An Age of Repair or Radical Change - The Use and Abuse of Tripartism and Centrism in Labour Legislation

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[1] I wish to acknowledge comments by Matt Nicholl, Lecturer, CQU

Introduction - Can a centrist approach help?

Tripartism and consequent centrist[2] reforms largely supported by both employers and trade unions delivered an arguably workable compromise enterprise agreement approval system which tested agreements against awards with the 'no disadvantage' test and other tests developed largely by agreement in 1988, 1992, and 1993[3]. Enterprise bargaining did expand and was widely used under the 1992-2004 'no disadvantage' test[4]. Some now argue that enterprise bargaining is now gradually shrinking in scope[5]. The object of the bargaining provisions is 'agreements that deliver productivity benefits' (s.171), and productivity is the basis of sustainable wage increases.

Similarly, the introduction of a Commission unfair dismissal jurisdiction in 1996[6], to replace a relatively controversial Court jurisdiction introduced in 1993[7], has been relatively successful.

Both the 'no disadvantage' agreement test and unfair dismissal provisions were based on acceptance of the existence of the award system and unfair dismissal laws and making the labour relations system work well.

The recent inability of the industrial parties to develop agreed or mainly agreed legislative changes[8] on issues such as non-compliance with awards and agreement approval procedures, to the apparent frustration of all sides, suggests that tripartite processes may not be currently working well.

Tripartism and centrism in labour relations may be neglected in public (and possibly academic) debate in favour of much greater interest in partisan polemics. This is an arguable omission which I respectfully suggest requires rectification. This paper contains a list of labour changes agreed by employers and trade unions over the last 40 years. They undoubtedly improved the operation of the labour system and provide examples of successful change. They are overlooked and relevant to national discussions on repairing enterprise bargaining.

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[2] Centrism is not centralism, but can be decentralising, such as the enterprise bargaining reforms.

[3] *Industrial Relations Act* 1988, Division 3A Certified Agreements of the *Industrial Relations Act 1988* passed into law 23 July 1992, *the Industrial Relations Act 1993*, the *Workplace Relations Act* 1996, and the *Fair Work Act* 2009.

[4] Eg. see Richard Mitchell, Rebecca Campbell, Andrew Barnes, Emma Bicknell, Kate Creighton, Joel Fetter, and Samantha Korman, What's going on with the 'no disadvantage test'?, The Journal of Industrial Relations, VOL. 47, NO. 4, DECEMBER 2005, 393—423; Peter Waring & John Lewer (2001) The No Disadvantage Test: Failing Workers, Labour & Industry: a journal of the social and economic relations of work, 12:1, 65-86, DOI: 10.1080/10301763.2001.10722015

[5] Agreement approval applications were 5,287 in 2017-18, and only 3,795 in 2019-20, see Fair Work Commission annual report 2017–18 online 'performance', and Fair Work Commission annual report 2017–18 online 'performance', https://www.fwc.gov.au/about-us/reports-publications/annual-reports, accessed May 2021.

[6] The *Workplace Relations Act* 1996, s.170CE-170CG.

[7] *Industrial Relations Reform Act 1993*, ss. 170DC, 170DE

[8] *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill* 2021

What is centrism?

This paper is about centrist reforms[9], which I describe as limited repairs to labour legislation which help industry and workers, based on practical problems which arise and 'practical aspects of the Commission's jurisdiction'[10]. We want labour relations to facilitate not hinder productivity increases. We cannot address stagnant wage growth without addressing productivity:

> 'Productivity growth is central to increases in the minimum wage. Prior to the pandemic Australia's productivity growth was already low, which is expected to remain stagnant as the coronavirus pandemic continues'.[11]

The centrist reforms I discuss are about attempts to improve service delivery, reduce technicalities, allow business to innovate and be productive and efficient, protect employee entitlements[12], not unsustainably increase labour costs, and carefully increase worker benefits where this is sustainable and justified. They give weight to both employer interests, and worker or employee interests. They are about the employment relationship, not benefitting a political party. They are not the same as tripartism, because tripartite discussions can lead to partisan legislation, because tripartism requires consultation but the subsequent legislation is a matter for the democratically elected legislature.

Advocacy groups sometimes quite properly support more wide-ranging or radical change[13]. Trade unions and employer associations, and political parties, are not necessarily natural centrists, although all have an interest in improving the labour system. A proposal can be centrist even if colourful objection is taken to it.

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[9] I do not in this paper follow the example of Justice Ludeke, who on his retirement from the Australian Industrial Relations Commission wrote a number of well researched articles calling for radical reform. See J.T. Ludeke, Industrial Relations in Australia— Reform's Rocky Road, Journal of Industrial Relations, 1995 volume 37 issue 3, 462. I will leave promotion of and opposition to radical change to those who are answerable to the electorate or membership of associations and who want such change. I have used acronyms such as the 'US' and 'UK' for the United States of America and the United Kingdom in order to avoid repetitive and unnecessary use of lengthy titles.

[10] See the Hon. Reg Hamilton, Practical aspects of the Fair Work Commission's jurisdiction, and the Australian employment safety net, speech to the 2018 Biennial Australian Labour Law Association National Conference. This paper outlined practical problems with the jurisdiction and suggested some limited centrist remedies.

[11] Reg Hamilton & Matt Nichol (2021) Minimum wage regulation in Australia in the wake of the pandemic: the future of the five wage concepts?, Labour and Industry, 31:4, 405-417, DOI: 10.1080/10301763.2021.1969738

[12] I refer to 'Harvester man or woman' as shorthand for the scheme of worker protection through awards that arose in part from the 1907 Harvester decision, Ex parte McKay(1907) 2 CAR 1. It appears to have consolidated given the abandonment of any attempt to legislate to overcome it.

[13] Eg The policies of the Australian Council of Trade Unions (ACTU), individual trade unions, Australian Chamber of Commerce and Industry (ACCI), Australian Mines and Metals Association (AMMA), Australian Industry Group (AIG), the Business Council of Australia (BCA) and others. I was involved in the development and publication of a landmark ACCI labour relations policy in 1991, which supported only very limited tribunal arbitration powers, and a very limited statutory 'safety net', and in the development of numerous submissions and at policies on labour legislation. This was 'A New Industrial Relations System for Australia', ACCI, 1991; see Reg Hamilton 'Employer Matters in 1993', March 1994 Journal of Industrial Relations, 126. See also the Productivity Commission [PC] (2015) Report of the Inquiry into the Workplace Relations Framework, December, Government of Australia. There have been two elections since 2015, and no attempt to implement those recommendations was made.

Further, as Professor Sawer said the debate on labour legislation has led to 'periodic crises caused by attempts to alter the system'[14]. Debate on labour relations is often dominated by politics.

Given these difficulties, what is the use of centrist changes, and what are their limitations?

To answer this question I discuss how practical problems were addressed during the long history of consultation and argument over, and application of federal labour legislation which I was directly involved in from March 1984-2001 as an industry representative at the national level[15], and as a Deputy President of the Commission 2001-2022. This was a third of the period of operation of the federal labour system 1904-2022.

I always tried to find conciliatory or centrist solutions to the problems I was required to address. If such satisfactory agreed positions could be found the result was that employer objectives would be addressed with less opposition and more effectively (and the effect would the same for trade unions, because this was centrist). In many cases conciliatory or centrist solutions were not possible and the result was some form of campaign on all sides. How effective or merited such campaigns were (and their equivalent from others) is for a different paper.

I could easily in this paper advocate radical change, but this is already the subject of many submissions and proposals from those with a democratic mandate, while centrist changes are a neglected orphan, but nevertheless have potential. One former Prime Minister complained that every person and his galah were talking about microeconomic reform to no effect[16], which is one view, although some radical change has lasted.

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[14] Australian Federal Politics and Law 1901-1929, Carlton 1972, Melbourne University Press

[15] I drafted the CAI response to the Report of the Committee of Review into Australian Industrial Relations Law and Systems, Canberra: Australian Government Publishing Service, 1985 ('the Hancock Report'), which was approved by CAI General Council. I then participated in tripartite discussions on its implementation which led to the *Industrial Relations Act* 1988, and subsequent tripartite discussions in the National Labour Consultative Council (NLCC) Committee on Industrial Legislation (COIL) until 2001. My first test case was the *Termination, Change and Redundancy Supplementary Decision 1984,* (1984) 9 IR 115, which I was involved in. Employers lodged a 'notification of dispute' about the first test case, and I had the task of putting together proposed changes to the order which were developed at a meeting of national employer associations, some of which were adopted by the Commission. I was the main ACCI advocate in the *Safety Net Cases* 1992-2001, which adjusted the minimum wage system, replacing Geoffrey Giudice then of counsel, who I appeared with in the April 1991 (1991) 36 IR 120 and October 1991 (Print K0300) National Wage Case proceedings. Colin Polites was the main CAI wage case advocate until his appointment to the Commission in 1989, appearing with others who made an important contribution. Some tribute must be paid to the beleaguered media, including the specialist industrial relations media, which were such an important part of policy formation during this period.

[16] 'I mean, I guarantee if you walk into any pet shop in Australia, what the resident galah will be talking about is microeconomic policy.', *Sydney Morning Herald*, 22 June 1989, 3; see Pet shop galah | ANU School of Literature, Languages and Linguistics, accessed July 2021

The tripartite development of the new certified agreement provisions of the *Industrial Relations Act* 1988[17] was an important example of centrism, which foreshadowed the later development of the labour system in emphasising enterprise agreements. One minor illustration of the possible role of centrism was the *Paid Rates Review* of 1990-1991. At the start of proceedings I tendered some centrist draft 'principles' for paid rates awards. This was my first major case as lead advocate. After a number of conferences this led to an agreed position, and other agreed positions followed on a review of the wage fixing principles and a review of the operation of the principles[18]. The alternative would have been very extensive, difficult and unpredictable arbitration proceedings with almost certainly no better result. An agreed position gives each side the option of a veto but arbitration proceedings do not, because it is a discretionary decision of the tribunal not the parties. Paid rates awards did not become a problem for employers as a result of that case (nor for trade unions). My draft centrist set of 'principles' to be tendered was initially controversial, but I was grateful for the internal support of the then Chief Executive, Ian Spicer, as well as Bryan Noakes. We owe a considerable amount to people of their calibre, on all sides, who have an understanding of such matters despite the complexity.

I was eventually given a large degree of autonomy because the result of such proceedings did not become a problem for employers. They might also involve actual advantage to employers, which was something I always sought consistent with the objects of ACCI, although during the Accord years 1983-1996 employers were to some extent on the defensive. Part of this autonomy was based on distinguishing those matters which would cause a problem for industry and which required disagreed action of some kind, such as detailed amendments. This involved putting a proposal for amendments to members, which was often or usually accepted. Another category of disagreed matter were those where no agreement was possible and perhaps a national campaign was required. However that is for another paper.

The purpose of discussing such matters is that it might help others consider the uses and abuses of centrist legislative and tribunal changes and come to better conclusions for the future.

Further the origins of much of our labour relations system are often not well understood. In at least one *Safety Net* decision the Bench was unaware of the origins and basis of the fixation of the Federal Minimum Wage clause set a

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[17] Sections 115-117. Section 115(5) provided that Full Bench principles need not determine the result of a public interest test, which was a departure given that Wage Fixing Principles were made in the public interest in order to guide movements in total labour costs by the Commission: '(5) Certification of the agreement shall not be taken to be contrary to the public interest merely because the agreement is inconsistent with general Full Bench principles.'

[18] April 1991 National Wage Case decision, Print J7400, Appendix C Paid Rates Review 74, May 1990 Review Appendix A 71, Review of Wage Fixing Principles Appendix D, 79.

decade earlier for example. The rate in the clause was fixed on the basis of the C14 rate in the *Metal Industry Award.* The *Safety Net* decision was only clarified when I participated in the next *Safety Net* proceedings[19]. I had been the advocate who applied for the clause[20]. A decade is a different country in Australian labour relations.

Little accurate historical material of such developments was available. Given this I attempted to document some of the important changes in over a hundred years of dynamic operation of the minimum wage system for example from its inception with the Victorian wages boards 1896 through to the 1904 Harvester decision, the basic wage then total wage, and then the modern 'safety net' system[21]. This present history of relatively centrist labour changes may also provide some assistance.

The issues I was involved in were significant legislative and award questions resolved at the national level during the period 1984-2001, including the development of the *Industrial Relations Act* 1988, the *Industrial Relations Reform Act* 1993, and the *Workplace Relations Act* 1996, as well as nearly all the significant Commission test cases of the time. It is also a history of approved employer policy 1984-2001, because all policy positions put by me were approved by the national council of Australian employer associations, as the CAI/ACCI[22] were at least in part. After that it is a history in part of Commission[23] application of the Act establishing the national labour system.

In the United Kingdom the Thatcher/Major Conservative Governments abolished wages boards in 1993, which only ever applied at their highest to a quarter of the workforce. In so doing they abolished minimum wages. The Blair Labour Government then introduced the first national minimum wage in 1998. By 2016 the Cameron Conservative Government supported a new living wage, which was a change in approach[24].

