



INDUSTRIAL RELATIONS IN AUSTRALIA: A HANDBRAKE ON PROSPERITY

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**Industrial Relations
in Australia:
a Handbrake on Prosperity**

Since the defeat of the Howard Government, industrial relations has come to be seen as the third rail of Australian politics. Even the Fair Work Commission's recent decision to modestly reduce Sunday penalty rate loadings for retail, fast food, and hospitality workers was deemed too toxic for the Turnbull government to wholeheartedly support.

However, Australia faces a number of major demographic and technological challenges that require much more than piecemeal changes to penalty rates. In order to overcome these challenges, we need substantial reforms to our industrial relations framework.

Unfortunately, the fundamental structure of Australia's employment law has broad, bipartisan support. There is, at least publicly, a consensus that a statutory agency with no special economic expertise should lay down a set of national pay rates and working conditions for 122 occupations that cover a sizeable share of Australia's workforce of over 12 million people. There's also consensus that collective agreements which diverge from these national minimums should be negotiated within a strictly regimented framework that grants extraordinary power to trade unions and next to no autonomy for individual workers.

This consensus explains why the question of whether baristas should be paid \$29 or \$34 per hour on a Sunday has been one of the most contentious points of political debate so far this year.

Even the government's much-hyped reintroduction of the Australian Building and Construction Commission – the much-hyped cause of a Double-Dissolution election – left the centralized structure of Australia's industrial relations system wholly untouched. As it stands, the wisdom of entrusting a centralized umpire with far-reaching influence and little accountability to make broad provisions for Australia's workforce at large, appears sacrosanct.

The challenges we face

The fact that you'd struggle to slide a cigarette paper between the industrial relations policies of the Coalition and Labor belies the critical role our employment system is certain to play in how Australia meets the most significant challenges of the decades before us.

The impending fiscal burden of Australia's aging population promises to place enormous pressures on the finances of both Commonwealth and State Governments. By 2049-50, spending on age-related pensions, age care, and health will swell from its current level of a quarter of the Federal Budget to half of all Government expenditure.¹ On the likely assumption that the electorate does not retreat from its preference for high public spending on a range of social services, these mounting claims on our public finances will have to be shouldered by a diminishing number of income-earners. The surest way to lessen the fiscal load of unavoidable demographic change would be to ensure as many working age Australians as possible have gainful employment.

However, this will be made increasingly difficult by looming structural changes to the workforce young Australians stand to inherit namely, the prospect of entire occupations being rendered obsolete by automation. According to the committee for Economic Development of Australia, up to five million jobs are likely to be automated by 2030, with almost half of current jobs at risk.²

The productivity gains from automation will help support higher standards of living despite a shrinking workforce. Nonetheless, these two challenges present a clear imperative that our industrial relations framework is equipped to maximize employment, and has the flexibility to adapt to rapidly changing economic circumstances. On both these measures, there's already ample evidence our current industrial relations system is falling short.

Our headline unemployment rate of 5.8% is often spruiked by politicians as a token of Australia's economic success. But it presents a deceptively upbeat impression of the labour market.³

Our labour force participation rate – that is, the proportion of working age adults working at least one hour a week – is just under

65%.⁴ This is far behind the participation rates of Iceland, almost 85%, and the United Kingdom's rate of 78.4%.⁵ As *The Australian's* economics correspondent Adam Creighton has recently highlighted, a sizeable share of this 35% of people not working are in fact unemployed, but are ignored by the Australian Bureau of Statistics arcane methodology.⁶ Creighton points out that until 2013, surveys consistently found 22% of people not working wanted to work, but were left out of the official statistic because they had either not recently applied for a job or could not immediately start work. If we add those numbers to the official numbers, we end up at an unemployment rate of 15.6%. Factor in record levels of underemployment, and that figure grows to 23%.⁷ And this still leaves a few million others who choose not to work, but probably could if circumstances required, or sufficient incentives arose.

The problem is particularly bad in rural and regional Australia. Even the ABS's dubious statistics show that areas of rural and regional Australia are in the throes of an unemployment crisis, especially among young people. In the Hunter Valley, outback Queensland, and the Barossa Valley in South Australia, at least one in five young people are unable to find even one hour of work a week.⁸

The social and economic toll of unemployment

The impact of youth unemployment is far worse than the loss of a few months spent languishing without work, study, or training. The most recent Household, Income and Labour Dynamics survey found that the likelihood of being unemployed later in life was three times as high after a bout of youth unemployment; a conservative estimate by international standards.⁹

But it is also a personal tragedy with grave implications for social cohesion and community wellbeing. Higher rates of domestic violence, alcohol and drug abuse, and mental illness are all longstanding correlates of unemployment; particularly for people out of work long term.¹⁰

