these proposals go to a developing an emergent concept of the fair go, um, that bases itself on an ever developing modern Australia. His workplaces and practices reflect that, and I have to say, I know I need to finish, but I once saw as a young union official John Lotti in a coffee shop. I don't know that many people can say that, but anyway, I do. Just as what the fair go means shouldn't be set in stone as it pertains to these legal frameworks. I'd argue that other concepts put forward in your book, like Full employment, A concept I'll be working on with others around an indigenous definition can be developed to reflect the changing nature and more importantly, understanding of when what the fair goes mean. Fair Go means in an Australia that has recognition of First Nation's cultural concepts of grace and respect as it's underpinning and inclusion and recognition of the needs of all people as it's practical work, legislative framework. Yellow,

Justice Ross:

Um, and our next speaker, Denita Wawn, the CEO of MBA Denita.

Denita Wawn:

Thank you Justice Ross and I first of all pay my respects to the Nu Wall country that I am, uh, sitting on at the moment, uh, and to their elders, uh, past, present, and emerging. If the last three years has taught us anything, it is the importance of remaining flexible and productive during times of crisis and change. The brilliant economy and broader society has the ability to respond to a complex ever-changing economic landscape if it's supported by flexible policy settings. As we emerge from the pandemic, we must resist the temptation of using rushed one size fits all policy to try and address some of the weaknesses in the system, and instead pause and reflect on the principles that have underpinned our productivity successes. Not only over the last three years, but after the last three decades, a strong and flexible industrial relations system is needed to underpin a competitive, modern and productive economy.

Central to this is enterprise bargaining, a system that leverages the competitive nature of business while protecting workers with appropriate safety nets like employment standards and high minimum wages. However, there has been a steady decline in enterprise bargaining due to the complexity of the regulatory framework around it, which has undermined the intention of employers and employees to achieve agreements. Rather than tackling these issues head on, there's talk of regressing and moving away from the enterprise based approach to a more pre hawk heating era of industrial relations as a bandaid solution to low wages growth at the expense of productivity. Something that I would argue goes against the very principles that labor governments of the past have championed, for example, by increasing flexibility and moving away from central wage, fixing hawkin heating unleashed a wave of prosperity in 1995. Pork heating noted if you get the structure right, like competition policy and a much more flexible labor market, and I quote all of these things produce a natural contestability, which gives you natural increments to productivity and low inflation, end of quote.

So it follows that if we revert to an inflexible IR system, we risk the productivity of the Australian economy and real, real wages of all Australians because we would argue productivity gains are the only way to sustainably increase rule wages for the long term. As Kevin Ru and Julia Gillard said, when introducing IR reforms during the gfc, labor has a proud history of industrial relations reform in Australia's nat natural national interest. An old centralized wage fixing

system is not relevant to Australia's modern workplaces and modern economy end quote. And as the productivity commission said only a few weeks ago, better wages will only be del, um, driven by bargaining, which is enterprise based and squarely aimed at achieving genuine improvements in productivity to the benefit of everyone in the workplace. So in closing, we would argue that the new government should exercise caution when undertaking reform by looking by the need to instead look at the short, medium and long term impacts on productivity and real wages of every day Australians, if there is a move towards greater centralization and increasing the role of the Fair Work Commission in the activities of every business in Australia.

Because simply put, you can't fix a complicated system by making it even more complex and inflexibility, um, is going to be certainly more destructive in terms of a complicated economic environment. Thank you.

Justice Ross:

Thank you Denita. And our next speaker is LiamO'Brien, the assistant secretary of the ACTU, and he's been in that position since 2018. Liam

Liam O'Brien:

Thank you justice for Ross and thank you Professor McCallum. I'd also like to acknowledge gadigal people of Eora nation and pay my respects to elders past and present friends. We all aspire for Australia to be a country where working people are afforded a fair go, a place where living standards rise for each and every generation. For men and women, for citizens and migrant workers. A place where decent work is central to our social and economic life and where opportunity is afforded to all equally. This is the egalitarianism that has been forged into our national psyche. A uniquely Australian concept built on values of fairness, justice and equality. Notwithstanding the struggle our nation endures in relation to gender equity and the rights of migrant workers, it has been this social and economic compact that has guided the country through a century of economic growth and prosperity and economic growth that until recent decades had been broadly shared amongst all Australians.

These values determined how income and wealth were earned, accumulated, and shared, and they were the foundation of an education system that afforded opportunity to all and the skills needed to drive economic growth and prosperity. A taxation system that provided both the revenue, that the services that we demand for a decent life and a transfer system that balanced excessive wealth and poverty. But also finally, and most importantly, a system of work relations that ensure income earned through the combination of labor and capital were fairly shared between profits and wages. It's true that each of these pillars have shown signs of strain in recent years. However, it is our work relation system that is most precarious and has been the last decade where the rot has really set in. It has been a period of declining real wages and falling living standards where profits are up and the share of national income going to labor is at its lowest points since records began a country which leads the world in insecure work.

And whether gender pay gap shamefully persists. It's been a period where productivity games have not been shared and where workers now consider the very concept with skepticism and derision feelings born of a reality that productivity in Australia is no longer about shared gains from skills, technology and innovation, but instead about driving down of unit labor costs and stripping of wages and working conditions. Much of these problems are a direct result of the collapse of bargaining. The introduction of the work act did see bargain and climb briefly to cover nearly a third of the workforce. However, since 2016, it has fallen to its lowest level on record with less than 15% of workers covered in the private sector, barely one in 10 workers bargain collectively, whilst the introduction of the Fair Work Act did restore some fairness to and address the carnage of work choices, the failure to maintain the

architecture and adapt to changing circumstances have laid bare shortcomings enacted before the full impact of the GFC was known and before the expansion of the gig economy.