No Government has supported the Productivity Commission recommendations for major change in 2015[25]. We may also like the UK have left an age of

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[19] Wages and Allowances Review 2007 [2007] AIRCFB 684; Wages and Allowances Review 2008 [2008] AIRCFB 635, 11

[20] April 1997 Annual Review – Wages (1997) 71 IR 1; Print P1997, 77

[21] Reg Hamilton, Waltzing Matilda and the Sunshine Harvester Factory, FWC 2010; The Hon. Reg Hamilton, Fair Work Commission, The History of the Australian Minimum Wage, The history of the Australian Minimum Wage (fwc.gov.au), accessed June 2021.

[22] The Confederation of Australian Industry (CAI) became the Australian Chamber of Commerce and Industry (ACCI) on 1 September 1992. I thank and acknowledge the contribution made by many during my working life with employer associations, and as a member of the Commission. Some such as Bryan Noakes and Commissioner John Lewin are unfortunately no longer with us.

[23] The Australian Industrial Relations Commission, Fair Work Australia, the Fair Work Commission.

[24] The Hon. Reg Hamilton and Matt Nichol, One Hundred Years of Dynamic Minimum Wage Regulation: Lessons from Australia, the United Kingdom and the United States, Working Paper Series, Employment Law Research Group, The College of Business, Central Queensland University, May 2020.

[25] Productivity Commission [PC] (2015) Report of the Inquiry into the Workplace Relations Framework, December, Government of Australia, 194.

radical reform and entered one of repair in the case of Coalition Governments, although perhaps not Australian Labor Party (ALP) Governments[26]. If we have not left an age of radical change, repair will still be needed.

In the past there were fundamental policy differences between employers and trade unions, which grew, but there was also an air of goodwill and common endeavour which founded successful changes. All sides wanted to make the labour system and its institutions work well.

Finally, labour relations is a dynamic process, which needs to address constantly changing economic, social and political developments. For example the minimum wage systems of the US, UK and Australia constantly changed over the last 100 years in order to address the needs of workers, employers and the public interest[27].

It is a poor reflection on the political culture of Australia if we are not able to address ordinary not radical issues of repair and improvement.

Debate about radical change will continue if political parties, trade unions and employers decide to continue it

The debate between those who support a more market-oriented labour relations system[28] and those who place more emphasis on legislative protections for workers[29] is in some ways a natural one, and one that will continue in some form.

In Australia this debate was expressed by the political and industrial parties in radically different approaches to the system of worker protection contained in 'awards'.

Centrist reforms had an important role in the six formal award review processes which applied from 1987, although the Coalition changes from 1996 were opposed by trade unions. Awards have been 'restructured', 'simplified', and

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[26] I use 'ALP' throughout.

[27] The Hon. Reg Hamilton and Matt Nichol, One Hundred Years of Dynamic Minimum Wage Regulation: Lessons from Australia, the United Kingdom and the United States, Working Paper Series, Employment Law Research Group, The College of Business, Central Queensland University, May 2020.

[28] Eg. The Australian Chamber of Commerce and Industry submission to the Senate Education and Employment Legislation Committee Review of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020, February 2021 paragraphs 2-25; The Australian Mines and Metals Association submission to the Senate Education and Employment Legislation Committee Review of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020, February 2021, paragraphs 251-260; AiGroup submission to the Senate Education and Employment Legislation Committee Review of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020, February 2021, 41-42; https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/FWSupportJobsandEcon/Submissions, accessed April 2021

[29] Australian Council of Trade Unions submission to the Senate Education and Employment Legislation Committee Review of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020, February 202, 39-45; https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/FWSupportJobsandEcon/Submissions, accessed April 2021

'modernised'. Thousands of federal and State awards were replaced with 121 national modern awards with consistent numbering and language, and often entitlements[30]. Evidence of the simplification and modernisation process can be seen in the metal industry award's 583 pay points reduced to 19 pay points after being combined with other manufacturing awards[31].

There is still a role for centrism in making awards easier to apply, for example in developing comprehensive 'loaded rates' in each award, and perhaps some other changes discussed later.

However, there have recently been important policy differences. Trade unions and the ALP strongly support the continuation of the 'award' system, and a 'no disadvantage' and from 2009 a 'better off overall' test for agreements against awards, while also sometimes initiating substantial reforms which should be acknowledged[32].

Employer associations and the Coalition were arguably supportive of the basic wage during the Menzies years (1949-1966) with reservations about amounts on occasion[33]. The Coalition and many or most employers supported award simplification introduced in 1996 and supported replacing the 'no disadvantage' test for agreements against awards with a test against a limited set of statutory criteria instead in the period 1996-2009, both of which were opposed by trade unions.

Mainstream employer associations began to argue for statutory minima to replace awards as agreement tests as a result of the 1991 attempt to develop an employer model labour relations system for the future, rather than simply proposing ad hoc reforms of the existing system[34]. I drafted a submission based

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[30] The Hon Reg Hamilton, *Industrial Dispute – A President's term on Australia's national employment tribunal 1997-2012* (2012) 10-29, available at <https://www.fwc.gov.au/sir-richard-kirby-archives/the-modern-era>.

[31] Manufacturing and Associated Industries and Occupations Award 2020, clause 20.

[32] The March 1987 National Wage Case decision (1987) 71 IR 65, 66-69, August 1988 National Wage Case Decision (1988) 25 IR 170, 173-175, August 1989 National Wage Case Decision (1989) 27 IR 196, 196-200 and others show that they helped initiate reforms in 1987-1995, and 2009 onwards, and opposed the Coalition award simplification system from 1996-2008. They have always argued for minimum wage increases and given that the minimum wage was set for nearly 100 years on the basis of 'industrial disputes' initiated by trade unions the relatively high minimum wage was set in part because of their representational activities. Employers have played an important role in moderating increases by providing economic and other analysis, and Government has supported the legal framework and also provided analysis.

[33] Basic Wage and Standard Hours Inquiry 1961, (1961) 97 CAR 376, 381

[34] 'A New Industrial Relations System for Australia', ACCI, 1991; see Reg Hamilton 'Employer Matters in 1993', March 1994 Journal of Industrial Relations, 126. I suggested to Bryan Noakes and the then Chief Executive Ian Spicer that a long-term framework be developed, although in doing so I was not clear about what that long-term framework would contain, except that there would be an emphasis on the free market. My view then was simply that some overall policy direction would help, and without that overall policy direction was ad hoc and less persuasive than it could be. I say this not to endorse this view, but to describe policy formulation in the main national employer association of the time. Bryan Noakes wrote the draft new policy, with some technical assistance from me. A process of securing political support within CAI then began, which I did much of the work for such as a private and confidential survey of the views of member associations. There was some difference of opinion about abandoning support for compulsory conciliation and arbitration, but opposition was weak, and appeared to be more personal than supported by employer membership. Support from employer membership was a precondition of successful opposition to the draft new policy. The policy appeared to be representative of views in the private sector, but outside the private sector was controversial in many respects, such as the limited number of minimum standards to replace awards, given the different emphasis on the market as opposed to worker protection. The employer

on that policy which called for a 'simple and fair national enterprise agreement procedure … a breaking of the link between awards and enterprise agreements through replacement of the 'no disadvantage' test with a set of true minimum standards'.[35] This seems to have begun two decades of serious political and industrial disagreement about statutory minima as an alternative to awards as tests for agreements.

Conflict over agreements had already started a year earlier, when the then ACCI Chief Executive, Ian Spicer, called enterprise agreements 'uninspiring' with 'occasional good results'. The then Australian Council of Trade Unions (ACTU) President Martin Ferguson launched what was described as a 'stinging attack', while Minister Senator Peter Cook said he was 'staggered' by the comments[36]. Employers, unions and political parties have been staggering and launching 'stinging attacks' on each other over this issue ever since, most recently with the Omnibus Bill 2021[37]. Before this speech ACCI discussed internally less radical changes, such as agreements pursuant to flexibility clauses in awards, but they received little support from employers, who wanted stronger beer.

This period was overall one in which all parties adopted relatively uncompromising policy approaches. The ACTU 'rejected' the April 1991 National Wage Case decision because it did not provide for enterprise bargaining and was supported by the then Government[38]. The Coalition proposed radical changes in its 'Fightback' proposals in the 13 March 1993 federal election[39]. Prime Minister Paul Keating's 21 April 1991 speech to the Institute of Company Directors led to lasting change as awards became a 'safety net' for enterprise bargaining with the *Industrial Relations Act* 1993[40]. Prime Minister John Howard and Peter Reith's *Workplace Relations Act* 1996 limited awards to stated 'allowable' matters rather than matters within the scope of an 'industrial dispute'[41]. The uncompromising policy debate led to lasting change as well as lasting disagreement. In some ways these were the formative legislative initiatives which still guide the current labour relations system.

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association membership supported only a small number of minimum standards, and this was the subject of difficult internal discussions.

[35] Reg Hamilton, 'Employer Matters in 1993', March 1994 Journal of Industrial Relations 117, 126

[36] Reg Hamilton, 'Employer Matters in 1992', March 1993 Journal of Industrial Relations 83, 92

[37] *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill* 2021, proposed section 189(1A)

[38] (1991) 36 IR 120

[39] Fightback: taxation and expenditure reform for jobs and growth, (pdf) Liberal Party of Australia, Political Party Documents, Parliamentary Library, 21 November 1991; accessed July 2021

[40] Reg Hamilton, 'Employer Matters in 1993', March 1994 Journal of Industrial Relations 117, 124

[41] Section 89A. The Senate removed from the Bill provisions testing agreements against statutory entitlements in favour of continuing the 'no disadvantage' test against awards. Individual bargaining (Australian Workplace Agreements) was removed in 2008-9 with the *Workplace Relations Amendment (Transition to Forward with Fairness) Act* 2008, The *Workplace Relations (Transitional Provisions and Consequential Amendments)* Act 2009

Statutory criteria replaced awards as agreement tests only in 2005[42]. The Coalition then amended the Act to provide for a 'fairness test' operating from 1 July 2007 which provided some limited additional protection but was not a full 'no disadvantage test'[43], and criticised the replacement of that test in 2009 with the 'better off overall' test but would it appears have supported the 'no disadvantage test'[44]. Employers for example would prefer the 'no disadvantage' test for agreements to the current 'better off overall' test.[45] Trade unions now strongly support the 'better off overall' test[46].

The latest example of this important policy disagreement is the recent proposed temporary 'pandemic' test for approval of agreements, which did not include a 'better off overall' or 'no disadvantage' test[47]. It led to a strong ALP and ACTU campaign of opposition[48]. The nature of the debate about a pandemic test for agreements arguably affected the fate of other provisions which had nothing to do with awards or radical reform, for example provisions regarding unrepresented litigants. The pandemic test was withdrawn from the 2020 Omnibus Bill, and the rest of the Bill was also withdrawn except for casual provisions.

Overall defeat of the pandemic agreement clause was a priority for the ALP and ACTU. They succeeded in their priority goal, just as maintaining access to the common law torts against industrial action was a priority for employers who defeated the *Industrial Relations Act* 1997. The common law restrictions were excised and eventually the *Industrial Relations Act* 1988 was passed.

Whether passing the pandemic agreement provision was a priority for employers and the Coalition is unclear, given the stated limited potential application of the clause. Other matters seemed to be a priority for them, such as extending the life of mining project agreements, although those issues were largely lost in the public campaign and debate about a pandemic agreement provision.

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[42] *Workplace Relations Amendment (Work Choices) Act* 2005, see later discussion.

[43] The *Workplace Relations Amendment (A Stronger Safety Net) Act 2007*

[44] Coalition Senate Committee Minority report, 1

[45] Eg. The Australian Chamber of Commerce and Industry submission to the Senate Education and Employment Legislation Committee Review of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020, February 2021 paragraphs 2-25; the Australian Mines and Metals Association submission to the Senate Education and Employment Legislation Committee Review of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020, February 2021, paragraphs 251-260; AiGroup submission to the Senate Education and Employment Legislation Committee Review of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020, February 2021, 41-42; https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/FWSupportJobsandEcon/Submissions, accessed April 2021

[46] Australian Council of Trade Unions submission to the Senate Education and Employment Legislation Committee Review of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020, February 202, 39-45; https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/FWSupportJobsandEcon/Submissions, accessed April 2021

[47] *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill* 2021, proposed section 189(1A)

[48] ACTU Submission to the Senate Education and Employment Committees Inquiry into the Bill, Executive Summary

No doubt public opinion, which may be supportive of the protections of the minimum wage and award system will be of importance given that the electorate, not just Parliament, is the ultimate decision maker.

Many successfully implemented radical changes have also derived from real world issues and involved a consideration of the real world effect of policies. The *Industrial Relations Act* 1993[49] and *Workplace Relations Act* 1996[50] radically limited awards to a 'safety net' of limited matters, in a policy environment where some form of permanent change was needed, it was agreed, after the economic damage of the 1967-1981 'wages explosion'[51], and to leave scope for enterprise bargaining supported by the first federal legislated form of protected industrial action. There were and are now some dissenters.[52]

The decline of collectivism

Collectivism has declined in the Australian labour market. Hardy and Stewart point out that 'Over the past 35 years union density in Australia has fallen from around 50 % to just 15% - and as low as 9% in the private sector', and 'Coverage by enterprise agreements in the private sector has fallen by over one-third since 2013'[53].