It would be naive to hold out employment as a catch-all cure for Australia's social ills, but we do know that a career is one of the surest

ways to lead a life of dignity and purpose. In the words of economist Michael Strain:

“A job is about more than a paycheck. It is about more than productivity and adding to the national income. Working is central to the flourishing life. One of the things sound public policy does is to help provide the conditions under which our fellow citizens can flourish, realize their whole human potential, and lead lives of dignity. Work is often unpleasant in our fallen world. But it contains within it the seeds of its own redemption, and ours. It often fails to make us happy, but happiness is a fleeting emotion. Work gives us something more lasting and sturdy than happiness: fulfillment.”¹¹

Clearly the mealy-mouthed platitudes typically spouted by politicians about Australia’s robust economic performance conceal an uncomfortable truth: the labour and human capital of Australia’s potential workforce is chronically underutilized.

The root of the problem

The problem is more fundamental than any one specific provision of the Fair Work Act. At its core, our system is still wedded to an antiquated conception of industrial relations and employment that is a hangover from a bygone era.

Although the former wage setting system of compulsory arbitration has been abolished, the clichés and shibboleths that underpinned it persist to this day. We still have an industrial umpire under its current guise of the Fair Work Commission as an active participant in the wage-setting and bargaining process.

How we got here

For at least the last 110 years, Australia’s industrial relations policy is designed to serve two Gods: employment and social welfare.

This conception of wage-setting as a social welfare mechanism has its roots in the most seminal decision in Australia's industrial history, the Harvester decision of 1907. The sole presiding judge, Henry Bourne Higgins ruled that employers ought to a basic wage capable of meeting "the normal needs of an average employee, regarded as a human being in a civilised community, regardless of his capacity to pay."¹² Over a century later, Higgins' worldview remains at the heart of Australia's industrial relations landscape.

The first objective of the Fair Work Commission's award setting function, set out in the Fair Work Act, is the relative living standard and needs of the low paid.¹³ The same wording also features as a key consideration in setting minimum wages. Similarly, an object of the Act itself is ensuring that these enforceable minimums are not undermined by individual or collective arrangements.

What's so bad about wage fixing?

At face value, this would seem to accord strongly with the notions of fairness and egalitarianism that run deep in Australia's political culture. The problem is that using industrial relations and wage settings as a proxy for social welfare policy cannot overrule the gravitational pull of market forces. This point has been proven with painful consequences multiple times throughout Australia's history.

Although the Harvester decision was overturned by the High Court, state wage tribunals picked up the effective 20% wage increase handed down by Higgins judgment with devastating consequences. From 1906 to 1915 unemployment rose from 6 to over 9%, reaching 11% by 1921 – close to double the trend rate for the foregoing period.¹⁴ As the late Ray Evans has noted, the statistics mask that the impact was harshest on low-skilled workers who were effectively priced out of work by the benevolence of the basic wage.¹⁵

Decades later, the Whitlam Government applied the Harvester Judgment's logic, to similar effect by adopting a policy of ambitious wage increases, supporting the ACTU's move in 1973 to raise minimum wages by a staggering 27.5%. Predictably, unemployment shot up from 2.4% in November 1973 to 5% in 1975 and reached

7.5 per cent in 1978. This may be contrasted with the historical average of 2% between 1950 and 1974.¹⁶

These painful lessons of the past bring into sharp focus several principles that ought to inform Australia's approach to industrial relations into the future. Foremost, wage increases arbitrarily imposed by a third party tribunal do not alter the iron law of business that workers will only be employed if their value outstrips their cost. In this sense, economy-wide pay increases are a blunt instrument that by design cannot account for the circumstances of individual businesses face; a fact unassailably borne out by the Whitlam Government's wages experiment.

Indeed, it is the very nature of a competitive market that productivity improvements measured at a macro level will never be exactly replicated by each and every individual business competing in an industry. For this reason, to the extent that wage increases are mandated based on perceived productivity gains in a particular industry – or worse, improvements aggregated across the whole economy businesses lagging behind the average will be forced to lay off workers, suffer reduced profitability, or go out of business. The same applies to wage hikes pegged to keep up with inflation, where competitive pressures in some sectors or businesses may render pay rises unsustainable, again costing jobs and businesses.

By the same token, any material benefit accrued from large-scale wage increases mandated by an industrial tribunal risk being eroded by inflation, especially where the pay rise is not supported by productivity improvements. The skyrocketing pay rates of the Whitlam era were a central cause of inflation peaking at 16.7 per cent in 1974, corroding the value of household assets and savings while decimating investor confidence.¹⁷

Clearly, the cautionary tale of Australia's labor market history is that centrally-determined wages make it harder for businesses to remain competitive, and ultimately reduce employment. For policymakers, the key lesson here is that the unintended consequences wrought by centralised wage fixing were not caused by an operational failing. Rather, they were inevitable outcome of a fundamental design flaw in our industrial relations system.