It has failed to keep pace with modern work has become complex, technical, outdated, and narrow and act covering only traditional work. It has spawn an industry of avoidance advisors, encouraging the use of labor hire and sham contracting to circumvent bargaining and undermine working conditions and job security, a system that not only permits but encourages non-compliance. We have seen the rise of wage theft that hurts workers and good employers alike. The Fair Work Act needs to be modernized. We need a framework that puts bargaining at the center, A system where bargaining is made simple, fair, and accessible, where it is expanded beyond the firm level to ensure that productivity is not driven as it has been by wage suppression, but instead by skills, innovation and technology. A framework founded on principles of fairness, justice, and equality that reflects community attitudes of gender equity and job security and can adapt to the changes in our labor market.

Critical to this modernization is the reinvigorating of the Fair Work Commission. If we are seriously going to future proof our system, then we must empower the commission to support bargaining, safeguard fairness, and responder changes in our labor market as they occur. An institution to check the power of both parties in driving, bargaining, setting, and maintaining standards and resolving disputes. Friends, our system of work relations is crumbling and in need of urgent repairs. The last decade has been one of neglect. We need to move quickly to modernize and maintain the system or risk a further erosion of our social and economic compact. Thank you.

Justice Ross:

Thank you, Liam. Uh, our next speaker is Stephen Smith. Um, now with Actors Workplace Lawyers, but will be well known, uh, to all of you given his previous extensive career with AI Group. Stephen,

Stephen Smith:

Thank you. The, the best way to futureproof our workplace relations system is to ensure that the system is as flexible as possible while preserving fairness for all. The last thing that is needed is Ill-conceived regulations, strangling workforce participation, stifling productivity, and deterring investment. We also do not need laws that will lead to uncertainty. Uncertain laws are unfair if employers are subject to hefty civil and criminal penalties and don't know exactly what they need to do to ensure compliance. The pandemic showed that our workplace laws and awards were not suited to the environment that we found ourself in. And fortunately, Parliament and the Fair Work Commission moved quickly to implement some more flexible arrangements. That flexibility has now been removed and we are left with an extremely and unnecessarily complex workplace relations system. No one is arguing that there's no need for any regulatory changes, but the changes need to be very carefully considered.

We don't need sweeping changes to the workplace relations system. There's no doubt that the award system is far too complex and inflexible for modern workplaces. There's a lot more that needs to be done to increase flexibility within awards. Uh, and in the broader safety net, there's also the need to ensure that any changes to workplace laws do not result in the loss of vital existing flexibility that is so highly valued by businesses, workers, and the community and the gig work reforms are a good example. The reforms need to be focused on determining what light touch minimum standards are appropriate for the cohort of independent contractors who work for on-demand platforms, not on disturbing the meaning of an employee or an independent contractor, which has recently been decisively, uh, clarified by the high court. Hundreds of thousands of Australians have found jobs in the gig economy and the OnDemand platforms appear to be having far less problems attracting staff than many other businesses.

This is because of the flexibility that workers enjoy with this type of work. Another good example is enterprise bargaining reforms are certainly needed to address the overly complex enterprise agreement approval requirements and to once again, encourage employers and employees at the enterprise level to reach win-win, uh, arrangements involving higher wages and higher productivity. In the 1990s, enterprise bargaining delivered major benefits to employees, businesses, and the community. But, uh, through, uh, a couple of key issues, you know, the union's opposition to what they call productivity trade offs and the overly complicated enterprise agreement approval requirements, including the boot. Uh, a lot of those, uh, benefits have been, uh, removed with some simple amendments to the ACT and a renewed share commitment to focusing on win-win solutions. The problems could be readily resolved. The last thing that's needed is an expansion of multi-employer agreements, wider industrial action rights, and wider arbitration powers for the Fair Work Commission. That is a recipe for reduced economic growth, reduced investment, fewer jobs, higher inflation, and higher interest rates. Ultimately, workers would lose the most if Ill-conceived. Changes are made to workplace laws. Thank you.

Justice Ross:

Uh, thank you Steven. And if we can go to Professor Anna Chapman from the Melbourne University Law School.

Anna Chapman:

Um, thank you Justice Ross. So, I'd like to acknowledge we're meeting on land with sovereignty was never seated. Um, and I pay my respects to indigenous elders of the past, the present, and of course, into the future. Uh, today I'm speaking broadly about the problems of discrimination, harassment, and bullying in workplaces. Um, and I wanted to start actually by thanking Nareen, um, for reading my chapter and providing those, uh, very thought, thoughtful, and useful comments. Thanks, Nareen. I can't see you, but we're across the, across the table. Thank you for that. Um, there's obviously been a lot of law reform and legislative activities since May this year, and these initiatives present very real potential to, um, make important improvements for working people In relation to the, um, workplace problems I'm speaking about today, um, I I thought that one of those initiatives is the respected work bill, and I just wanted to say a few words about that if I could.