Industrial action has almost disappeared:

Table 1: Working days lost per year per 1000 employees since 1985

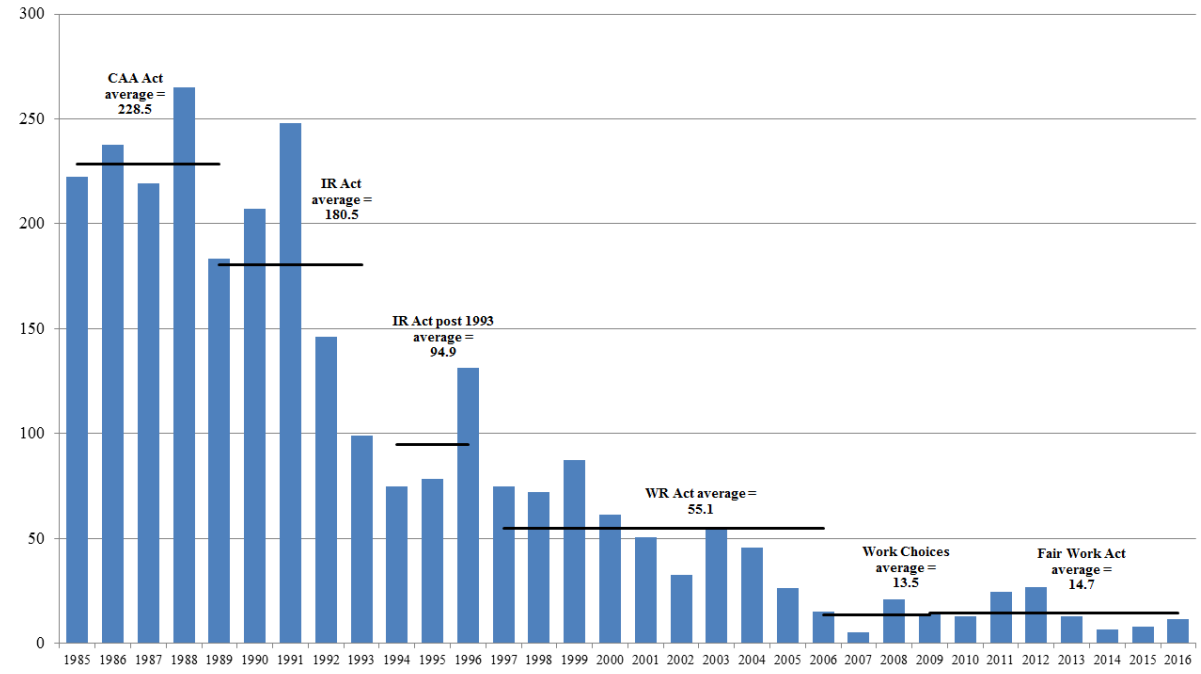
[49] *Industrial Relations Reform Act 1993* (Cth), s 88A(b).

[50] *Workplace Relations Act* 1996, ss.88A, 88B, 89A

[51] The Third Safety Net Adjustment and Section 150A Review Decision October 1995, Print M5600

[52] *National Wage Case October* 1991, Print K0300 30 October 1991. Although see Joe Isaac, 'Why Are Australian Wages Lagging and What Can Be Done About It?' (2018) 51(2) *Australian Economic Review*.

[53] Andrew Stewart, Jim Stanford, Tess Hardy (ed.), The Wages Crisis in Australia, University of Adelaide Press 2018, Chapter 4, Tess Hardy and Andrew Stewart, What's causing the wages slowdown?, 55, 56



Note: Based on, and extending, Chart 4.16 at p. 75 of *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation*, report prepared by the Fair Work Act Review Panel, DEEWR, 2012.
Source: ABS, *Industrial Disputes, Australia, Dec 2017*, Catalogue No. 6321.0.55.001.

As industrial action diminished across the economy so did discussion of it in national decisions on the minimum wage. The last substantive discussion of industrial action as an issue discussed in a National Wage Case or Safety Net decision was in 2000 in relation to the metal industry, although such discussion was of obsessive and central importance in National Wage Case decisions of the 1970s and 1980s[54].

Australia's award system, made initially in settlement of collective disputes beginning in the 1900s, has remained in place by force of statute, although it has been substantially reviewed and changed since 1987. As a 'safety net' for bargaining awards are also a diminished force, as bargaining occurs on top of awards, and they are no longer a vehicle for giving industry agreements legal effect and flow-on[55]. In 1990, 78 per cent of the workforce received award rates[56] and this number had fallen to 22.7 per cent of workers in 2018.[57] Nevertheless Australia has maintained a minimum wage which is one of the comparative highest in the world[58]. The national tribunal, established in 1904 to

[54] Safety Net Decision 2000, 95 IR 64 S5000, at 22
[55] The Hon Reg Hamilton, *Industrial Dispute – A President's term on Australia's national employment tribunal 1997-2012* (2012) 10-29, available at <https://www.fwc.gov.au/sir-richard-kirby-archives/the-modern-era>.
[56] Stephen Clibborn and Chris F Wright, 'Employer theft of temporary migrant workers' wages in Australia: Why has the state failed to act?' (2018) 29(2) *The Economic and Labour Relations Review* 207, 214.
[57] *Annual Wage Review 2017-18* [2018] FWCFB 3500, paragraph 265.
[58] The Hon. Reg Hamilton and Matt Nichol, One Hundred Years of Dynamic Minimum Wage Regulation: Lessons from Australia, the United Kingdom and the United States, Working Paper Series, Employment Law Research Group, The College of Business, Central Queensland University, May 2020.

resolve collective disputes, now deals with more individual grievances than collective disputes[59].

Any debate about labour laws needs to have regard to the substantially diminished role of collectivism over the last forty years, and the increase in individual grievances and individual arrangements. For example there has been only limited need to discuss collective action as a force in pushing general wage increases across the economy in National Wage Cases since the 1990s whereas in 1960-1983 the subject was an obsession. Collectivism is not likely to disappear, and may revive, and has a role to play that has to be accepted and managed by all in a sensible manner.

The nature of tripartite discussions

I was on the tripartite Committee on Industrial Legislation (COIL) of the NLCC[60] and helped develop the 1988, 1993, and 1996 Acts[61], which were major reforms, as well as innumerable smaller legislative initiatives.

During that period at least four Ministers I worked with showed considerable skill in negotiations, and something can perhaps be learned from their work. Minister Ralph Willis frequently disagreed with official employer positions, as he was entitled to do, and was careful and polite to deal with, but he eventually secured the passage of the *Industrial Relations Act* 1988. Other Ministers showed considerable negotiating and policy skills, including Senator Peter Cook, who managed relations with employers well by dealing with them at face value despite the policy differences, Tony Abbott who steered unfair dismissal reforms through the Senate, and Minister Peter Reith, who negotiated the passage of the *Workplace Relations Act* 1996. The Keating Government took issue with what they said was an endorsement by ACCI of the Coalition's 1991 'Fightback' policy and relations between the Government and ACCI were overall somewhat hostile, although I met with Minister Laurie Brereton about changes to the Act and was given a fair hearing in my view, and there was also some friction between the Government and the ACTU[62]. By tradition mainstream employer associations in Australia and internationally do not

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[59] The Hon. Reg Hamilton, Practical aspects of the Fair Work Commission's jurisdiction, and the Australian employment safety net, speech to the 2018 Biennial Australian Labour Law Association National Conference, 1.

[60] The National Labour Consultative Council, representing the CAI and ACCI. I worked in particular with Bryan Noakes, Director-General of CAI, who was the main employer leader after George Polites retired in 1983-84. As is the way I was at first mainly a researcher and later was a main advocate. I was initially a young researcher, who prepared the draft CAI response to The Report of the Committee of Review into Australian Industrial Relations Law and Systems 1985 (referred to as the Hancock Report, after its chairman, Keith Hancock) which was approved by CAI Council. I gradually became a spokesman and negotiator as well. After I was appointed to the Commission in September 2001 the ACCI work was performed by able practitioners including Peter Anderson, Richard Clancy, and Scott Barklamb.

[61] *Industrial Relations Act* 1988, Division 3A Certified Agreements of the *Industrial Relations Act* 1988 passed into law 23 July 1992, the *Industrial Relations Act* 1993, the *Workplace Relations Act* 1996.

[62] Reg Hamilton 'Employer Matters in 1995', March 1996 Journal of Industrial Relations, 114, 119, 128

represent the political interests of their employer members but instead make decisions based on industrial and economic issues:

> 'labour relations issues should, as far as possible, be decided on industrial relations principles or criteria. There is likely to be little confidence in an organisation whose decisions are largely based on political considerations, although such considerations must at times weigh in arriving at a decision. Admittedly the distinction is a thin one …. whether the organisation is one which promotes the industrial relations and related interests, rather than the political interests, of its members.' [63]

Trade unions are often political as well as industrial, and in Australia and some other countries were involved in establishing the main political party representing social democracy. In any event these were difficult times.

Government usually allowed employers to select their own representatives, consistent with freedom of association requirements. The ACCI was the most representative body because it covered every State and Territory, every industry sector, and every size of business, and was therefore representative in a way that no other body was at that time, however unwelcome the advice was. It had an overall coordinating role amongst employers with considerable tensions. For example I coordinated the employer representation on five Commission initiated working parties, which worked productively on s.150A award reform although there was considerable jostling for position[64]. ACCI coordinated national campaigns of employer opposition to various Government Bills during that period.

Recent events suggest that a better approach to this coordination has not been developed[65]. However if this is no longer feasible or supported then the onus is on the large representative employer associations to develop a better approach.

The representative role of the ACCI came under challenge particularly because of fundamental differences of opinion. ACCI, for example, opposed the Accords 1983-1995, and abandoned its support for compulsory conciliation and arbitration after the 'rejection' of the April 1991 National Wage Case decision[66].

Legislation was not collectively bargained, but Government legislation, although consultation helped. The non-union collective agreement option

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[63] S.R.De Silva, Managing an Employers' Organisation and its Changing Role, International Labour Office, June 1992, 14

[64] The Third Safety Net Adjustment and Section 150A Review Decision October 1995, Print M5600

[65] Ewin Hannon, Bosses Brawl on Political Bastardy, The Australian, 21 April 2021, p.1

[66] 'A New Industrial Relations System for Australia', ACCI, 1991; see Reg Hamilton 'Employer Matters in 1993', March 1994 Journal of Industrial Relations, 126

introduced in the *Workplace Relations Act* 1996 was my submission on behalf of the group I represented[67]. The draft Bill only contained Australian Workplace Agreements and trade union collective agreements as agreement options. I thought that a full menu of options should be available to the parties. The original 'no disadvantage' test for agreements against awards in the then draft Bill examined during private tripartite discussions provided for no reduction on the award at all, by my recollection, which we (and trade unions) said was unworkable. This was the first 'no disadvantage' test introduced in 1992[68].

Common ground does not mean abandoning the interests you represent. Rather it means avoiding both unnecessary extremism and appeasement, although public campaigns always involve some 'poetic licence' which the other side describes as something else. Disputes should not be personal but based on policy, although the afflictions of ego, hatred and revenge may occasionally have been a factor of importance.

In terms of content accurate assessments of problems and proportionality have to be made by the parties, and the result cannot be just the useless middle ground. Actual problems have to be addressed.

The nature of limited reform will vary by political complexion of Government but should nevertheless be limited. For example a reformist ALP Government would on past experience introduce limited reforms such as having regard to whether an employer agreed to an employee request for a support person during an unfair dismissal interview in considering whether a termination was unfair[69]. Different political parties take different approaches to labour relations. Associated with these different approaches there is a 'tribalism', 'them against us' element of the labour relations debate which is not likely to disappear. Some believe it can lead to effective campaigning, or an inability to assess unwelcome evidence, or even bigotry. However, in my view the most persuasive campaigns have a strong element of truth in them.

Labour legislation is not necessarily a history of continual successful improvement[70].

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[67] Peter Reith, 'The Reith Papers', Melbourne University Press, 2015, 85

[68] Section 134E introduced by the *Industrial Relations Legislation Amendment Act* 1992

[69] Section 387(d) of the *Fair Work Act* 2009

[70] Thomas Babbington Macauley, *The History of England from the Accession of James the Second* (1848), and in his essays, wrote history as one of the progress of England from the 17th to the 19th century in all aspects from roads to finances. This is sometimes called the Whig view of history. Macauley's writing was also entertaining. He said that the Puritans banned bear baiting not because of the pain caused to the bear, but because of the pleasure caused to the spectators (*History of England* volume 1 (1849) chapter 2), and that the Jesuits were educated to just before the point at which they became open minded. This has no application to the modern Jesuits.

How does centrism deal with the objectives and goals of labour legislation?