The award system and the safety net misnomer

Some say these lessons of the past have been heeded. Granted, it's true the Fair Work regime is less centralised than the old compulsory arbitration system, it still retains much of the command and control structure of the past.

Today's modern Award system is the direct descendent of the Harvester judgment and the former system of wage fixing by way of compulsory arbitration. The Fair Work Act saw the consolidation of state based awards under what was intended to be a less complex national system. The aim was for national awards to operate as a simplified safety net, setting a strong benchmark for enterprise bargaining negotiations as the main method of setting pay and conditions.

The reality is quite different.

The modern award system has fallen dismally short of its promise to create a streamlined, easy to access system for employers. All indications suggest the award system remains unwieldy, expensive and painstakingly complex to comply with, particularly for small business. The last Fair Work survey found 80 per cent of business respondents found the award obscure or unclear as to when penalty rates and overtime loadings were to be paid.¹⁸

Choosing the right award can involve drawing fine legalistic distinctions, or even pure guesswork. But punishment for non-compliance or employing workers under the wrong award is punitively high. In one illustrative, a small Melbourne design firm made repeated inquiries about the appropriate award for its workers whose roles/duties didn't fit obviously within any of the prescribed categories. Months later, it was issued with a notice for back pay by the Fair Work Ombudsman amounting to \$700,000.¹⁹ The notice was finally withdrawn after several costly months of lawyers and Fair Work hearings, not to mention the dozens of hours of wasted time and inconvenience taken from the firm's management.

The modern awards also go much further than providing a minimum standard or 'safety net', as the Fair Work Act claims. The true safety net in the current workplace framework is the Fair

Work Act's ten National Employment Standards, which includes an annually reviewed minimum wage and other basic entitlements that apply equally to all employees. By contrast, awards comprehensively set out unique pay rates, classes of workers, penalty rates and other loadings, all tailored to different occupations and industries; all of which are more generous than the national employment standards. These rates and conditions are sometimes arbitrary at best, and often lead to distortions and pay differences that make little sense economically or practically. For example, under the recent Fair Work penalty rates decision, hospitality workers still receive 25% higher Sunday penalty rates than fast food workers, even though businesses in these industries are often indirect competitors, drawing from the same pool of workers.²⁰ As a result, a cashier working in a fish & chips shop could find themselves taking home up to \$35 a day less than someone performing virtually the same job in a café, just next door. To this end, the award pay rate setting function of the Fair Work Commission is better thought of as a quasi-legalistic line-drawing exercise than a rigorous analysis of the commercial needs of a given sector and its corresponding workforce.

Many awards also prescribe a comprehensive list of different classes of workers, each with their own differentiated pay rate and assumed work functions. In this sense, awards effectively impose a standardized workforce structure upon businesses; a function more in keeping with the role of management than wage setting, much less simple safety net. As industrial relations veteran Stephen Sasse has observed, the highly regimented structure of awards assume a world far simpler than reality:

“Sydney’s Fish Market has many vendors who prepare and sell raw fish, and cook and serve take away and sit-down meals. Those activities that deal with the preparation and selling of fish fall under the General Retail Industry Award – with the exception of crocodile meat, which would bring in the Meat Industry Award. Where those vendors are engaged in the preparation of meals that are intended to ‘be consumed elsewhere should the customer so decide.’”²¹

The safety net misnomer also ignores the dominant role awards play in setting the wages and conditions of a vast share of the workforce. Last year, a Fair Work Commission survey found around 20 per cent of the workforce were directly covered by an industry award.²² As Judith Sloan has noted, the surveys' dismally low response rate possibly indicates that an unrepresentative response from smaller enterprises, who are far more likely to opt for an award. Even so, if we factor in that one third of employees on individual arrangements are on substantially award based agreements that pay only the award rate, coverage of award-based arrangements jumps to 35.5% of workers.²³

Last of all, the fact that the awards system's heavily prescriptive conditions apply to skilled occupations, earning at or even above the median wage of the workforce, ought to put a final nail in the coffin for the safety net claim. University academics, pilots, medical practitioners and pharmacists are some of the high earning occupations covered by their own tightly structured award.²⁴

Despite plenty of rhetoric to the contrary, centralised wage fixing aimed at both social and economic ends remains an integral part of Australia's industrial relations system.

The fallacy of equal pay for equal work

Just like its predecessors, the root problem with today's award system runs deeper than the competence of the coterie of ex-union officials and lawyers at the Fair Work Commission responsible for administering it. The central problem with the award system is it's predicated on the mistaken belief that the same national wage should apply to industries and occupations covering thousands of individual workers and businesses.