Um, this bill, of course, seeks to enact the remaining recommendations of the Sex Discrimination Commissioner inquiry of the same title, which reported in 2020. Um, in this inquiry, the Sex Discrimination Commissioner was working with terms of reference, of course, provided by the former federal government. Um, those terms of reference were limited to sexual harassment in the workplace. Of course, to state the obvious, there's no broader, there was no broader remit to examine other forms of abusive behavior in workplaces relating to, for example, race, disability, sexual orientation, and gender identity. Um, for example. Yet, of course, there's no justification for not requiring organizations to proactively prevent harassment related to race or bullying related to disability. For example, uh, the current bill imposing a positive duty on employees to prevent sex discrimination and sexual harassment is to be applauded. Um, but I think it does prompt the question, why is this positive obligation limited to sex discrimination, harassment related to sex and hostile work environments on the ground of sex, but not other types of hostile work environments and harassment.

Um, why aren't other forms of abusive behavior being investigated and addressed with as much energy? Um, this takes me to the idea of the book. Um, and at least as I've understood the ideas of the book in related to my chapter in relation to discrimination, harassment, and bullying, I think these ideas do offer the potential to revisit important questions, including the one, um, I've outlined tonight. Uh, because the ideas in the book present an opportunity to

move away from piecemeal law reform briefly, the ideas of a central body that sets a high level standard for all workplace settings, um, that standard could be a fair go. And then of course, the fair go would be, um, articulated through a number of principles delivered from international standards, human rights, and also perhaps from other sources as well. And so, organizations would have a positive duty to provide and maintain a fair go in their workplaces unless doing so would impose an unjustifiable hardship on them. And then the elaboration of the fair goes standard would take place at a lower level with, with, by agencies of detail, which provide, would provide directions to an industry or industries on approaches and methodologies through which the national standard could be achieved. And then organizations would have discretion to craft their own approach in consultation with their employees and other workers. Thank you.

Justice Ross:

Thank you, Anna. And our last speaker, Mark Perica, the Vice President of A I E R and Senior Legal Officer with the psu.

Mark Perica:

I'm gonna quickly acknowledge the tradition owners, the various lands in which we meet. Um, the Australian Institute of Employment Rights has, since its inception, 17 years ago, been focused on promoting regulation of the world of work based on tri partisan and decent work consistent with international standards. We believe and have always believed that labor rights are human rights. Our latest book, a new Work Relations Architecture, as Molly Meldrum used to say, Do Yourself a favor, is an intervention into the law reform debate by leaders in the field of labor law, and industrial relations. We argue that reform based on our foundational principles is required, and that the Fair Work Act is no longer fit for purpose. One of the reforms that we argue for in our book is multi-employer bargaining. A restriction to bargaining at an enterprise level has never complied with our obligations. Under, uh, Article four of the ilo Freedom of Association Convention 98, which requires free and voluntary collective bargaining, the committees of the ILO have decided for decades that legislation should not constitute an obstacle to collective bargaining at a sectoral regional or in industry level Research, which I refer to in my chapter, provides evidence that the European model of industry bargaining has led to industrial pluralism and workers' rights.

It has encouraged deep workplace participation at all levels on a range of matters. From shift changes to macroeconomic policy. I argue multi-employer bargaining could lead to greater workplace consultation, joint decision making, and workplace democracy. Since the move to single enterprise bargaining 9 91, the wage chair of national, our output has progressively fallen and productivity growth has slowed. In a 2018 paper in the Australian Economic Review, the the light, Great Joe Isaac at the right old age of 96, mind you made a compelling case that multi-employer bargaining increases productivity. Innovation promotes a fair share of profits for workers, and a more level playing field for business. He wrote, compared to enterprise bargaining, multi-employer bargaining establishes greater fairness and uniformity in pay in that employees doing the same work are likely to part be, be har paid the same or similar workers wages by all employers covered by the agreement. Multi-employer bargaining establishes a common standard for all employers, employers involved the profitable and the less profitable. It takes wages out of the com, the competition and forces the less efficient firms, rather than being subsidized by lower wages to operate at greater efficiency in order to survive, thus raising productivity. So multi employer bargaining is consistent with our international obligations, will enhance industrial pluralism and workers' rights, and will lead to greater and EF efficiency and innovation as a mature social democracy. Multi-employer bargaining is a reform whose time has come.

Justice Ross:

Thank you. Thank you. And thank you, Mark, for being the only speaker to come in at three minutes. Um, it's, it's a triumph of hope over experience. Uh, um, so we've got about, uh, 35 minutes. I wanted to start with two of the broad themes that seem to have come out, and then we'll see how much time we have. Uh, obviously one around bargaining, uh, and, uh, the other around this flexibility and fairness, uh, uh, debate. If we can go to bargaining. Um, and I wanted to particularly involve, uh, Liam, Steven and Danita in this debate. It's obviously a topical one for you this week. Uh, Liam, how is bargaining in the, in the care sector going to address the issue of low pay when one of the issues is, um, uh, lack of industrial capacity?

Liam O'Brien:

Thanks, Justice Ross. So I think this is one of the critical debates that we're about to have in the coming weeks and months in relation to how workers actually can get real wages going. Again, I think what we've talked about in the care sector is that it is predominated by smaller workplaces that are fractured across whole industries for which single enterprise bargaining is not fit. There is a cost to bargain, both for workers and for employers that makes enterprise bargaining, which is very technical, very complex inaccessible for groups of workers such as those, and they are predominantly female. What we would say has occurred over the last 30 years is that those workers have fallen further behind because of the failures of the bargaining system to adapt. As John said at the start, if we are going to increase bargaining coverage across the country, then we need to look at all of the possible, uh, levers that we can pull, in particular multi-employer bargaining. The other key issue is not just to these small workplaces, but they are funded by government or they are funded by a third party who is not necessarily at the, at the table when it comes to single, um, employer bargaining. We need to think of systems that can bring the widest group of parties together where there is a common interest to determine how enterprise bargaining or multi-employer bargaining is gonna work.