Australia has effectively ended compulsory conciliation and arbitration of industrial disputes. The functions that remain with the national industrial tribunal are maintenance of the award safety net, and a number of additional functions such as arbitration under dispute settlement procedures in agreements, where the parties agree to include this in the agreement, and personal grievance procedures such as unfair dismissals and bullying, as well as functions relating to industrial action, bargaining and approval of enterprise and multi-enterprise agreements.

How did this system come about? Section 51(35) of the Constitution required that any labour system set up under it consist of a type of independent tribunal performing conciliation and arbitration of industrial disputes. Given the then restrictive interpretations of the corporations power (s.51(20)) a different system could not be set up under that section. Section 51(35) provided the required model for the federal labour system, and the model was discussed by for example Charles Cameron Kingston during the Constitutional Conventions[71].

The influence of the political values and Constitution of the country is important. Related countries such as Australia, the United Kingdom and the United States of America all based their original minimum wage systems on the Victorian wages boards of 1896 (although Australia also had industrial courts). Then their political values and systems led those wages boards to develop in completely different directions. In the US Supreme Court decisions on the Constitution effectively rendered wages boards ineffective and confined to women and children until the 1930s when decisions changed, perhaps because of changes to the ideological complexion of the court. This illustrates the importance of appropriate appointments to tribunals and courts[72]. The New Deal revolution of the 1930s then led the US to have a minimum wage fixed by Congress not by wages boards or tribunals.

The UK introduced wages boards but limited their application to no more than a quarter of the economy, as a supplement to collective bargaining, before the universal minimum wage of 1998 set by the Minister who may seek advice from the Low Pay Commission[73]. Australian wages boards and industrial

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[71] Reg Hamilton, Waltzing Matilda and the Sunshine Harvester Factory, FWC 2010, 24; The Hon. Reg Hamilton, Fair Work Commission, The History of the Australian Minimum Wage, 4, The history of the Australian Minimum Wage (fwc.gov.au), accessed June 2021

[72] The path from *Adkins v Children's Hospital*, 43 S.Ct. 394, 403 (1923), which declared minimum wage laws in breach of in effect the Fourteenth Amendment to the Constitution, to *West Coast Hotel Co v Parrish* 7 S.Ct. 578 (1937), which declared them valid is long and complex.

[73] Reg Hamilton and Matt Nichol, One Hundred Years of Dynamic Minimum Wage Regulation: Lessons from Australia, the United Kingdom and the United States, Working Paper Series, Employment Law Research Group, The College of Business, Central Queensland University, May 2020.

tribunals were not limited in either way and fixed in effect a universal minimum wage from at least 1954, and award wages were actual wages for most employees until after World War II. The basic imprint of the labour systems developed in this way seems difficult to dislodge.

Labour legislation can be seen on its own, or as part of a broader policy framework[74]. The New Protection policies of the early Liberal/Protectionist party, in which employers were protected by tariffs, if employees were given 'fair and reasonable' wages, led to the Harvester decision about what constitutes fair and reasonable wages, and the Australian basic wage. Labour legislation today is not formally linked in this way, although it is often described as a 'safety net' for those in employment. Other parts of the safety net are the free health system, social security benefits, and the progressive taxation system which places a lesser tax burden on lower paid workers. The unemployment benefit is sometimes described in terms of a percentage of the minimum wage (recently claimed to be set at 41.2 per cent[75]). During the Accord period increases to the minimum wage system were linked to broader policy issues. For example increases to award wages were accompanied by the Accord 'social wage' of taxation, social security and other benefits[76], which later included superannuation benefits. This ended with the election of a Liberal/National Party Government in 1996, which rejected what was sometimes called 'corporatism'.

Employer unity

Trade unions are relatively united, while employers less so. They seem to have become less united than they were when I was involved in the period 1984 to September 2001. That period also saw the AiG, then the Metal Trades Industry Association, leave CAI because of a dispute with or mistake made by the trade and commerce section of ACCI, not involving labour issues. The AiG were professional in the development of their labour relations policy, and this was an extremely negative development for overall employer interests.

The high degree of unity that employers achieved was initially supported by the then Fraser Coalition Government and was then to some extent not supported even disunity promoted when a change of Government occurred, the Hawke/Keating Governments which commenced in 1983. The then CAI now ACCI opposed the Prices and Incomes Accord in the 1983 election, which was central to the incoming Government's program, because of its provision for

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[74] John Howe, Centre for Employment and Labour Relations Law, The University of Melbourne, November 2010 Working Paper No. 49, 'The Broad Idea of Labour Law: Industrial Policy, Labour Market Regulation and Decent Work'.
[75] Press Conference - Australian Parliament House, ACT | Prime Minister of Australia (pm.gov.au), accessed June 2021
[76] September 1983 National Wage Case Decision (1983) 291 CAR 3

wage indexation and later further additional wage increases to be made from 'productivity'[77].

Some of the conflict between employer associations related to finances, ego, an occasional deliberate refusal to coordinate, lack of understanding, and even deliberate courting of the other 'side' and seeking of advantage.

Policy differences existed, but probably were less important or could be worked through by compromise if individuals had wished to. Ultimately employers are generally affected in the same sort of way by, for example, poorly operating unfair dismissal procedures, an unsustainable cost impact, or other change.

My view is that a strong and well-informed employer and employee voice is necessary in developing labour legislation, and all aspects of labour relations. I hope that this is not a controversial view. I have already noted the coordinating role of the ACCI in the past and asked whether a suitable alternative has been found.

Are centrist measures sufficient?

It is easy to describe centrist measures as not sufficient. If debate is not to be just somewhat empty rhetoric, or sound and fury signifying nothing[78], it must be an attempt to make improvements. Governments, opponents and the general community have to be persuaded. Industrial fantasies should be avoided. There is unlikely to be a miracle cure in labour relations.

Measures may assist in important ways, such as award reform or much of the labour legislation 1988-1996 which developed an enterprise focus in our labour relations system. The Productivity Commission Report of 2015 made a similar point[79]. Its overall assessment was:

> 'Despite some significant problems and an assortment of peculiarities, Australia's workplace relations system is not systemically dysfunctional. Many features work well — or at least well enough — given the requirement in any system for compromises between the competing and sometimes conflicting goals the community implicitly has for the system.'[80]

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[77] George Polites of the Confederation of Australian Industry, the predecessor to the ACCI, the main employer leader of the time was involved in the development of the Accord. Some apparently believe that he was a supporter of the Accord, but he was not, including because of wage indexation, according to Dr.Steve Kates, who worked with him during this period.

[78] William Shakespeare, Macbeth, Scene V, Act V. Shakespeare's peasant rebel Jack Cade said at the height of his powers 'burn all the records of the realm: my mouth shall be the parliament of England', Henry IV, Part II, Act IV, Scene 7. This is perhaps a reminder of the need for careful debate about laws, and perhaps for more than one house of parliament. Hubris as well as poor judgement can unfortunately be a factor of importance in legislation.

[79] Productivity Commission Report, Key Points, 1

[80] Productivity Commission Report, Volume 1, 4

Nevertheless we need to make enterprise bargaining more accessible and reverse its decline, given that wages growth is dependent on productivity growth. The object of the bargaining provisions is 'agreements that deliver productivity benefits' (s.171).

There has been considerable recent debate about disagreed or radical change, which has to some extent overwhelmed discussion of more centrist approaches.

The Coalition *Workplace Relations Act* 1996 was contentious and passed Parliament in a heavily modified form. It introduced Australian Workplace Agreements and award simplification, while retaining a 'no disadvantage' test for agreements against awards. A later Coalition attempt to build on and substantially extend these reforms, the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill* 1999[81], was rejected by the Senate.

The greatest dispute occurred over the introduction of the Coalition *Workplace Relations Amendment (Work Choices) Act* 2005, which made comprehensive radical changes[82]. *WorkChoices* is arguably the greatest contrast to centrist attempts at reform in recent years and has to a large extent dominated debate over labour relations legislation since then. The *Fair Work Act* which currently applies, for example, was implemented as a direct response to many aspects of *WorkChoices*[83]. The incoming Government introduced the 'better off overall' test for agreements and argued that there was a lack of protection of worker entitlements in approving agreements under *WorkChoices*[84], although the 1996 'no disadvantage test' had already come under criticism by some for not protecting employees even before those changes[85]. The *Fair Work Act* 2009 was a radical change because it made fundamental changes to *WorkChoices* laws but was arguably not in the sense that it involved continuity with legislation applying before *WorkChoices* over issues such as agreement tests against awards. Under *WorkChoices,* for example, agreements came into force when lodged not when approved by the Employment Advocate.[86] They were not tested against an award through a 'no disadvantage' test. Rather the Australian Fair Pay and Conditions Standard applied and overrode any contrary content of agreements, and this standard was not the award but rather was[87]:

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[81] See the Bills Digest No. 94 1999-2000 *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill* 1999 for an analysis of this Bill.

[82] See the Senate Standing Committee on Education and Employment Report on Provisions of the Workplace Relations Amendment (Work Choices) Bill 2005; *Understanding Work Choices*, 3rd edition, CCH 2007, Joe Catanzariti

[83] Julia Gillard, 'My Story', Knopf 2014, 305, 'I undertook the repeal of Work Choices and its replacement with Labor's new Fair Work laws.'

[84] Senate Standing Education and Employment Committee Report into the Fair Work Bill 2008, Chapter 4

[85] Eg. see Richard Mitchell, Rebecca Campbell, Andrew Barnes, Emma Bicknell, Kate Creighton, Joel Fetter, and Samantha Korman, What's going on with the 'no disadvantage test'?, The Journal of Industrial Relations, VOL. 47, NO. 4, DECEMBER 2005, 393—423; Peter Waring & John Lewer (2001) The No Disadvantage Test: Failing Workers, Labour & Industry: a journal of the social and economic relations of work, 12:1, 65-86, DOI: 10.1080/10301763.2001.10722015

[86] Section 100(1)

[87] Sections 89, 89B

‘(a) basic rates of pay and casual loadings (see Division 2);
(b) maximum ordinary hours of work (see Division 3);
(c) annual leave (see Division 4);
(d) personal leave (see Division 5);
(e) parental leave and related entitlements (see Division 6).’

The Rudd ALP Government implemented the *Fair Work Act* 2009 after the Coalition was defeated in a federal election in 2007, which included a highly successful trade union campaign of opposition to WorkChoices coordinated by the ACTU. Employer associations supported WorkChoices in varying degrees, and for example the list of statutory entitlements was similar to the list proposed in the CAI 1991 industrial relations policy already mentioned. The 2009 Act and earlier legislation[88] repealed Australian Workplace Agreements, introduced the ‘better off overall’ test, and introduced award modernisation.

These political crises were linked to earlier labour relations crises. The damage of the 1981 ‘wage explosion’ was remembered long after the danger of another wage explosion had passed. Two competing conclusions seemed to have been drawn from that failure of collectivism. One was that collectivism should be reformed so that it could continue within sustainable limits, because it had value. This led to the *Industrial Relations Act* 1993. The second was that collectivism and traditional Australian labour relations approaches overall had failed in important respects, and we should move to a strictly market-orientated labour relations system. This contributed to *WorkChoices*[89].

Examples of practical limited reforms that meet the tests of centrist reforms

Enterprise agreement approvals process

Centrist reforms delivered a relatively workable enterprise agreement approval system tested against awards with the ‘no disadvantage’ test in legislation. The first ‘no disadvantage’ test was introduced in 1992[90] and provided:

> ‘134E.(1) The Commission must certify an agreement if, and must not certify an agreement unless, it is satisfied that:
>
> (a) the agreement does not, in relation to their terms and conditions of employment, disadvantage the employees who are covered by the agreement;

[88] The *Workplace Relations Amendment (Transition to Forward with Fairness) Act* 2008, The *Workplace Relations (Transitional Provisions and Consequential Amendments)* Act 2009

[89] The Hon. Reg Hamilton and Matt Nichol, One Hundred Years of Dynamic Minimum Wage Regulation: Lessons from Australia, the United Kingdom and the United States, Working Paper Series, Employment Law Research Group, The College of Business, Central Queensland University, May 2020, 38, https://www.fwc.gov.au/documents/documents/archives/comparative-minimum-wage-working-paper.pdf, accessed June 2021.

[90] *Industrial Relations Legislation Amendment Act* 1992

> …
>
> (2) For the purposes of paragraph (l)(a), an agreement is only taken to disadvantage employees in relation to their terms and conditions of employment if:
>
> (a) certification of the agreement would result in the reduction of any entitlements or protections of those employees under: (i) an award; or (ii) any other law of the Commonwealth or of a State or Territory that the Commission thinks relevant; and
>
> (b) in the context of their terms and conditions of employment considered as a whole, the Commission considers that the reduction is contrary to the public interest'.

There was no provision for 'protected action', ie. protected industrial action. Protected action and other bargaining measures were introduced with the *Industrial Relations Reform Act* 1993.

The 'better off overall' test of the *Fair Work Act* 2009 provides:

> 's.193(1) An enterprise agreement that is not a greenfields agreement ***passes the better off overall test*** under this section if the FWC is satisfied, as at the test time, that each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.'