In this sense, the award system is founded on the principle of 'equal remuneration for work of equal value' – one of the stated objectives of modern awards in the Fair Work Act.²⁵ This object is effectively a watered down version of the notion of 'comparative wage justice', which served as the ideological justification behind the unsustainable across-the-board wage increases frequently imposed

under compulsory arbitration. The principle is also manifested in the concept of 'work value', a phrase used to refer to changes over time in the 'value' of the work performed by a given occupation in Fair Work award reviews.

At first blush, the idea that workers should be paid equally for performing the same work appears self-evidently fair and reasonable. However, as far as employment is concerned, the only relevant measure of work value in a market economy is the productive contribution an employee makes to a business. The real value of work is therefore a question of fact that turns on an individual's skills and ability and circumstantial factors like local market conditions and the capital resources available to a worker. For instance, the work value of a butcher with the latest equipment working out of a busy shop front in Newtown could be more than twice that of an equally qualified butcher working out of IGA in suburban Wollongong. From the standpoint of a business deciding whether to hire a prospective employee, the principle of equal pay for equal value implies the opposite of a standardised national wage rate.

So why should it matter if the notion of equal pay for equal value underpinning the award system is completely at odds with how businesses assess worker value for the purposes of employment?

The answer is that unless the award rate is set according to the real value the most junior employee can add to the most marginally profitable business, the national minimum will produce unemployment.

No allowance for regional difference

It's important here to recognise that one of the greatest factors weighing on the value a prospective employee can add to a business are the conditions of the local market. As common as it is for politicians to talk loftily about the performance of Australia's national economy, aggregated statistics even within a specific sector can have little in common with the individual circumstances of our country's 800,000 businesses.

At the peak of the mining boom, the pubs and hotels in Perth's CBD enjoyed ample demand for \$12 pints of beer from a surging local

economy backed by high wages and soaring property values. Such conditions are far removed from those that would have been faced by local publican in the quaint, but economically sluggish Tasmanian town of Launceston. It's a mark of byzantine logic of the award system that while every price from the rent paid by the proprietor to the cost of food and beverages paid by the consumer could fluctuate according to ebbs and flows of the local market, the award system mandates an identical base rate of pay for staff.

In this respect awards would be less damaging if they were set to cater for the needs of the economy's least competitive businesses and lowest value workers in the most economically moribund region. Unfortunately, the reality of modern awards is quite the opposite. The overwhelming share of awards prescribe wages and conditions comfortably more generous than the national minimum wage, the highest in the developed world according to the OECD. The mere fact that awards determine the wages of over a third of the workforce is alone enough to dispel the pretense they are a basic minimum.

As long as awards proceed on the wrongheaded assumption that the 'work value' occupation can be assigned a single dollar value applicable to the overall economy, the system will operate to the detriment of Australia's weakest towns and regions, especially regional areas already ravaged by savagely high unemployment rates.

In towns with high unemployment, like Townsville in Queensland or Mandurah in Western Australia, job-seekers face a far tougher task convincing potential employers their actual work value exceeds the award wage compared to businesses in booming metropolitan cities. In this sense, a single national wage makes as much sense as putting a minimum price floor on the cost of beer, plumbing, or any other number of everyday goods and services.

It doesn't make sense from the standpoint of the living standards and welfare of the low paid, either; despite this being another express objective of the award system.²⁶ The cost of housing, transport and recreation vary markedly from region to region. The wage needed to live in 'frugal comfort', as Justice Higgins put it, in Sydney could well be a third higher than what is needed to survive comfortably in Tamworth.²⁷ For this reason, national award wages are prone to creating the absurd situation of job-seekers in struggling regional

towns being prevented by law from being profitably employed at a wage that would more than meet their basic material needs.

Critics of this view argue that Australia's relatively low unemployment by international standards, consistently sturdy levels of employment in award dominated industries like retail and hospitality, and our steady record of long-term economic growth is all evidence that reforms are unnecessary. Others argue that allowing people to pay less will only beef up corporate balance sheets or that paying people under the award is an affront to the dignity of the unemployed. This sentiment was summed up neatly by a friend of mine, who said that 'businesses that can't afford to pay penalty rates shouldn't employ people.'

It's understandable why these views enjoy widespread support. The link between wages or employment practices and job losses is only ever really brought to public attention in the event of a major business closure, like the demise of Australia's car manufacturing sector, or the threatened closure of the Arrium steel mill in Whyallah. Job losses due to the failures of small and medium sized businesses, as well as layoffs and cutbacks on hours worked, tend to be out of sight for those not personally involved. The jobs and businesses that would otherwise have been viable if not for the strictures of the award system are even more elusive, and chronically overlooked in public debate.