Justice Ross:

Thank you. Denita, can I go for you? Um, and you've expressed concern about, uh, the notion of multi-employer bargaining. And I don't mean to put you on the spot, but I've been looking at construction agreements for a very long time now, and there seems to be a remarkable commonality between, uh, the agreements bargain, whether it's by the cfmeu, they have, uh, I below to describe it as a patent agreement, because that wouldn't be right, surely. Um, but the MBA has a similar level of consistency and the agreements that, uh, it promotes, uh, as does neca. How do you see the difference between that and multi-employer bargaining, and what is it about multi-employer bargaining that gives rise to concern from your organization?

Denita Wawn:

Thanks Justice Ross, I mean, certainly there's no doubt, uh, in, uh, industries where there is high level of, um, enterprise agreements, uh, there is the likelihood of similar agreements simply because of the ease of, uh, accessibility. Nevertheless, it does not preclude any individual enterprise in amending, um, those standard, I'd call them standard form agreements. Let's not use pattern agreements, uh, standard form agreements upon which they can make changes, but, and therefore it's still reflective of some of the needs of the enterprise. Where we've got difficulty in, uh, multi-employer agreements is that it can be prescriptive that you don't have the choice of, uh, reflecting individual needs. It diminishes, therefore flexibility. It also, and certainly the productivity commission

indicated, uh, may well have increase in wages for workers in the short term, but in the long term, it actually reduces real wages because of the lack of productivity happening in those more productive firms.

So we've got a real concern that the more you centralize, the more you have lack of flexibility, and therefore you reduce productivity and in turn reduce re wages. But can I pick up a point that Liam said, You know, I, my background, uh, is not in construction. I've spent most of my industrial relations experience in other industries that are highly award reliant. And I think we cannot ignore the fact that we've had very complex industrial awards, uh, that are very prescriptive, that, um, parties, both employers and employees have the right to amend those to make changes. Now, I would've thought that the debate around, um, ensuring that we have alternatives to enterprise agreements is not about multi employer agreements, but rather our industrial awards that by their very nature are in fact, uh, multi employer coverage. And so what are we focusing? Are we focusing on enterprise agreements incorrectly, but rather the way in which upon industrial boards are in fact amended? Uh, so I think that's the importance of having constructive debate rather than rush through legislation.

Justice Ross:

All right. Thank you. Denita Can Stephen, can I go to you, um, and raised two things. One, following on from Denita's point, Um, you and I, and perhaps Paul Monroe might be the only ones old enough to remember, uh, the Mtfu mtia industry based model or framework, uh, which then albeit accessed on an individual enterprise basis, did allow for change to flow through the manufacturing sector. Um, and you saw that in the 4%, two tier, uh, arrangement as well. So it's like any system, there may not be, it's not gonna be all perfect, but it may also provide an opportunity, albeit not a tailored one for every enterprise, but for some, uh, greater flow of productivity. What, what do you see the difference between that model and where you see, uh, Liam's preferred model?

Stephen Smith:

Well, that, that was at a time when we were coming out of a centralized wage system. There was a lot of low hanging fruit with productivity, uh, improvements, you know, wash up times and so on. But of course, after that period, we then had a couple of, uh, major battles between the employers in manufacturing and the unions. And, you know, I was heavily involved in all of that. Um, and just two of those disputes. Um, the productivity commission estimated cost $450 million in loss production in the car industry. You know, there was another seven week strike that I was heavily involved in. So, you know, the, the pursuit of patent agreements, um, is extremely damaging when you've got militant unions, uh, bringing industries to their knees. And, you know, I agree with Denita's comments about, um, the awards system. Like a lot of the arguments we've heard today about the, the reasons why you would, uh, support a multi-employer agreement is really an argument about maintaining the award system, which is supposed to be fair and relevant

Justice Ross:

Just on the award systems.

The incentive sort of flows both ways in this direction that, uh, on the one hand, would you accept that the incentive for an employer to bargain based on award complexity is less now, albeit still there, that in the past, because one of the incentives in the past was that an enterprise might be covered by seven or eight awards, perhaps a mixture of federal and state. There were 1500 awards in operation prior to the current system. So now you have at least that issue. And if you, um, if you advance the point that you're both putting, and I'm not suggesting that, uh, modern

awards are perfect instruments of flexibility and fairness, having just gone through a four year review, that seems to have drifted into eight. Um, but if you, if you reduce the level of regulation in awards, you could see how that might create an incentive for unions to want to bargain. Um, but where does it create an incentive for employers to bargain if they already have, have the flexibility they seek in the award system?

Stephen Smith:

Well, I think there will be an incentive to bargain if it's a two-way street. Like, out of those big battles that we had with the unions in the early two thousands came this, uh, catch cry of no trade-offs. So the unions decided they'd given up enough, they weren't prepared to talk about productivity anymore. And that was extremely damaging. It led to people just rolling over and enterprise agreement making, becoming for a while, just, you know, a fairly mundane exercise and in more recent times, a, a minefield. So it's, it's major problem

Justice Ross:

To some extent. It reflects the fact that it is a relationship business that we're in. And I think we saw in the early part of the pandemic, um, a high level of cooperation between unions and employer organizations to move quickly to develop a level of flexibility in the system and adaption. Um, and that sort of be fair to say, I wrote it a bit with the passage of time, um, but it's, whether that can be captured again, might be at the heart of the debate.

Liam O'Brien:

Can I?

Justice Ross:

Certainly.