The 'no disadvantage' test provided for 'the employees' not being disadvantaged, and also provides for reductions if they are the in the public interest. The current test provides for 'each employee' being better off overall, and the public interest test is limited to 'exceptional circumstances' (s.189). The difference between the old and the new test was arguably highlighted in for example *Hart v Coles Supermarkets Australia Pty Ltd*[91], in which an agreement applying to a major retailer was set aside on appeal.

Commission rules were introduced following the *Industrial Relations Act* 1988, which provided for them. The first *draft* rules issued by then President Barry Maddern, did not provide for agreements to be accompanied by sworn statutory declarations. I suggested on behalf of ACCI that a sworn statutory declaration be provided in order to provide a proper evidentiary basis for applications, and also to apply a degree of seriousness to views expressed by the parties. It is an offence to make a false declaration.

Another rule change I suggested was to require the applicant to put first submissions, with a reply from the respondent, in unfair dismissal cases, consistent with the ordinary practice of an applicant seeking to prove his or her case. This was centrist as consistent with ordinary legal practice but not centrist because it may have been in the employer interest, although there is an advantage to an employee applicant in ensuring that a case exists at an early stage in proceedings. The stringencies of formulating a satisfactory applicant

[91] [2016] FWCFB 2887.

submission and witness statement may in fact help an applicant, because a weak case may not be in an applicant's interest, and revelation of this may help the applicant decide to settle or withdraw the matter. I settled rather than arbitrated most unfair dismissal matters simply by direct questions which forced the parties to accept where their evidence and submissions led. Often they led to a logical conclusion of a fatal weakness for one side, or that the case turned on one simple conflict of evidence which was a risk for both sides which they often did not wish to take.

The *Workplace Relations Bill* 1996 was amended by including in it non-union collective agreements[92] after I suggested that the parties should have a broad 'menu' of options for agreement. They were provided with this broad menu in the final Act of trade union collective agreements, non-union collective agreements, and Australian Workplace Agreements (AWAs), as well as both enterprise and multi-enterprise agreements. Before that the draft Bill only provided for trade union collective agreements, and Australian Workplace Agreements.

The *Industrial Relations Bill* 1993 introduced for the first time non-union collective agreements. This followed a campaign I undertook on behalf of CAI, claiming that there was a statutory 'trade union monopoly' on the parties to enterprise agreements, and that 60-70 per cent of the private sector workforce was not unionised[93]. AWAs were strongly opposed by trade unions, and they eventually succeeded in abolishing those procedures for the foreseeable future[94]. Non-union collective agreements are now well established.

It is notable that for the period 1992-2004 amongst the most common applications in the Commission (now in the top three), unfair dismissals and agreement approvals, were governed by provisions of the Act developed largely by consensus and even centrism. If the debate had stopped there, it might be said that trade unions and employers, and political parties, were able to work together constructively to develop Australia's important labour laws.

However, both trade unions and employers were unhappy about the restrictions on approval of agreements. Trade unions 'rejected' the April 1991 *National Wage Case decision*[95] because it did not provide for a system of enterprise bargaining. The Government introduced with trade union support new legislation for an agreement procedure which did not enable the Commission to refuse to approve an agreement because of general 'public interest'

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[92] Peter Reith, 'The Reith Papers', Melbourne University Press, 2015, 85

[93] Eg. Cathy Bolt, Govt opens talks on IR Reform, Australian Financial Review, 28 April 1993, 5; Cathy Bolt, Vic bosses signal deal with unions possible, Australian Financial Review, 10.

[94] *The Fair Work Act* 2009.

[95] (1991) 36 IR 120

considerations in 1992[96]. This became the ultimate model for collective agreements. The only 'public interest' test in that Act related to whether or not the agreement disadvantaged employees compared to the award:

> '(2) For the purposes of paragraph (1)(a), an agreement is only taken to disadvantage employees in relation to their terms and conditions of employment if:
> (a) certification of the agreement would result in the reduction of any entitlements or protections of those employees under:
> (i) an award; or
> (ii) any other law of the Commonwealth or of a State or Territory that the Commission thinks relevant; and
> (b) in the context of their terms and conditions of employment considered as a whole, the Commission considers that the reduction is contrary to the public interest.'

This prevented the approach adopted in the April 1991 National Wage Case decision[97], which was a refusal to approve agreements because they were an alleged flow on threat or anything similar.

Later trade unions became critical of the pragmatic Commission approach to approval and arguable possible occasional marginal downwards flexibility in agreements, which led to the far stricter 'better off overall' test to replace the 'no disadvantage' test in 2009[98].

Employers were to some extent accepting of the 'no disadvantage' test, despite the lack of downwards flexibility. In practice it was administered with a degree of pragmatism with which trade unions were eventually in disagreement. My recollection is that the Commission was also criticised for allegedly quickly approving 'trade union' approved agreements, while being more analytical with agreements which were made without union involvement, on the basis that unions provided scrutiny and tested agreements[99].

The current system of a 'better off overall' test prevents downwards flexibility, has no limits on upwards flexibility, and is now strictly administered by the Commission and Courts before agreements take effect. It was administered for a while with a degree of pragmatism, with weight apparently being given to the fact of agreement, which became untenable because of interventions opposing approval. It was introduced in 2009. It appears that trade unions support this system, while employers are less supportive. Employers were unable in 2020-21 to persuade Parliament to change it.

In a 2018 speech I said that the Commission had 'little discretion to overcome defects which some might consider to be minor or having no effect on approval

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[96] Section 134E introduced by the *Industrial Relations Legislation Amendment Act* 1992
[97] (1991) 36 IR 120
[98] The *Fair Work Act* 2009, s.193
[99] I have not been able to find a source for this.

of the agreement by employees or having some other real policy importance', leading to proceedings before both the Federal Court and a Full Bench of the Commission on the issue of whether or not the omission of the word 'employer' in a notice of representation rights, and its replacement by another term, meant that the agreement could not be approved[100]. Government legislation conferring a discretion on the Commission was passed with the support of the Opposition [101].

It may be that employers and perhaps unions should not use approved enterprise agreements as much as in the past and should now rely more on awards in some sectors where market rates are close to award rates given the difficult calculations required if penalties are to be rolled up in a single annual rate, for example. Computerised payroll systems might enable modelling of nearly every conceivable work pattern to ensure that every individual under any work pattern will be better off.

Finally, the debate about a test against awards is not present in the United Kingdom and the United States of America, for example, because they do not have awards. It is difficult to find any assistance in overseas examples, although the similarity with European industry agreements is discussed later.

Unfair dismissals

Federal unfair dismissal laws were introduced in 1993[102]. Employers undertook campaigns because of the nature of the resulting decisions[103]. A Commission jurisdiction to deal with unfair dismissal claims was introduced with the *Workplace Relations Act* 1996 to replace the jurisdiction of the Industrial Relations Court. I suggested and supported a Commission jurisdiction rather than a Court jurisdiction, because of the need for pragmatism and flexibility, rather than the imposition of strict rules. The old Act did not provide for an overall 'fair go all round' assessment, rather it required a valid reason, and procedural fairness as binding legal obligations[104].

The pragmatic approach has been relatively successful, and unfair dismissals are now much less controversial amongst employers, and worker entitlements were not undermined. Employment Tribunals in the United Kingdom are also tribunals not courts[105]. Even if this is the case all such procedures require regular minor review. Ensuring that the Commission has sufficient powers to

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[100] See the Hon. Reg Hamilton, Practical aspects of the Fair Work Commission's jurisdiction, and the Australian employment safety net, speech to the 2018 Annual Australian Labour Law Association National Conference, 6.

[101] Section 188(2) of the Fair Work Act 2009 was introduced by the Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018, No. 170, 2018.

[102] The *Industrial Relations Act* 1993

[103] For example I produced on behalf of ACCI regular 'report cards' on the Industrial Relations Act 1988, which focussed on unfair dismissals, see Reg Hamilton, 'Employer Matters in 1994', March 1995 Journal of Industrial Relations, 164, and an ACCI Discussion Paper, Reg Hamilton,'Unfair Dismissal in Australia' (ACCI 1995).

[104] Sections 170DC, 170DE of the *Industrial Relations Reform Act* 1993

[105] The Employment Rights Act 1996 (UK)

control the litigation conduct of litigants, particularly unrepresented litigants, without undermining entitlements, is one example[106].

Unfair dismissal exemptions

In 2004 I described the then unfair dismissal exemptions as a 'Serbonian bog', the 1909 criticism made by Justice Higgins of early High Court interpretations of s.51(35) of the Constitution[107]. All had to apply an unworkable distinction in the Act between 'probation' and 'qualifying' periods in contracts of employment[108], for example, and all the unfair dismissal exemptions were similarly unclear in operation[109]. There had also been a highly technical series of Federal Court decisions on whether or not regulations were compatible with the Act or ILO Convention which supposedly supported them[110], which by their very nature had to almost ignore the alleged policy need for the exemption regulations[111].

Court or Commission decisions can quite properly make it apparent when laws are badly drafted and causing difficulties for the parties, which are not from arguable or necessary policy grounds. It may be that a review of the *Acts Interpretation Act* should be undertaken to promote interpretations which lead to simple, clear, and workable legislation which small business and unrepresented litigants can apply, without rewriting legislation. One interpretation[112] which was rejected, for example, was to simply equate

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[106] Eg. see Gopi Awasthi v ANZ Bank [2020] FWC 5302 in which the applicant breached Commission directions on at least four occasions.

[107] Odgers v the Hard Wash Cafe, PR950623, 12 August 2004, Hamilton DP. In my view part of the answer to the Serbonian bog was to have regard to the similarity in all relevant elements of probation and qualifying periods. The original Serbonian bog was a series of High Court decisions on s.51(35) of the Constitution, which were described by Justice Higgins in 1909 as having an 'effect on this Court as a practical administrative concern', and as a 'Serbonian bog of technicalities, and the bog is extending' The Australian Boot Trade Employees' Federation v. Whybrow and Co (1909) 4 CAR 1, 41, 42. In 1909 the High Court in the Woodworker case The Federated Saw Mill, Timber Yard, and General Woodworkers Employes' Association of Australasia v James Moore and Sons Proprietary Limited (1909) 8 CLR 465 decided that State awards prevailed over federal awards, a decision not overturned until 1927 in Clyde Engineering Co Ltd v Cowburn (1927) 37 CLR 466. Until 1927 there was a real lack of clarity about which award provisions applied, a serious operational problem.

[108] Section 170CC(1)(c) and regulation 30B(1)(c), (d), 170CE(5A) and (5B), section 170CBA(1)(c). See the *Workplace Relations Amendment (Termination of Employment) Act* 2000, Act No.104 of 2003.

[109] Section 170CAB(1)(a)

[110] Eg. Hamzy v Tricon International Restaurants trading as KFC [2001] FCA 1589, in which the Full Court of the Federal Court considered s.170CC of the Act, influenced by the ILO Convention 156 Termination of Employment, which authorised regulations exempting employees employed for a 'short period'. The Court found that this did not authorise a regulation which exempted casual employees employed for less than 12 months from access to the unfair dismissal procedures. See also Moore J in *Reed v Blue Line Cruises Limited* (1996) 73 IR 420. That case arose under the *Industrial Relations Regulations*.

[111] The Government used ILO Convention 158-Termination of Employment, rather than the Recommendation which allowed flexibility, although that would not have provided legislative power under the external affairs power of the Constitution. ILO Conventions and Recommendations were used by Australia (and employers) to help in the move from separate minimum wages for men and women, the introduction of maternity leave, and other provisions, and are of great assistance to developing countries attempting to remedy the equivalent of what we termed 'sweating' in the late 19th century. We now use the corporations power, which provides Parliament with flexibility in the terms of legislation implemented.

[112] Odgers, Ibid

probation and qualifying periods in the ILO Convention as distinctions without a difference, which they are in practice[113].

The unfair dismissal exemptions were radically simplified using the corporations power in 2009[114]. The references to qualifying or probation periods were removed and replaced by six months' service, or one year in the case of small business before the federal unfair dismissal provisions apply (s.383).

There will never be a campaign for a return of the unfair dismissal exemptions that applied under the 1993[115] and 1996[116] legislation.

In November 1993 I suggested a six month cap on compensation and reforms to the exemptions. This was largely adopted by Government on 30 June 1994 as a suite of restrictive reforms needed because of operational difficulties[117], only three months after the unfair dismissal jurisdiction commenced. I was later involved in the inclusion in the Act of unfair dismissal 'fair go all round' reforms in 1994[118]. These may not be centrist reforms, but they assisted the workability of the system and the six month cap has survived successive Governments.