Business profitability and job creation – two sides of the same coin

A look at how finely balanced the difference between profit and loss often is for small businesses allows the impact of wages on unemployment to be readily appreciated. According to the Australian Bureau of Statistics, cafes and restaurants average an annual profit margin of just 4%.²⁸ The same data finds an average per business income of \$671,600, which works out to an average per annum profit of \$26,864.²⁹ If a variation in the general hospitality award rate were to increase by \$2, a café employing three staff over a 12 hour day would see its operating costs grow by \$26,208 over the

next year. Assuming that café made an annual profit and nothing else changed, this would reduce its profit margin to a paltry \$600.

Let's be clear about the fraught choice this café would now face. Continuing as is may well not be worth the pain and effort, particularly compared to other business ventures. On the other hand, increasing prices or employing less staff runs a strong risk of turning customers away to a nearby competitor.

The takeout here is that the broad brush of a single national award wage is never in the interests of maximizing employment and ensuring the dead hand of government doesn't consign otherwise viable businesses to a premature death. Once differences in regional economic strength and individual worker productivity are factored in, it's London to a brick that for 99 per cent of firms, the award wage will either fall above or below the pay rate that would allow them to attract an optimal number of capable employees, while remaining profitable.

The critical point to understanding the true opportunity cost of the award system's one-size fits all approach is that the economy is the opposite of a zero sum game. The potential wealth and income that could have been generated by each job, business or extra shift lost as a result of the award system is not of a fixed economic pie that will necessarily be recycled elsewhere in the job market. Rather, it represents a real reduction in Australia's productive output, and by extension, the national wealth.

Assessed according to its fullest effect, this cost includes not only increased social services payments funded by fewer tax receipts, but the future income and wealth that could have been generated through the skills and experience gained by work opportunities rendered unviable by awards. In this respect, the declining numbers of trade apprenticeships being offered by employers is instructive. For an unemployed 18 year old, the real loss of missing out on an apprenticeship is not a modest wage, but the opportunity to obtain skills and experience that would allow them to earn a comfortable living for the rest of their working life.

While thriving businesses competing for scarce workers can always opt for individual arrangements that pay above the award

as many already do, workers unable to earn back the award rate are priced out of competition. Just like blowing a feather in the air can't suspend the laws of gravity, the good intentions of the award system will never change the fact that businesses will only employ workers to the extent that it is profitable to do so.

The worst off suffer most

The award system attempts to rectify the assumed unequal bargaining position of workers vis a vis employers. But in doing so, it has created a new inequality that cripples the bargaining position of both workers in Australia's worst performing states and the most disadvantaged jobseekers within the labour force. The price floor imposed by awards means that the long-term unemployed, inexperienced and other less desirable candidates are forced to compete for entry-level work on the same terms as every other applicant, negating what may be their only competitive advantage.

As a human resources assistant at Coles recently told me, high school students with zero customer service experience, unimpressive personal skills and limited work availability are readily hired on the sole basis that their enterprise agreement follows the award in allowing minors to be paid well below the adult rate. Unsurprisingly, the standard for applicants over the age of 21 is far higher. With the number of applicants always exceeding positions available, over 21s without retail experience are usually culled at the first stage.

The unvarnished truth that commercial considerations dictate the hiring decisions of private firms sits uncomfortably with every instinct about work held by a general public taught to fear the creation of an Americanised underclass of working poor. But viewed in terms of its broadest effects, the status quo's claim to fairness is hollow, at best. A full-time worker at the bottom rung of the fast-food award still takes home \$738.80 – \$471 more than the effective rate of \$7.05 an hour paid to a single person on the newstart allowance.³⁰ As Senator David Leyonjhelm recently remarked, it is hardly fair that an unemployed person with no skills

is prevented from earning a wage of \$12 an hour, but is effectively given \$7 an hour to do nothing.³¹

When you consider that the actual loss borne by the unemployed worker isn't just a wage, but crucial experience that may represent the only path to a higher wage in the future, the combined operation of the award and social welfare systems starts to look a lot like paying the unemployed to fail.

Lifting the noose on job creation by abolishing awards

Centralised-wage fixing has never really served the interests of Australian workers, business, or the unemployed, and that remains the case today. The heavy-handed centralised design of the award system operates to the detriment of its key objects set out in the Fair Work Act. It damages social inclusion by frustrating the ambitions of the unemployed, thwarts the flexible approach to work demanded by a modern economy, and undermines the performance and competitiveness of sections of the national economy.

The good intentions of policymakers to confer fair, decent, and indeed generous pay, upon every member of the workforce, has in reality, done more harm than good. The first and most necessary step towards reform is therefore abandoning the shibboleth that awards should act as a surrogate for worker welfare.

This would ideally involve the abolition of separate awards in favour of one universal safety net, designed only to prevent work arrangements that are plainly unpalatable.