Liam O'Brien:

Very briefly on the awards, Awards are very different today than what they were 20 years ago. Awards 20 years ago were a settlement of disputes between employers and unions and the workers they represented. They were effectively settling terms and conditions across whole sectors. Today, they are minimum safety net conditions. They are, as Justice Ross pointed out, significantly simplified on where they were 20 years ago, even, even 15 years ago. And I would argue that that has probably come with some significant restrictions on employers. We no longer had bespoke arrangements that were particular to a sector. We now have, you know, a general retail award that covers, you know, a million workers, admin and clerical, a similar number. And we've lost that bespoke, There's real advantage in multi-employer bargaining because employers and unions can come together and craft conditions that are relevant to their sector that ensure that productivity is not, as Steven's described, a trade off essentially of unit labor costs, but one of essentially shared gains through the innovation and technology that can be developed together. I just think the debate about awards has moved on so much that they're no longer relevant instruments to, to many indeed. They're not ones that you or I and unions and employers, and they're, they're, they're Ian's to, to sort of manage and care for in the future. <laugh>,

Justice Ross:

Oh, no, <laugh>. Um, look, I, I think it does bring me back to my first point that whatever happens out of this debate and whatever legislative changes emerge, I think it is important to be clear about what the objective of the change is, and then to evaluate it over time to assess whether that objective has been met, whether the concerns that have been raised, have been realized, or whether the ambitions have been realized. And then have a willingness to reconsider and reset and see where you go. Um, I wanted to then touch on this sort of vex question, question of flexibility and fairness. And I think, uh, I could almost get everyone to sign up to, we need a system that's flexible and fair. Uh, it's then how you move beyond the that point and that proposition, uh, and it's always comes an issue of who's flexibility, who accesses it, Do you have a right to access it? How does it work? Um, and I wanted to, um, uh, go to you, Melissa, if I could, on it. It seems to me it's part of the broad pay equity, um, puzzle, and it's the intersection with flexibility and flexible work arrangements. And how do you see that space? What does fairness and flexibility look like for you?

Melissa Donnelley:

Yep. Thank you, Justice Ross. Um, well, I think you are absolutely right. I think most of the speakers spoke about flexible, um, and a flexible system. And we all perhaps mean slightly different things. I think from where I sit, uh, we have flexibility in the system right now, but it's pretty one way. Uh, when you think about the, uh, insecure work rates, um, across the economy, when you think about how few employees are covered by collective agreements today, um, there is flexibility, but it's predominantly with employers. Um, o on the issue of, uh, women's participation in work and, and gender equity and the persistent pay equity problem we have in this country. We need a system that can deliver flexibility for employees who need that. Um, obviously a real barrier to participation of women, uh, in particular in the workplace is the infrastructure around women's participation, whether that's paid parental leave or easy and accessible childcare, and that they're big system problems that need to be addressed.

But within the industrial relations framework, there are significant, uh, steps that can be taken to, uh, provide flexibility, um, which would, uh, support, uh, gender, uh, women's participation and better gender equity outcomes, whether that's around, uh, rights, around hours through the nes, um, that could be addressed, whether it's around, um, addressing, uh, our bargaining system so there can be greater capacity for employees to achieve certainty and hours. Um, I, I represent federal public servants, and every time you have an enterprise bargaining situation and you go to a workplace and you explain that a, a proposal from management is about reducing certainty on rosters. You have women approach you immediately after the meeting saying, If that succeeds, I will need to quit my job. So we need to address, uh, the way in which we achieve those rights. We need a system that better supports achieving those rights in bargaining, and that's fairer and that, uh, feminized industries can access.

But we also need to address the issue of, uh, job security, because if you're a casual, it's very hard to work out what day you're working and therefore what day it's worth paying for the childcare fees. On top of that, I think the pandemic has opened up other opportunities, uh, particularly, um, in the industry. I represent, um, working from home, for example, uh, is achievable in a way that was previously thought, um, you know, unimaginable. And for, for working, uh, parents or people with caring responsibilities who are often women, the ability, um, to access working from home rights and that kind of flexibility where they choose that that's what they want actually will support their participation in the workplace. Uh, cuz they can work longer hours if they don't have to organize all the other ca other additional care arrangements around school hours. So I think there, there are really big structural, um, issues around, uh, paid parental leave and childcare and so on. But there are really important reforms we can make in the industrial relations system about job security and about bargaining to achieve, uh, that certainty that will help women's participation at work.

Justice Ross:

Thank you. And look, certainly the commission wasn't immune from the shift in working from home, I think. And you've used the, used the word unimaginable, and I think that's true of our organization as well. Um, there would've been significant resistance from mini middle management, uh, and from some members to the notion of working from home or working remotely. Uh, but we were compelled to do it. So I became a natural experiment. And now we're in a position we've recently surveyed our staff and 80% of them want to have a balance of between two and three days, uh, at work, at home. And most members, uh, are are in a similar position. So we are trying to manage through, uh, how we can, uh, deliver that flexibility, uh, but also enable teams to come together, uh, to promote collaborative work and learning. Uh, and so I don't think it's, um, uh, by any stretch, um, uh, one area I think it's swept through and it's likely to be an enduring change because once people, uh, have a desire for it, now you see professional services firms recruiting on the basis of the flexibility they offer.