Appeals

In March 2012 I suggested that the Commission adopt an expedited appeals procedure, to deal with the problem of appeals made by unrepresented litigants that lacked any basis:

> 'There are a large number of unfair dismissal appeals made by unrepresented applicants in which the Full Bench determines that there is no error within *House v. King*, let alone a 'significant error of fact', and in which they also do not find that there is a public interest in granting permission to appeal (ss.400, 604). I have not seen any statistics but my estimate would be that it might be as high as 90% of such matters. There may also be a problem with unrepresented respondents appealing, although it appears to be a lesser problem.'[119]

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[113] Officers of the International Labour Office assured me that such an interpretation was consistent with ILO Convention 158, on which the legislation was based.
[114] *Fair Work Act* 2009, ss.394, 387
[115] The *Industrial Relations Act* 1993 (Cth.)
[116] The *Workplace Relations Act* 1996 (Cth.)
[117] The *Industrial Relations Amendment Act (No.2)* 1994. Reg Hamilton, 'Employer Matters in 1994', Journal of Industrial Relations 148, 162-164
[118] Reg Hamilton 'Employer Matters in 1995, Journal of Industrial Relations March 1996, 114, 129; Mark David 'Employers seek a 'fair go' in on sacking', Australian Financial Review, 3; Ewin Hannon 'Employers shun state IR systems', Australian, 3, both 19 June 1995; Reg Hamilton 'Unfair Dismissals in Australia – A Discussion Paper', ACCI, 18 June 1995.
[119] The Hon. Reg Hamilton, Practical aspects of the Fair Work Commission's jurisdiction, and the Australian employment safety net, speech to 2018 Annual Australian Labour Law Association National Conference.

Examples of the problems I gave in an address to the Australian Labour Law Association Biennial Conference in 2016[120] included appeals against decisions that did not exist and appeals regarding terminations that occurred over ten years previously, before there was an unfair dismissal jurisdiction. An expedited appeals procedure was accordingly introduced in in November 2014[121], with a permission to appeal pilot. This consisted of a process of expedited hearings to consider whether permission to appeal should be granted. If permission is granted then hearings take place on the remaining issues. This process has operated since then and has led to the dismissal of many unmerited appeals, perhaps 70 per cent, on the basis of a refusal to grant permission to appeal[122].

Chaotic and damaging conduct of unrepresented litigants is common in the legal system and is not confined to labour relations. The Full Federal Court recently noted the problems. In *Hastwell v Kott Gunning*[123] the Court said:

> '11.This case is a stark illustration of the difficulties that people with serious mental health problems face in the litigation system. There is often as here, a complete lack of trust between the parties. The difficulties faced by such a person in the commencement and pursuit of a proceeding are only, and inevitably, compounded as the proceeding continues. The sympathy that the Court inevitably feels for such a person however, does not enable the Court to ignore the rights of the person the subject of an applicant's claim. Nor can the Court ignore the reality that limited resources are available and must be applied to ensure that all applicants may have their cases considered. It is to be hoped that an improved, more appropriate, and effective system could be developed to enable resolution of such cases.
>
> 12. In this proceeding, the primary judge has treated the arguments advanced by Mr Hastwell at each stage of the proceedings with great care, sympathy and patience. There is no doubt that the conclusions reached by the primary judge in *Hastwell (No 5)* were correct for the reasons that his Honour gave and this application for leave to appeal must accordingly be refused.'

This led Steven Amendola, a prominent solicitor, to call for special measures to deal with the problems such as '*creating a special division within jurisdictions*

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[120] The Fair Work Commission and self represented parties**,** The Hon. Reg Hamilton, Deputy President, Fair Work Commission, speech to 2016 Annual Australian Labour Law Association National Conference.
[121] FWC Press Release, November 2014
[122] Justice Iain Ross, Presentation to AIGroup National PIR Group, 4 May 2015.
[123] [2021] FCAFC 70 (13 May 2021)

that receive large numbers of claims from self-represented applicants'[124] which would engage in particularly forceful mediation.

This does not mean that the rights of unrepresented litigants should be limited. Instead measures should be taken to deal with problems effectively in the public interest through for example this appeal process and dismissing matters where procedural directions are breached or procedures abused, and perhaps costs orders and 'enhanced mediation'.

However, if rights are to be removed by a Bill this almost by definition will make it difficult to describe the Bill as a centrist proposal.

Hearing by telephone

I used telephone conferences to settle most regional matters from early in my appointment, and only travelled for regional hearings where one or more party was intractable. These were rare matters. This was considered unusual and some concern was expressed to me by others. Gradually views changed. Regional hearings are now done mainly by telephone.

Transitional costs to employers and employees of radical change and change back again

At the Fair Work Australia member's conference held in 2009 I raised with the ACCI and ACTU the difficulties experienced by employers and trade unions caused by the recent large major changes and then reversals of labour legislation. Many had difficulty in understanding the constant major changes in legislative requirements, which affected their ability to comply with legislation. A similar point may have been made in a paper[125]. Both the unions and employers said in response that they were aware of the problems and were attempting to overcome them by providing advice.

Simplification of the Act by separate Acts or Schedules

During various debates on the *Workplace Relations Act* 1996 I suggested putting the registered organisation provisions into a separate Schedule or Act, to reduce the size and complexity of what had become a large and complex Act[126], which I claimed was similar in complexity to the *Income Tax Assessment Act* 1936, something of a model of obscurity and lack of useability. Because of constant amendments that Act contained provisions such as ss.102AAZB, 102AAZBA, 102AAZC, 102AAZD, 102AAZE, 102AAZF, 102AAZG, and subsections that were similar. This is not ideal for users, such as the ordinary

[124] Workplace Express, 18 May 2021

[125] Geoffrey Giudice AO, Industrial relations law reform – What value should be given to stability?, 2014 Journal of Industrial Relations, 53(6), 433

[126] I have been unable to find the exact transcript of the many Parliamentary inquiries I appeared before.

labour relations practitioner of *Kucks' Case*[127], who is not pedantic or legally trained, but practical in outlook.

The counter argument put by the Parliamentary draftsperson of the time was that parts of the Act could be published separately, achieving the same effect, but in my view undermining the authority of publications[128].

In 2002 the registered organisations provisions were moved to a new Schedule 1B at the back of the Act[129] by the Howard Coalition Government. Later under the Rudd ALP Government the provisions were moved to a separate Act[130], which made the change bipartisan, because it helped with complexity and did not damage anyone's interests. The Act is still extremely complex and large, not least because of the introduction of the National Employment Standards, tests for approval of agreements, and other provisions. Unlike the registered organisation provisions these are inter-related to other provisions of the Act, and therefore it is difficult or not appropriate to move them.

Centrist award reforms

I was involved in developing agreed award changes which were then approved by the Commission and are three standard schedules to modern awards. They are the following schedules to the Manufacturing and Associated Industries and Occupations Award 2020:

Schedule E—Supported Wage System

Schedule F—School-based Apprenticeships

Schedule G—National Training Wage

I was also involved in the period from the April 1991 National Wage Case decision[131] in developing the award flexibility, facilitative and individual flexibility clauses that are in all modern awards, and which were discussed in numerous Commission proceedings. I filed the applications which led to the *Superannuation test case*[132] and was the main employer advocate in that case, a case which sought to develop a more systematic approach to the interaction of award superannuation provisions and the *Superannuation Guarantee* legislation.

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[127] *Kucks v CSR Limited* (1996) 66 IR 182

[128] I have no criticism to make of Parliamentary draftspersons beyond such legitimate policy discussions.

[129] The *Workplace Relations Amendment (Registration and Accountability of Organisations) Act* 2002

[130] The *Registered Organisations Act* 2009

[131] (1991) 36 IR 120

[132] The Australian Insurance Employees' Union & Others v Adjustor and Assessors (Ass Risks) Pty Ltd & Others Superannuation Test Case – (1994) 55 IR 447 – O'Connor President, McIntyre VP, Polites SDP, Acton DP and Merriman C. Decision issued 7 September 1994, Print L5100.

I was the main employer advocate in the *Personal/carer's leave* test cases[133]. These issues were contentious and different positions were taken by Governments, employers and trade unions, and cannot be described as centrist award change agreement, although there were always areas of agreement that the parties sought to develop.

The *Supported wage system* schedule was developed by consultation with trade unions and the Government, and this agreement was approved in the 1994 *Supported Wage System – wages* decision[134] for people with disabilities. It is now a schedule to all modern awards. This provides a fair system of discounted wages for people with disabilities which affects productivity. The clause was developed in a sub-committee of the NLCC, and I did the technical work on behalf of ACCI[135].

On behalf of the main employer association appearing (ACCI) I agreed with the extension of parental leave to certain long term casual employees in the *Parental Leave for Casuals Case* 2001, subject to debate about the form of the order [136]. This agreement was approved by member associations.

I was also involved in rewriting the award traineeship provisions, to include all modern training packages, a new AQF IV wage level for higher level trainees, part-time apprenticeship provisions, and school-based apprenticeship provisions[137]. This was done through a tripartite committee of employers, unions and Government[138]. All of these are now in modern awards and were developed by agreement between employers, trade unions, and the Commonwealth.

A common numbering system for award clauses, and order of clauses, was introduced after agreement in a tripartite working party established by the Commission. During debate on the award reform process required by the new s.150A of the Act I realised that an earlier working party report on standard

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[133] Australian Liquor, Hospitality and Miscellaneous Workers Union & Others Personal/Carer's Leave Test Case – Stage 2 - November 1995 (1995) 62 IR 48 – O'Connor President, Ross VP, Marsh SDP, McDonald C and Holmes C, Decision issued 28 November 1995, Print M6700; Personal/Carer's Leave Test Case – Stage 2 – March 1996 (1996) 66 IR 138 – Marsh SDP, Decision issued 26 March 1996, Print N0343; Personal/Carer's Leave Test Case – Stage 2 – April 1996 (1996) 66 IR 176 – Marsh SDP, Direction issued 22 April 1996, Print N1124

[134] Australian Council of Trade Unions & Australian Chamber of Commerce and Industry (joint application for a supported wage system) – O'Connor President, McIntyre VP and Gay C, Decision issued 10 October 1994, Print L5723; eg. Schedule E of the Manufacturing and Associated Industries and Occupations Award 2020

[135] It would be presumptuous of me to attempt to list all the trade union and other representatives who had responsibility in these various matters.

[136] Giudice J President, Watson SDP, Acton SDP, Bacon C and Cribb C, 31 May 2001, PR904631

[137] See eg. clauses 13 and 15 of the Manufacturing and Associated Industries and Occupations Award 2020, and Schedules E and F above.

[138] This committee was chaired by myself and included Bill Mansfield ACTU, Julius Rowe Australian Metal Workers Union (AMWU), and John Stewart Commonwealth.

award numbering and order of clauses which I had been involved in[139] could be something that would be both helpful as a practical measure, and relatively non-controversial, because it did not undermine the interests of employers, employees or trade unions. I proposed use of this report during early proceedings in relation to s.150A. Trade unions were prepared to work on such a proposal, because it was practical and useful and did not undermine employee interests. It might help because it might reduce complexity and assist employers and employees to apply awards. The Commission said, for example in the relevant Safety Net test case[140]:

'2.4.7 Consistent Award Formatting

One of the deficiencies specified in s.150A(2) of the Act is that an award is not structured in a way that is as easy to understand as the subject matter allows [s.150A(2)(e)]. This matter was considered by central working party (ii) which examined, among other things, consistent award formatting.

'After extensive consultation an agreed approach to award format standardisation was reached in early 1995, with the Commission subsequently issuing a report on the areas of agreement. The Commission said that it considered that it was desirable that the award format guidelines developed by the working party be used in all awards, however strict adherence is not mandatory.

Consistent award formatting involves:

· determining award titles in a consistent way;

· the grouping of related items together (for example, grouping all provisions in relation to leave of absence, such as sick leave, annual leave, jury service, etc.);

· the logical listing of clauses and subclauses within each part and the adopting of a consistent system of numbering. The system proposed by the working party uses decimal numbering, then letters, then Roman numerals (for example, 3.2.1(a)(i)); and

· standardising wage clauses so that the classification, wage group (if applicable) and rates of pay appear together.'

[139] Prepared by then Commissioner Johnson at the request of President Maddern.

[140] The Third Safety Net Adjustment and Section 150A Review Decision October 1995, Print M5600

Such changes were important, given the then considerable differences between award formats, language and numbering, which were sometimes accordingly very difficult to apply. As it was an exercise in centrism it benefitted all sides rather than one, and as the Commission said:

> 'It should be noted that these measures concern the form and structure of awards and not award content.'

A further modern anti-discrimination clause was developed by a tripartite working party established by the Commission, to deal with new requirements that awards not discriminate. I represented the ACCI on both committees[141]. Further, discriminatory language had been removed from awards on a systematic basis by agreement during earlier award restructuring discussions.

Two substantial programs of award reform were introduced in the period 1987-1989[142], the Restructuring and Efficiency Principle and the Structural Efficiency Principle, which were both applied by the Commission when an application to vary an award to include in it a minimum wage increase was heard. These were beneficial and to a large or some extent agreed. Later award simplification requirements introduced in 1996 were highly controversial and were opposed by trade unions and supported by employers.

The introduction of a restrained wage fixation system in September 1983[143], with a 'no extra claims' commitment and benefits to workers was partly agreed, although wage indexation which operated from 1983-1987 was opposed by employers. These reforms assisted in preventing the recurrence of another damaging 1981 wage explosion. They also provided for minimum wage growth. A wage freeze was not supported by Government or the trade unions. A continuing freeze was not workable or arguably desirable, and there would have been damaging industrial campaigns that employers would wish to avoid or bring to an end.