This change would benefit the current workforce, those who aspire to become a part of it, and the wellbeing of Australian society in the three main ways:

First, it would recognise that experience in the workforce is the most reliable and effective way to boost the future earning potential of the more than 15% of working age people who can't find a job. The Government's PaTH program – which subsidizes the wages of inexperienced young workers to give them a 'foothold' in the workforce – not only accepts, but assumes this very logic. Likewise, it would also acknowledge that unemployment is a far more significant

driver of income inequality, poverty, homelessness, and social dislocation than modestly paid entry-level work. By rectifying the current misconception that tribunals are better equipped to decide how, and on what terms a worker deploys their skills and labour than the individual themselves, this change more than almost any other would help facilitate high levels of workforce participation into the future, when it will be most needed.

Second, cutting ties with the award system's collectivist approach to classifying workers would grant more flexibility, so that employee remuneration can be more closely tied to the value they provide to a business. This reflects the modern reality that employers tend not to view workers as a collective resource like any other economic input, but as individuals with distinct skills and experiences,

Third, it would provide greater flexibility for wages to respond to the peaks and troughs of the market, improving job security in the event of economic downturn.

Enterprise bargaining

The flaws of the award system would be less consequential if enterprise bargaining lived up to its promise of creating a decentralized alternative to awards that was genuinely responsive to market conditions and the needs of individual businesses. There were high hopes when the Keating Government introduced enterprise bargaining in 1992 that work agreements negotiated at the enterprise level between employers, workers and unions would usher in a new wave of productivity growth, and with it, higher living standards.

Unfortunately, just like the award system, the gap between the intentions behind enterprise bargaining and its practical outcomes is glaring.

Enterprise bargaining has proven too complex, costly and rigid to be remotely workable for small businesses. Nor has it succeeded in providing a flexible negotiating framework responsive to market forces even for Australia's largest enterprises.

Complex, rigid and unworkable

Imagine you are an independent grocery store owner with a workforce of 50 sitting down to negotiate an enterprise agreement. The bargaining representative across the table is unlikely to be a member of the workforce or one directly appointed to it, but a union rep due to the rule that if just one member of your workforce is a member, that union is automatically appointed as the representative for negotiations. You are also required to negotiate in good faith – a nebulous legal requirement which could see you face thousands in legal bills and a protracted dispute before the Fair Work Commission for making a take it or leave it offer if talks reach an impasse, or engaging in any other hardnosed tactics that are standard fare in every other aspect of commercial life. Finally, your ability to bargain for meaningful trade-offs due to the requirement that each and every one of your workers under the new agreement must be ‘better off overall.’ Given you have some casual staff working two shifts a week after hours and on weekends, this probably precludes any genuine tradeoff between overtime and penalty rates in favour of a higher base rate of pay, unless of course the union is willing to certify that your workers do indeed benefit. What’s more, once an enterprise agreement is created, individual arrangements for managers will be effectively off the table.

Finally, if you decide to buck the trend and try negotiate with a representative other than the union, you should brace yourself for the possibility of interference and even a costly legal stoush before the Fair Work Commission. Witness the SDA or shoppies unions attempts last year to torpedo an Aldi enterprise agreement negotiated without a union on the spurious grounds that the agreement used the term ‘leader’ not ‘employer.’³²

In the teeth of all this, you’d be well advised to just stick with the industry award.

The entrenched bargaining power of trade unions

It should therefore come as no surprise that enterprise agreements are very rarely negotiated and certified without the blessing of a trade union. And although trade unions now only represent a miserly 10% of the private sector workforce – less than half the number of independent contractors and self employed workers – they retain enormous power in enterprise bargaining negotiations.³³

Thanks to a little known rule in the Fair Work Act, any new body purporting to represent workers cannot be registered as a trade union if there is an existing union to which they could more conveniently belong.³⁴ This basically gifts the well-known major unions, which are virtually all affiliates of the Labor Party, a monopoly over worker representation in enterprise bargaining negotiations. Unless no member of the workforce is a union member, the only way to unpick the union's entrenched position in wage negotiations is if each employee in the workplace appoints a non-union representative. The combined effect of these factors is to grant extraordinary influence over some of Australia's most vital industries to a group of legally sheltered, yet overtly political trade unions.

In addition to the union's virtually guaranteed seat at the table, the negotiating position of employers is frequently undermined by certain aspects of the enterprise bargaining process.

During enterprise bargaining negotiations, the Fair Work Act grants unions the right to apply to commence legally protected strike action over a broad range of demands with no necessary connection to the employment relationship. In the resource sector, such demands have routinely included positions for paid onsite union stewards, limitations on a company's policy regarding alcohol and drug use and the operation of heavy machinery, the right to be paid for union training days among many others.³⁵ Nor does the Fair Work Commission have any power to reject applications for protected industrial action ballots on the grounds that the demands are manifestly excessive.³⁶

In certain sectors such as mining, offshore oil and gas and construction, the enterprise bargaining process often occurs in a

commercial context where delays caused by industrial action or non-cooperation by unions has the potential to inflict enormous financial damage on the business and the industry.