Can I just pick up this issue of rights and access, uh, and perhaps go to you Anna and then, uh, and Nareen that, um, it does seem to me in most areas of workplace, uh, uh, law that, uh, it's, um, needs to be simple, simply stated and accessible. And it, you look at discrimination law where you have this overlay of federal and state, um, and levels of complexity and differences, uh, in treatment as you've, you've identified that there'll be an obligation in one area, but not in others. Um, if you were, let's just assume you had the magic, uh, uh, knife, you're able to cut through the knot. What sort of system would you have that could deliver on simplicity? Uh, and then I'll, I'll ask Nareen. Cause I was interested in the practical, uh, application of it. Well, what do you need? If you've got a simple legal framework, what do you need so people can access their rights?

Anna Chapman:

Cool. Um, great question. Thank you, <laugh>. But look, I, I, I think it's really worth pursuing this idea of a simple system based on an idea of fair go and then, um, articulating that in ways that draw out, draw upon important principles. Um, so I think that's very useful. Of course, I think you also need to have a well funded public regulator, um, a a public body as well as giving individual rights of enforcement and, and rights to trade unions. Um, I, I mean, I, I do think that, I do think that employers should be under a proactive duty, um, to think about preventing various all forms of harassment and bullying and discrimination, at least on the basis of the grounds that we currently recognize.

Justice Ross:

And it's almost like a, um, uh, what started to come out of, um, the implied term debate. It's a, it's a right to fair treatment, um, as a broader concept. All right? And if you were to, to move to a, a simpler rights framework, uh, then the challenge is always, well, how does a worker access those rights? Having a rights one thing, but how do you, uh, enforce it? How do you get change in a way that doesn't put your employment at risk, doesn't cost you a fortune, is quick and gives you a remedy.

Nareen Young:

And that goes to the very real issues, um, about raising concerns. And for example, um, all of the sport ones that we've seen recently, it's years after, and it's instigated by what's effectively the employer, um, that's given employees courage, I suppose, to raise those things. So you're quite right. I think in terms of, um, the fair go, it's, it's how it's definitional, is that a word? It's, it's about the definition. And I I, I would argue, but I'm sure other First

Nations people would disagree that like women, um, First Nations people fed better in what you, uh, outline, um, uh, Liam as, um, in, in, in terms of what was developed here, what was bought here by the colonizer, uh, First Nations people have been better off within that, um, than without. However, were actively excluded from employment markets, um, very by, by, you know, by designed policy.

And so, um, has had its impact. And I, I'm obviously not gonna go into that, but why I'm attracted to Anna's, um, proposals in the book is that notion of simplicity and simplification and dealing with, as I did for many years, the complexity of the anti-discrimination jurisdictions, for example, um, deciding which one, um, deciding whether it was to be an employment matter or anti-discrimination matter, all of those things. It's, it's exactly why I'm attracted to Anna's idea, and I don't, I thought a regulatory agency was a really good idea. Initially, I, in working this through with the, um, First Nations Employment Alliance, including, as we said, the ACTU, um, and representatives of the, of the ACTU's indigenous committee, we thought initially about, um, uh, of course, um, human rights provisions being, um, included in employment law, and we will continue to do so.

But I, I really do need to think through, um, Anna's, uh, proposal about, um, a regulatory agency around workplace discrimination. The other really two, I'd like to just touch on two other big ones that have been raised through Mel and Liam in terms of, um, the new concepts around pay equity. We've course don't have any data around where First Nations people, especially women work. We know anecdotally that First Nations women work in the community and care sectors. You're never very far away from, um, conversations around the indigenous voice and how care funding might be allocated. Um, obviously we understand that in terms of pay equity, um, if there is a change, um, then First Nations women will fare well, but we still don't understand how indigenous people fare within the broader indigenous, how the broader indigenous group fares in terms of pay equity. So there's that point.

Um, the second point, um, I I think that's really important is do we apply, we need to apply when we determine, um, those questions of pay equity to indigenous women, for example, um, women, lesbian women, um, trans women, um, all of those questions of women with disability, women from CalEd, racially and marginally, uh, marginalized backgrounds, um, are we what, um, inherent as, for example, the, um, 1996 New South Wales IRC Matter said, for example, which I knew very well at the time, um, that there was an element of straight out discrimination, what kind of intersectional discrimination is going to be impacting as we, we now understand it. And that's something Joellen and I can talk about next week.

Justice Ross:

All right, thank you. Um, we've got about 10 minutes left. And, um, at the risk of, um, upsetting any of the organizer, I wanted to depart slightly from the, the script and invite anyone in the audience who might have a question or an issue they wanted to put, uh, to the panel, a member or, or a couple of members of the panel to, uh, uh, just, um, stand up and put your question, what's on your mind

<question from audience>

Justice Ross:

Okay, I'll probably repeat the question because you're not micd up and the people, I'm sorry. No, no, no, not at all. Um, the issue is, um, uh, around how you enforce, um, discrimination actions and the idea that the reversal of onus, how do you prove them? How do you prove discrimination's taken place? And if you're broadening the categories, um, and what do you think about the idea of, um, uh, taking the adverse action, reverse onus and applying it more broadly?