Nearly every award test case provision includes both substantial policy changes, and technical centrist practical considerations. For example the *Termination, Change and Redundancy* test cases of 1984[144] introduced both substantial policy changes in new notice periods for termination and prohibitions on termination, a

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[141] The September 1994 Review Decision, Print L5300; The Third Safety Net Adjustment and Section 150A Review Decision October 1995, Print M5600; Section 150A of the *Industrial Relations Act 1988*; Regulation 26A of the *Industrial Relations Regulations*.

[142] March 1987 National Wage Case Decision (1987) 71 IR 65, August 1988 National Wage Case Decision (1988) 25 IR 170, August 1989 National Wage Case Decision (1989) 27 IR 196

[143] September 1983 National Wage Case Decision (1983) 291 CAR 3

[144] (1984) 8 IR 34; Moore J, President, Maddern J Deputy President and Brown Commissioner, Decision issued 2 August 1984, Print F6230; (1984) 9 IR 115 Moore J, President, Maddern J Deputy President and Brown Commissioner, Supplementary Decision issued, 14 December 1984, Print F7262

requirement of consultation over the introduction of major change, and standard severance pay and redundancy award provisions. CAI argued for a continuation of case by case award determination of for example redundancy, and this was rejected, noting that awards already had a range of provisions on termination and redundancy although less on consultation. Standard provisions were introduced and remained in awards and now in part the Act. However, on behalf of ACCI (then CAI) I drafted a number of amendments to the order, including successful proposals that severance pay be offset against superannuation payments, an exemption from severance pay where there is 'ordinary and customary turnover of labour', and other matters.

Similarly employers opposed the introduction of *Paternity Leave*[145]. However I suggested that paternity leave and maternity leave taken with respect to the same pregnancy and birth be offset against each other and that the order be used to remove the remaining award restrictions on part-time work. This was relatively successful. It is worth noting that this period saw a removal of the traditional award restrictions on forms of work other than full-time under award simplification legislative requirements introduced with the *Workplace Relations Act* 1996, and labour hire arrangements continued to develop.

The *Award Simplification Case* 1997[146] arose from applications I filed, and was hard fought, but during the case I both pressed the case for change and also made some corresponding concessions where the applications seemed weak and unachievable, such as in relation to predictability of hours for part-timers. This process of debate overall probably helped the process of achieving workable provisions for employers and employees[147].

Recent Amendments to the Act

The 2021 Omnibus Bill was developed by the Government, with the assistance of an intensive process of consultation with employers and trade unions, and a Senate committee report. The Explanatory Memorandum said about the Bill:

> 'The Bill supports the Government's commitment to Australia's jobs and economic recovery, including by:

[145] Cohen J, Moore DP, Polites DP, Griffin C and Turbet C, Decision issued 26 July 1990, Print J3596, 26 July 1990

[146] Re Award Simplification Decision; Re The Hospitality Industry – Accommodation, Hotels, Resorts and Gaming Award 1995 (1997) 75 IR 272 – Giudice J President, Ross VP, McIntyre VP, MacBean SDP and McDonald C, Decision issued 23 December 1997, Print P7500

[147] I personally experienced little or no personal unpleasantness between advocates. The civil process may be a tribute to Australian labour relations and helped the process of conciliation and negotiation. On one occasion only I was berated in the lift after a *Safety Net Case*.

- providing certainty to businesses and employees about casual employment;
- giving regular casual employees a statutory pathway to ongoing employment by including a casual conversion entitlement in the National Employment Standards (NES) of the Fair Work Act;
- extending two temporary JobKeeper flexibilities to businesses, in identified industries significantly impacted by the pandemic;
- giving employers confidence to offer part-time employment and additional hours to employees, promoting flexibility and efficiency;
- streamlining and improving the enterprise agreement making and approval process to encourage participation in collective bargaining;
- ensuring industrial instruments do not transfer where an employee transfers between associated entities at the employee's initiative;
- providing greater certainty for investors, employers and employees by allowing the nominal life of greenfields agreements made in relation to the construction of a major project to be extended;
- strengthening the Fair Work Act compliance and enforcement framework to address wage underpayments, ensure businesses have the confidence to hire and ensure employees receive their correct entitlements; and
- introducing measures to support more efficient Fair Work Commission (FWC) processes.'

The Prime Minister, Scott Morrison, said on 26 May 2020[148] that the reforms would be the subject of consultation and focus on a 'practical reform agenda':

> 'Now, beginning immediately, the Minister for Industrial Relations, the Attorney-General, Christian Porter will lead a new, time-bound, dedicated process bringing employers, industry groups, employee representatives and government to the table to chart a practical reform agenda, a job making agenda, for Australia's industrial relations system.'

Christian Porter, the Attorney-General and Minister for Industrial Relations, used the language of centrism in his second reading speech:

> 'These reforms address known problems in the industrial relations system and will be crucial to securing Australia's economic recovery and safeguarding the workplace for future generations.

[148] Speech to the National Press Club

> This bill is not ideologically based; rather, it is founded on a series of practical, incremental solutions to key issues that are known barriers to creating jobs.
>
> They are balanced and pragmatic and seek to create a fair and efficient industrial relations framework for all Australians.'

The Attorney-General and Government made an effort to work with trade unions, employers and employer associations in developing the Act, in part through a set of working groups. They and the ACTU, ACCI, AIG, AMMA and others also deserve credit for attempting to address issues in a practical fashion, although acrimony appears to have ensued, perhaps mainly because of disagreed changes to the 'better off overall' test.

The permanent change to the 'better off overall' test proposed in the 2021 Omnibus Bill included recognition of non-monetary benefits, the fact of agreement, and a test of work patterns actually used not theoretically possible[149].

Serious controversy however occurred in relation to the proposed 'pandemic' better off overall test, which did not mention awards, but instead used a Commission 'not contrary to the public interest' test. It was to operate for two years only. This special test provided a Commission public interest test with other factors such as emphasising the effect of the agreement on employer and employees, and the fact of agreement, without specifically mentioning awards. The test provided[150]:

(1A) The FWC may approve the agreement under this section if the agreement is not a greenfields agreement and the FWC is satisfied that:

(a) it is appropriate to do so taking into account all the circumstances, including:

(i) the views of the employees, and of the employer or employers, covered by the agreement and of the bargaining representatives for the agreement; and

(ii) the circumstances of those employees and employers, and of any employee organisation that has given a notice under subsection 183(1) that the organisation wants the agreement to cover it, including the likely effect that approving or not approving the agreement will have on each of them; and

(iii) the impact of the coronavirus known as COVID-19 on the enterprise or enterprises to which the agreement relates; and

(iv) the extent of employee support for the agreement as expressed in the outcome of the voting process referred to in subsection 181(1); and

(b) because of those circumstances, the approval of the agreement would not be contrary to the public interest.

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[149] Proposed section 193(8)

[150] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021, proposed section 189(1A)

The ACTU and Opposition parties did not see the Omnibus Bill as centrist, even with the removal of the 'pandemic' better off overall test. The ACTU for example said:

> '1. The Bill takes rights off Australian workers. Parliament should not be supporting laws that take rights off workers leaving them worse off.'[151]

Only casual changes were passed in the Senate, after the Government withdrew the rest of the Bill because of considerable opposition in the Senate, and an effective ALP and ACTU campaign.

The *Industrial Relations Bill* 1987 was withdrawn by the then Hawke ALP Government after 30 tripartite meetings between industry and trade unions. Employers objected to a proposal to provide trade unions with an immunity from the common law torts, in return for an improved Commission enforcement process, a new power of the Commission to direct that industrial action stop. The then CAI commenced a national publicity campaign of opposition. The Government was entitled to test the extent of opposition because this was its legislation. There were public indications that the Bill would be abandoned, which seemed a pity, and I obtained permission to advise the Government that we would make a concession on one issue. That concession was made public and the Government decided to proceed with the Bill. The enforcement compromise was removed from the Bill, and it passed in a largely unmodified form as the *Industrial Relations Act* 1988, with additional provisions facilitating trade union amalgamations.

The removal of a test against awards has been a key difference between political and industrial parties since mainstream employers suggested this in 1991[152] and the Coalition Government attempted to legislate it in 1996 and did so in 2005. It is perhaps not surprising that the result was that discussion of other less radical measures in the Omnibus Bill, such as those relating to unrepresented litigants, was not as prominent as it might have been without this key highly disagreed issue.

Overall Parliament can leave the agreement approval proposals as they are, with the view of some that agreement coverage will decline, or make moderate changes, such as arguably some of the changes proposed in the Omnibus Bill without the 'pandemic' collective agreement test.

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[151] ACTU Submission to the Senate Education and Employment Committees Inquiry into the Bill, Executive Summary

[152] 'A New Industrial Relations System for Australia', ACCI, 1991; see Reg Hamilton 'Employer Matters in 1993', March 1994 Journal of Industrial Relations, 126

International comparisons

Given the role of awards there is little comparison between the Australian bargaining system and the 'strictly market-orientated' governance of the US[153] and UK[154]. In those countries company level collective bargaining has little coverage, and industry agreements almost no coverage, and there are no awards to maintain the results of past collectivism. Collective agreement coverage in the UK private sector declined from 23.2 per cent of the private workforce in 1996 to 13.6 per cent in 2020, and 74.4 of the public sector workforce to 57.2 per cent [155]. This compares to 41 per cent of non-managerial employees covered by Australian collective agreements in 2018, with 80.5 per cent coverage of public administration[156].

Australia seems closer to the larger European countries, which have a similarly high influence of regulation and collectivism in labour relations. Collective bargaining coverage of employees Germany in 2018 was 54 per cent, France (94 per cent), Spain (68 per cent), Italy (80 per cent), and the Nordic countries similar. In these countries regional, sectoral and national agreements apply to a significant minority of the workforce, sometimes in combination with company level agreements[157]. There are many additional regulations such as the European Union Working Time Directive and country laws which make similar provision to awards.

Some Historical Issues of Importance

Bipartisan Commission appointments.

Strong dissatisfaction with Presidential appointments and Full Benches was publicly expressed by trade union leaders in the early 1990s[158]. The reasons for this dissatisfaction did not apparently convince employer associations. After 1983 employers also began to privately express strong dissatisfaction with the consistent background of Presidential appointments and undertook a public campaign on the issue in 1992 after many private approaches to Government

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[153] https://www.dol.gov/agencies/olms/regs/compliance/cba, accessed May 2021

[154] Eurofound (2020), *Industrial relations: Developments 2015–2019,* Challenges and prospects in the EU series, Publications Office of the European Union, Luxembourg, 39. *Trade Union and Labour Relations (Consolidation) Act* 1992 (UK), ss178,179

[155] Clark, D. (2019), Collective agreement coverage: Proportion of employees whose pay and conditions were agreed in negotiations between the employer and a trade union in the United Kingdom from 1996 to 2018, by sector, Statista, web page, available at: https://www.statista.com/statistics/287297/collectiveagreement-coverage-unions-united-kingdom-uk-y-on-y -by-sector/, accessed June 2021

[156] Statistical report, Table 10.1; ABS, 'A guide to understanding Employee Earnings and Hours statistics', feature article in *Employee Earnings and Hours, Australia, May 2018*, Catalogue No. 6306.0.

[157] Eurofound (2020), *Industrial relations: Developments 2015–2019,* Challenges and prospects in the EU series, Publications Office of the European Union, Luxembourg, 38, 39, 49, 53, 54.

[158] Stuart Macintyre, Arbitration in Action, in Joe Isaac and Stuart Macintyre (eds) *The New Province for Law and Order* (2004), 95

were unsuccessful[159]. Tripartite arrangements for appointments within the NLCC broke down.

Different members bring different backgrounds and legal policy approaches, and therefore a lack of balanced appointments can be a disadvantage[160], although it is difficult to predict what any individual member will do once appointed.

Since then there has been continuing public controversy about the appointment of Presidential members, and some about the composition of Full Benches. Employers made the allegation in the 1980s that the established approach was to alternate employer nominated Presidential members, and trade union nominated Presidential members in appointments. The then Government did not appear to follow this practice, and Governments have not followed this practice since then.

There has not been a centrist established approach to the appointment of Presidential members since these disputes occurred.

It appears that Governments have a choice. The present approach can continue, which will involve continuing controversy, and one 'side' will be seen to win or lose. The current approach may conceivably undermine the objectives of labour legislation to some extent, because of this controversy.

Alternatively, an 'alternation' system can be introduced, with the support of both sides of politics and labour relations, using for example a sub-committee of the NWCC, if that is still an approach which has any general support. Most practitioners represent one side of the employment relationship to a greater degree than the other, and sometimes share in part or more the policy approaches developed by either trade unions or employer associations. This is supported by Productivity Commission findings. Another approach would be to attempt to develop common ground on the issue by political discussion or private discussion in the group I suggest as an option be established to develop centrist proposals.