This often leaves businesses with little to no negotiating leverage to insist on productivity improvements in return for lavish pay hikes, a fact borne out by the parlous performance of Australia's mining industry over the last decade. It is nearly 150% more expensive to staff the same vessel in Australia's offshore resource industry than in comparable European economies, nearly 30% more expensive to produce LNG in Australia than in Canada. Perhaps most depressingly, productivity has dropped by 45%.³⁷

A bare 7% of employers in Australia's resource sector believe enterprise bargaining currently meets the needs of employers and employees.³⁸ In terms of Australia's reputation as a destination for global investment, this has bruising implications. According to Aurizon managing director Lance Hockridge 'it is not a question of will it become an issue of sovereign risk – it already has.'³⁹

The economic toll of uncompetitive enterprise agreements

Just as basic economic theory would suggest, enterprise agreements dishing out hefty pay rises without commensurate productivity improvements have driven scores of previously profitable businesses to either fail, downsize, or move their operations offshore.

The death of Australia's car manufacturing sector is a case in point. Take Toyota, which in the wake of Holden's announced decision to end production in Australia, struck an enterprise agreement that delivered a whopping 13 per cent payrise over the forthcoming two years.⁴⁰ Instead of trying to offset the pay hike by paring back burdensome work practices, the agreement doubled down on productivity inhibiting terms that had less to do with employment than interfering with management of the business. Among these terms included a 3 week long, factory wide shutdown over Christmas, 10 paid union training days a year and restrictions on labour hire arrangements that hamstrung the factory's ability to meet production quotas. Toyota is leaving Australia at the end of this year, but workers

will see their last days out with a 5.5% pay rise for 2017 alone.⁴¹ The lesson here is that it makes more commercial sense to spend \$600 million moving a car factory overseas than attempt to navigate Australia's enterprise bargaining system.

Commercial construction is another industry known for its fraught industrial climate yielding eye-watering pay rises far and sclerotic-productivity. This is partly a consequence of certain features of commercial construction that make it particularly susceptible to one-sided negotiations with unions. Before the brick is laid, enterprise agreements or Greenfield agreements struck between the head contractor and the union – usually, the CFMEU – lock in sky high wages for every worker who steps foot on the building site. This means that when it comes time to hire the subcontractors working on a multimillion or billion dollar project, there is absolutely no competition on price and productivity between firms vying to secure work. These same uncompetitive, high cost agreements are then replicated across the top-tier of head-contractors, essentially negating even the semblance of a competitive market on the biggest commercial and public building projects. What makes this arrangement look a lot like a cartel is the fact that without a union approved enterprise agreement, major builders and subcontractors often find themselves persona non-grata on major projects, either by implicit or express threat of strike or boycott. Unlike Toyota, our construction sector doesn't have the option of moving abroad. However, given how closely tied the performance of construction is with the health of our overall economy, the cost of anti-competitive bargaining practices in the construction sector are borne by the whole economy.

A thoroughly unequal bargaining position

Much like the award system, the Fair Work Act's myriad interventions to address the perceived unequal bargaining positions of workers and employers has given rise an inequality of its own. Not only do unions bear none of the risks in enterprise negotiations, they are legally shielded from their own competitors while their powers are largely unaffected by their support in the workforce. By contrast, it

is businesses, shareholders and employees who stand to lose from a waning investment, business failures and the reduced competitiveness of our industries internationally.

The unfairness of sweetheart deals

The power conferred upon trade unions in enterprise bargaining is also used for a second, arguably more nefarious purpose. Observers of Australia's industrial landscape will be familiar with the revelations from the Trade Union Royal Commission that during Bill Shorten's tenure as Victorian AWU Secretary, the union brokered enterprise agreements that slashed the pay and penalty rates of cleaning workers who were then automatically added to the union's membership list.⁴² This practice of trade unions brokering enterprise agreement less generous than the award is in fact standard fare in some of Australia's largest industries such as retail, hospitality and fast food. It might seem curious that a union would knowingly put its name to an agreement that consigns many of its workers to lower wages than the legal minimum.

Yet there is no shortage of quid pro quo. In return for these business friendly wage deals, which are estimated to save one supermarket giant in particular \$100 million a year, the SDA are paid exorbitant sums to conduct training exercises and receive privileged access to the workplace and employee inductions to boost their membership lists.⁴³

At a glance, the terms brokered by some of these agreements look like the kind of forward-thinking, sensible and job conducive trade-offs that enterprise bargaining ought to achieve. For example, the Coles enterprise agreement that is currently being challenged by an aggrieved supermarket worker, reduces overtime and penalty rates in favour of a base rate of pay during ordinary hours of work. In a business which relies on being open at times convenient to the rest of the population and hires thousands of inexperienced students and part-timers seeking to work around an ordinary 9-5 schedule, trade-off would appear to make good commercial sense. The enterprise agreements covering McDonalds, KFC, Hungry Jacks and other major chains follow a similar formula.