Anna Chapman:

Well, I think it's a great idea. Um, of course, yeah, absolutely. It's important in adverse action, isn't it? Although of course there is some, um, there are some decisions that perhaps undermine the usefulness of it. But nonetheless, it is important, I think, and I think it's completely justified to ask an employer, um, to indicate what is the basis of a decision. Um, so yeah, no, I think it's really important, so thank you for the thought. Of course, it does actually exist, exist in some anti-discrimination statutes, but not all. So there's an instance of inconsistency there. But yeah, no, thank you for the idea. I must say, you know, the, the ideas in, in the book, or at least in my chapter, they're very preliminary, so there's a, there's a lot of work to be done, I think. But thanks for the suggestion back

Nareen Young:

I think that I mentioned in my remarks that the issue is actually the act and it's formulation and our developing understanding of how we view, for example, the definition of racism, right? And standpoint theory and, you know, indigenous standpoint theory for example, is, um, very interesting in that context. And that's, um, the perspective of which I do my work, for example, and in indigenous research methodology. So that standpoint is clearly very different. Obviously, we're not gonna have an act designed around exclusively indigenous standpoint theory, but given Black Lives matter, given me too, given our developing understandings, we probably need to rethink our frameworks around changed, um, perceptions of standpoint. And its importance because we know exactly as you outlined how difficult it is to prove these things. But, you know, um, we, every time again, there's netball, the last couple of weeks, uh, standpoint to me just becomes clearer and clearer as, as a huge issue.

Justice Ross:

Alright, any other questions perhaps on bargaining and this balance between flexibility and fairness? And anyone wants to put, no one's interested in bargaining by the blue <laugh>. Yeah, it's good.

<Audience Question>

Would it not be easier to give the unions the right to have strike action at the, and it's, will the union then take on on board and, and the, is that what they're after or is it something more,

Justice Ross:

I don't know. We'll ask Liam <laugh> and then, then we'll see what Denita thinks about the idea. Well,

Liam O'Brien:

I think what we've described is not a significant departure from what you've put forward. I think what we wanna ensure in terms of multi-employer bargaining, firstly, is that a group can be chosen around a common interest so that we can group employers that are competing against each other that are not gonna be able to essentially compete on labor. To point to the productivity question that we talked about before, if we are gonna drive productivity, we need to take wages out of competition so that employers will compete on other issues, technology,

training, innovation in relation to, you know, the rights of the parties. Well, they should be fair. So we should ensure that when bargaining parties are coming together, they have the full range of rights that they otherwise would in an enterprise bargaining environment. Otherwise, it's not bargaining, it's begging

Justice Ross:

Just notion of how much do you leave open the existing multi-employer bargaining options that exist in the act, uh, to provide access to protected action, Stephen?

Stephen Smith:

There are a number of Options, Course, within the existing act, the, you know, employers can freely come together and have a multi-employer agreement. There's the low pay bargaining stream, there's the single interest bargaining stream, and there's a broad definition of an enterprise which captures, you know, common ventures and other things. So, you know, this issue of, uh, opening up industrial action at the multi-employer level is just going to be extremely damaging. And we've seen the history of what that would result in. Um, you know, these big patent bargaining campaigns, industry-wide industrial action. You back in, uh, the early two thousands, the Cole Royal Commission identified, you know, a list of about 10 reasons why industry-wide patent agreements kill productivity, and those reasons are as valid today as they were back then. You know, why should everyone, uh, employer and employee apply the same terms and conditions, uh, of employment? You know, it, it, uh, stifles innovation.

Justice Ross:

Um, I'll try you again, Denita. I know that you, it looks like you can hear us, but we can't hear you.

Denita:

Thank you. I I'm only getting part of the conversation. I'm sorry. Sorry. It's difficult to hear the question. Um, but I presume you're talking about tradeoffs on multi, um, employer agreements. Uh, certainly I'd take, uh, agree with Steven Smith. Uh, the issue we've got is that you are going down effectively in creating a highly, effectively, a highly anti-competitive environment. At the moment, we are seeing employers utilize their advantage on, um, you know, whether it's enterprise agreements or it's above ward conditions to compete in a strong labor market, uh, to ensure that they remain competitive. Uh, so the problem will be if you are now bargaining at that, uh, level of multi employers, uh, then it diminishes competition and as the productivity commission, uh, indicated it, therefore ultimately in the longer term, reduces real wages as well. So you've got problems at both ends. And what we would argue is that we actually need to be looking at how we collectively, uh, ensure that we have productivity growth in this country. Uh, and it should not be stifled by a centralized system whereby you cannot use that as a tool to improve productivity in your workplace, productivity in your workplace.

Justice Ross:

Right. Thank you, Denita. Are there any, any more burning questions before I call on Ron for his reflections and clo Yes.

<Audience Question>

Um, question, systemic question about how we actually reach a decision about what we regard as of that fair going forward around wrap? Um, and I'll just take two issues. Leaving entitlement throughout my life, I thought I would actually see page parental leave be a, a reality as opposed to a marginalized aspect. So we've had an industrial system that has maintained that that is adequate fairness. And then you might also say more recent things like family and domestic violence leave or whatever factors that were weighed up, it was regarded as fair that that be a form of unpaid leave. So how are we actually going to move forward in a way that is bit more encompassing and what, what we mean by,

Justice Ross:

Well, in relation to family domestic violence leave, it went through a transition period of unpaid and then became paid, Um, and that

…

Sure.

…

Personal, No, I'm not taking it that way. I just think that, um, you see the evolution of leave generally, uh, over time through tribunals. You look at annual leave started as two weeks, three weeks, four weeks, um, uh, paid parental leave has been more in the political sphere. Um, how do you progress it? Um, well, Melissa, you, I mean, one of the, there's a recent announcement to extend it to 26 weeks. It's still at the national minimum wage. It still doesn't cover superannuation during the period. There are those debates to be had.