At one stage the Commission was administering eight different remuneration systems for members of the Commission, which seems difficult to justify, and which had an arguably similar controversial history. A part of the solution is to enable Commission members to work for longer periods up to 70 rather than

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[159] As a rule neither the trade unions nor employer associations engaged in public criticism about any individual appointment because they had the necessary skills and background. Some five or six Presidential members of the Commission were appointed from the trade union movement in the 1980s-1990s. See Reg Hamilton, 'Employers Matters 1992, March 1993 Journal of Industrial Relations 84, 92. I was the first Presidential member appointed from an employer association, in September 2001.

[160] Productivity Commission [PC] (2015) Report of the Inquiry into the Workplace Relations Framework, December, Government of Australia, 161

requiring retirement at 65, given their need now to continue working, because of a diminution of their superannuation benefits[161].

The surprising influence of the Victorian 1896 wages boards on the first minimum wage systems in the US and UK

The 1981 US Study Commission Report on the Minimum Wage[162] was prepared for US Congress pursuant to a legislative requirement. It said that the Victorian 1896 wages boards[163] led to the first UK and then to the first USA wages boards. It was therefore the start of minimum wage systems in those countries:

> 'Massachusetts passed the first minimum wage law for women and children in 1912, the same year that Theodore Roosevelt included a minimum wage plank in his platform as the Independent Progressive candidate for President.
>
> The National Consumers League under the pioneering influence of Florence Kelley prepared a model minimum wage bill based on a 1909 British law, which in turn grew out of a 1909 act in the Australian province of Victoria. Following the Massachusetts' example seven states passed the Consumers League model bill in 1913.'

Other studies agree with this analysis[164].

Alfred Deakin, later the second Prime Minister of Australia, was an important influence on the Victorian wages board system of 1896 and was a member of the Victorian Legislative Assembly. A series of wage board Bills introduced into the British House of Commons by Sir Charles Dilke from 1898 were eventually adopted as the *Trade Disputes Act 1909*, the beginning of the British minimum wage system.

Deakin worked closely with Dilke, both seeing themselves as 'liberals', at a time when both were British subjects, before Australia was established as a nation. In 1887, before the 1896 establishment of Victorian wage boards, Deakin met with Sir Charles Dilke[165]. They discussed a proposal for wages boards composed of representatives of employer and employees with compulsory wage fixing powers, which was being advanced in Victoria by David Syme, the proprietor of The Age newspaper and an important political

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[161] Presidential members are no longer entitled to the judges pension scheme, except in the case of the President.

[162] The *Report of the US Minimum Wage Study Commission*, volume 1 (1981) 2

[163] Set up under the *Victorian Shops and Factories Act 1896* (Vic) passed by the Parliament of the then British colony of Victoria.

[164] Keith Hancock, *Australian Wage Policy, Infancy and Adolescence* (2013) 5; E.H. Phelps Brown, *The Growth of British Industrial Relations: A Study from the Standpoint of 1906-14* (1959) 206-207; United States Minimum Wage Study Commission, *Report of the US Minimum Wage Study Commission*, volume 1 (1981) 2; David Neumark and William L. Wascher, *Minimum Wages* (2008) 12.

[165] Sheila Blackburn, *A Fair Day's Wage for a Day's Work? Sweated Labour and the Origins of Minimum Wage Legislation in Britain* (2007).

figure. Deakin then drafted and sent Dilke a bill for trade boards.[166] In 1898 Deakin and Dilke again discussed wages boards when Deakin and family visited England. They discussed the Victorian experience with the wearing apparel boards which had been set up in 1896.

Coper says that from this time Dilke and his wife and niece were determined to introduce wages boards in England[167]. Blackburn[168] considers that Deakin may have been responsible for convincing Dilke to pursue wages boards with compulsory wage fixing powers, although there were also other influences in Britain. When the Victorian Act was introduced in 1896, Dilke discussed with Sydney and Beatrice Webb, leading campaigners on labour issues, the possibility of introducing such legislation in Britain. Beatrice Webb visited Australia and like Dilke favoured the wages boards of Victoria, rather than the compulsory arbitration system of New Zealand[169].

All major political parties in Australia support minimum wage systems although arguably with a different emphasis on worker needs or the needs of industry and the role of awards, and it is remarkable that the Victorian 1896 wages boards played such a key role in the development of minimum wage systems in the world, beginning with the UK and US. The 1896 Act is somewhat obscure, shown by the reference in the 1981 US Congressional report to the 'province of Victoria', when it was the British colony of Victoria. Despite this it is widely recognised of great importance, and the product of an independent Victorian or Australian parliamentary process.

Wages boards led to both the 'minimalist' UK system of minimum wages applying only to a small proportion of the workforce, a quarter at one point as the maximum, as well as helping develop the more comprehensive Australian system. The range of systems encompasses nearly all current Australian views on minimum wage systems other than those that support no minimum wages at all. It should be remembered that all OECD countries regulate wages either through collective bargaining systems or minimum wage systems, or usually both.

Given this widespread support for minimum wage systems, and the influence that the 1896 Act had, it would be appropriate to develop a detailed account of the origins of the 1896 Act, and the influence it had on the first UK and US minimum wage systems.

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[166] Keith Hancock, *Australian Wage Policy, Infancy and Adolescence* (2013) 5; E.H. Phelps Brown, *The Growth of British Industrial Relations: A Study from the Standpoint of 1906-14* (1959) 206-207.
[167] John Cooper, The British Welfare Revolution, 1906-14, Bloomsbury 2017
[168] Sheila Blackburn, A Fair Day's Wage for a Fair Day's Work?: Sweated Labour and the Origins of Minimum Wage Regulation in Britain Routledge, 2017
[169] Blackburn 2007, p.222

Future centrist reforms

The federal Government and others have the difficult task of generating the right environment for a low-key discussion in good faith of actual problems. This is a difficult thing to do given the extent of recent policy differences and conflict.

It would be a poor reflection on the political culture of Australia if only an economic crisis of the dimensions of 1987 can lead to sensible centrist discussion and review.

It might be appropriate to convene an academic, union and employer conference, supported by the federal Government, focussed on centrist approaches to labour legislation or a more centrist consideration of issues such as award changes run by a body such as the Australian Labour Law Association, or a major academic journal, perhaps sponsored by Governments. This could start with the distinction or alleged distinction between centrist and more partisan or radical approaches and lead on to discuss other issues such as an increase of matters which may be determined 'on the papers' to save time and litigation costs, with little or no substantive change in the ability of a party to put a case, or amending the *Acts Interpretation Act* 1901, to promote interpretations which provide for simple, clear, workable legislation and awards and agreements which can be used by the ordinary non-pedantic practitioner of *Kuck's Case*[170], or applied by small business and unrepresented litigants.

Conclusion

Centrist measures developed through tripartite discussions have made an important contribution to labour relations reform, a contribution usually not recognised because of arguments about radical change. They helped develop a relatively workable enterprise agreement system in the period 1988-1996, and relatively workable unfair dismissal procedures from 1996. A commitment should be made by all parties to refuse to overlook genuine issues of repair, conducted in a low-key fashion, despite the painful nature of such reviews. This requires good faith dealings between groups with partly different objectives.

[170] *Kucks v CSR Limited* (1996) 66 IR 182

Attachment 1

National tribunal tests for agreements regarding awards 1904-2021

Conciliation and Arbitration Act 1904

28. Certified agreements and consent awards

(1) If, before an industrial dispute has been referred to arbitration in accordance with this Act, the parties to the dispute or any of them reach agreement on terms for the settlement of all or any of the matters in dispute, they may either

(a) make a memorandum of the terms agreed on and request a member of the Commission to certify the memorandum; or

(b) request a member of the Commission to make an award or order giving effect to their agreement, and, subject to this section, the member of the Commission may, by order to which a copy of the memorandum is attached, certify the memorandum or may make an award or order accordingly.

(2) Subject to sub-section (2A), a member of the Commission shall not refuse to certify a memorandum or make an award or order in accordance with this section unless he is of the opinion that -

(a) the terms are not in settlement of an industrial dispute;

(b) any of the terms is a term that the Commission does not have power to include in an award; or

(c) it is not in the public interest that he should certify the memorandum or make the award or order.

(2A) A member of the Commission shall not certify a memorandum in accordance with this section unless, in relation to each organization that is a party to the agreement to which the memorandum relates, there is produced to him a statutory declaration by an officer authorized by the committee of

management of the organization declaring that the committee of management has approved
the principal terms of the agreement.

An ‘industrial dispute’ as defined had to be present for an agreement to be approved under s.28, which in practice meant a log of claims served by a registered employee organisation, sometimes combined with logs of claims served by registered employer organisations and employers. The log of claims had to be ‘genuine’ and contain sufficient ‘ambit’ for the terms of the agreement.

Industrial Relations Act 1988

115 Certified agreements

(1) If the parties to an industrial dispute or any of them agree on terms for the settlement of all or any of the matters in dispute, they may make a memorandum of the terms agreed on.

(2) The memorandum of agreement shall specify the period for which the agreement is to continue in force.

(3) The parties to the agreement may apply to the Commission for the certification of the agreement.

(4) If the Commission is of the opinion that the agreement is in the interests of the parties immediately concerned, the Commission shall, subject to subsections (6), (7) and (8), certify the agreement unless it is of the opinion that it would be contrary to the public interest to certify the
agreement.

(5) Certification of the agreement shall not be taken to be contrary to the public interest merely because the agreement is inconsistent with general Full Bench principles.

(6) If, in the opinion of the President, the agreement is inconsistent with general Full Bench principles, the powers of the Commission under this section are exercisable only by a Full Bench.

(7) The Commission is not empowered to certify the agreement if it includes terms based on the terms of another certified agreement unless the Commission is satisfied that the inclusion of the terms in the agreement is justified in the particular circumstances of the case.

(8) If it appears to the Commission that the agreement wholly or substantially regulates all the matters pertaining to the relationship between: the employers who are parties to the agreement; and the employees whose employment is dealt with in the agreement; the Commission shall not certify the agreement unless it includes provisions setting out procedures for preventing and settling, by discussion and agreement, further disputes between the parties.

(9) Subsection (4) shall not be taken to require the Commission to certify the agreement if it is of the opinion that: the terms are not in settlement of an industrial dispute; or any of the terms is a term that the Commission does not have power to include in an award.

(10) In this section:

"general Full Bench principles" means principles established by a Full Bench that apply in relation to the determination of wages and conditions of employment, other than principles that apply in relation to the certification of agreements under this section.

An ‘industrial dispute’ as defined had to be present for an agreement to be approved under s.28, which in practice meant a log of claims served by a registered employee organisation, sometimes combined with logs of claims served by registered employer organisations and employers. The log of claims had to be ‘genuine’ and contain sufficient ‘ambit’ for the terms of the agreement.

Industrial Relations Legislation Amendment Act 1992

134E Certification of agreements

(1) The Commission must certify an agreement if, and must not certify an agreement unless, it is satisfied that:

(a) the agreement does not, in relation to their terms and conditions of employment, disadvantage the employees who are covered by the agreement;

(2) For the purposes of paragraph (l)(a), an agreement is only taken to disadvantage employees in relation to their terms and conditions of employment if:

(a) certification of the agreement would result in the reduction of any entitlements or protections of those employees under: (i) an award; or (ii) any other law of the Commonwealth or of a State or Territory that the Commission thinks relevant; and
(b) in the context of their terms and conditions of employment considered as a whole, the Commission considers that the reduction is contrary to the public interest.

Industrial Relations Reform Act 1993

170MC

(1) The Commission must certify an agreement if, and must not certify an agreement unless, it is satisfied that:

(a) wages and conditions of employment of the employees covered by the agreement are regulated by one or more awards (as defined in subsection (6)) that bind their employer, or their respective employers; and
(b) the agreement does not, in relation to their terms and conditions of employment, disadvantage the employees who are covered by the agreement;

Workplace Relations Act 1996

170XA When does an agreement pass the no-disadvantage test?

(1) An agreement passes the no-disadvantage test if it does not disadvantage employees in relation to their terms and conditions of employment.
(2) Subject to sections 170XB, 170XC and 170XD, an agreement disadvantages employees in relation to their terms and conditions of employment only if its approval or certification would result, on balance, in a reduction in the overall terms and conditions of employment of those employees under:
(a) relevant awards or designated awards; and
(b) any other law of the Commonwealth, or of a State or Territory, that the Employment Advocate or the Commission (as the case may be) considers relevant.

Workplace Relations Amendment (Work Choices) Act 2005

Under *WorkChoices* agreements came into force when lodged not when approved by the Employment Advocate.[1] They were not tested against an award through a 'no disadvantage' test. Rather the Australian Fair Pay and Conditions Standard applied and overrode any contrary content of agreements, and this standard was not the award but rather was[2]:

(a) basic rates of pay and casual loadings (see Division 2);
(b) maximum ordinary hours of work (see Division 3);
(c) annual leave (see Division 4);
(d) personal leave (see Division 5);
(e) parental leave and related entitlements (see Division 6).'

Fair Work Act 2009

193 Passing the better off overall test

When a non-greenfields agreement passes the better off overall test

(1) An enterprise agreement that is not a greenfields agreement *passes the better off overall test* under this section if the FWC is satisfied, as at the test time, that each award covered employee, and each prospective award

[1] Section 100(1)
[2] Sections 89, 89B

covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.