Melissa Donnelly:

Absolutely. And I think, um, sorry, I think that, you know, the points you raise about fairness in the system and how slow some of those changes, particularly for women, have been, uh, very well made. Um, in part it is because our industrial relations system has been over the last decade, very mabu, and we have not been able to move with the times. Um, and what's required when the Fair Work Act was, uh, introduced into Parliament, uh, paid domestic VI family violence lead wasn't, uh, a, a known, um, entity, it wasn't a thing. And, and it has been developed based on research, based on advocacy, um, to be seen as something that's so vitally important. The other point I'd make about how we achieve fairness is it, it, it does go back to, you know, the question of bargaining and doing that beyond individual enterprises to achieve steps forward in one go.

Um, and just as Liam's point was about, um, earlier about low wages, uh, we don't want low wages to be the point of pro uh, competition, uh, between, uh, sectors, um, e even on issues like paid parental leave and in the public service, uh, we got extra paid parental leave, um, in agencies where there were fewer percentage of women first because it didn't cost. And, and so you can see why sector bargaining and making steps forward in one go, um, across a whole industries, how we make, um, those achievements more widespread rather than piecemeal, which is what we have now.

Justice Ross:

Yes Liam

Liam O'Brien:

we're in a system where you're either in a position where you've got the industrial strength and you're in a privileged position where you can bargain and an ability to set a standard, whether it be around paid parental leave or any other condition, alternatively, rely upon a modern award objective, which is a safety net, which is a narrow test, which leaves the commission very, very restricted in terms of what it can introduce. What we're talking about is expanding bargaining so that you can promulgate those community standards faster and, you know, in, in agreement hopefully with employers so that it doesn't become a competitive disadvantage to one employer in one sector who would willfully agree to introducing such a standard, but for the fact that it might render them uncompetitive to the workplace around the corner. That's the benefit of industry bargaining or multi-employer bargainings that you can quickly establish a standard across the sector.

Justice Ross:

Thank you. And now call on Ron for his reflections and closing remarks.

Ron McCallum:

Well, may I begin by thanking Justice Ian Ross for, in a masterful way, opening up the discussion, uh, using pressure points, uh, to get people to think more about their positions. And I hope that this debate will lead people to broaden their thinking. Um, everyone wants flexibility, but I think we can do better than what we have at the moment. I, I'm have to, um, acknowledge Professor Gregor Murray, but when reading the the Fair Work Act, it reminded me of when I was a 10 year old and would have tea with my maiden aunt, and after tea she would say, Gentleman, wash the dishes while I was the only one there. And as I washed them, she would stand behind me and explain each cup. And I feel that the Fair Work Act, in fact, much of our legislation is a bit like that perhaps due to court reactions, but it's really has layer upon layer upon layer I've found the discussion of enterprise and employer and multi-employer bargaining.

Interesting. I, I think the, the first things I'd point out is that, that the battles of the past, the union movement isn't what it once was. Uh, we have seen a huge movement of, of people no longer in unions. We have seen, um, employers now most employees are employed by small employers, collective bargaining, leaving aside that there are is in the manufacturing area, but it's basically a public sector phenomenon where there a large employers, um, let's think more broadly. I think that in his opening remarks, John made the point, um, it's not either enterprise bargaining or multi-employer bargaining. There are various levers we can have in certain industries, extension of collective agreements, uh, into particular geographical areas or states or Australia wide. Um, we can play all sorts of games. We need to think more, and it should not just be an either or. There may be some areas where enterprise bargaining is operating and other areas where it can't, like the low paid.

The honest truth is that we are in an area of wage stagnation, that we have fewer people on bargaining than we've ever had. The award system is not suitable for increasing wages in any sense, as I see it apart from certain industries. And we have to think, how do we get out of this mess and how do we ensure that there is appropriate wages and appropriate discussions between employers and employees. And that's why we say in the book that we need, um, large tribunals with giving high level, um, regulation and in moving down to the workplace where these things should be decided through consultation. Other areas we need to think about as discussion of the geek economy. Well, what do we actually do about people who aren't running their own businesses but are delivery riders, um, who aren't being paid appropriate wages with no entitlements?

Do we just let that go on? Or should we say as part of the workplace they should be included? I mean, we, we can't go on forever saying that that doesn't matter. What do we do about significant under wage payment? I don't think it can be possibly the complexities of a board, from what I remember them. Um, how do we solve that problem? What do we do particularly about migrant workers? No one's really mentioned migration and yet some people see this as a panacea in relation to discrimination. I would say, um, answer to your not in answer, but to follow on from your useful comments, thoughtful comments to is in chapter four of our book, we look very much at the Swedish system of parental leave and childcare, which if we adopted that, we would increase productivity because we would enable more women and more carers to get into the workplace.

We really have a lot of work to do, and we need to think outside the square in a world where technology is changing, where it is unlikely that union membership will increase that it's likely that we will see more and more small employers, uh, topped by large multinational corporations whose interests are in foreign countries. These are the things that we need to solve in the next coming decades. And I want to thank the participants and the audience and the people online. I hope we can continue these discussions because it's only through reasonable discussions that we can move forward and make this country a better one.

Justice Ross:

Thank you, Ron. And I'll finally call on Mark to close.

Mark Perica:

I think James is closing. That's been taken from me. So <laugh>,

James Fleming:

Very gracious of you, Mark. So just wanted to say big thank you to you, Justice Ross for moderating the debates. Uh, I, I really enjoyed listening to it and it's been a privilege to hold that space so that those kind of discussions can occur and we, we need more of them. So that's, that's it for tonight. Uh, please check out our website if you're interested in ordering a copy of the book. And, uh, you can check out our national industrial relations calendar on the website to see what's happening and subscribe to our newsletter. So good nights and see you all next year.

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