The problem is the SDA or ‘shoppies’ union only negotiate these deals with the big players – Coles, Woolworths, Big W – while IGAs, independent grocers and competing small and medium retailers are left to cope under the award wage.

What is curious here is that the millions of dollars these agreements save businesses makes it utterly plain they do not leave all workers ‘better off overall’ as the Act requires. Indeed, a report by Deutsche Bank analyst Michael Simotas found that the added wage costs of switching to an enterprise agreement with award level penalty rates would see the profitability of Domino’s Pizza to nosedive a staggering 24 per cent. The raw arithmetic of savings accrued by an enterprise agreement accounting for a profit of the chain’s profits lays waste to any pretence these pay deals do indeed make workers better off overall.⁴⁴

The approval of dozens of these business friendly enterprise agreements therefore raises serious questions about not only the basic competence of the Fair Work Commission, but its willingness to uncritically certify an enterprise agreement if it has the blessing of a trade union.

That unions have used this role as the unofficial gatekeepers of the enterprise bargaining process to selectively gift major chains a serious cost advantage over small businesses is repugnant to the basic precepts of a free and competitive market. It teaches major companies that commercial advantage can be obtained over smaller competitors not through hard and ingenuity, but courting favour from vested interests. By tacitly encouraging a culture of corporate cronyism, these sweetheart deals threaten to create a rot that runs far deeper than the industrial relations system. And given that bureaucratic ineptitude has allowed these agreements to circumvent the clear intent Fair Work Act, it also presents a challenge to the rule of law.

Far from starting a new era of flexible, productivity enhancing work agreements, enterprise bargaining in its current form has often lead to uncompetitive and rigid work arrangements reminiscent of the compulsory arbitration.

Leveling the enterprise bargaining playing field

It should be stressed that the issue here is not with unions per se, or even the collective bargaining. The problem is the privileged position enjoyed by unions throughout the bargaining process enshrined by law in the Fair Work Act.

Clearly the first step should be to abolish the rules that sideline competitor organisations from threatening the stranglehold of existing unions on employee representation in bargaining. The trade union movement is fond of asserting its rights to intervene in workplaces on grounds of freedom of association. But true freedom of association means offering employees a genuine choice on who ought to represent their interests.

Employees should be given a choice as to who represents them in bargaining negotiations, with no special rules that entrench union power above any other party. This would mean unions could only wield a veto in enterprise negotiations to the extent that they enjoyed the support of the workforce. Likewise, provisions preventing some workers entering individual arrangements alongside an enterprise agreement should also be abolished, allowing a business facing demands for unsustainable wage increases would be able to make a counter-offer to workers on an individual basis. By shifting the power in collective bargaining in favour of those who bear the risks of gridlock, or uncompetitive arrangements; namely employees and employers, unions could no longer use their legally protected status to threaten industrial chaos free from consequence. In turn, this would help rectify the investment deterring reputation of Australia's industrial climate and ensure the mining, resource and construction sectors are a fertile source of jobs into the future.

The changes discussed so far would go along way towards removing the roadblocks that frustrate the ambitions of the unemployed and hinder the ability of Australian businesses to run profitably and compete on the world stage. But at least in the short-run, the most beneficial thing Australian policy-makers could do to shore up our labour market would be to pass no laws whatsoever.

Regulating the sharing economy

In raw numbers, platforms like Uber, Airtasker, AirBnB now represent a \$15 billion slice of Australia's economy.⁴⁵ Estimates suggest around 800,000 Australians take home more than \$300 a month in income generated from these new digital or sharing economy job platforms.⁴⁶ While many of these workers are irregular or part-time users, the sharing economy's job creation record still contrasts favourably with the Government's South Australian submarine building program, which it is estimated will cost taxpayers \$4 million per job created.⁴⁷

Bypassing the straightjacket of the Fair Work Act

What is striking about the groundswell of job opportunities generated by the sharing economy is they overwhelmingly involve services and occupations that are hardly new. This can be partly attributed to how digital platforms minimize transaction costs by efficiently pairing a desired service with a party willing to perform. For example, I may have previously had the desire to hire a chainsaw to cut down the palm tree in my backyard, but lacked an efficient way to identify a chainsaw owner willing to loan me. The other core reason for the sharing economy's success is that by treating users as independent contractors, the sharing economy bypasses the quagmire of the Fair Work Act. Indeed, the degree to which these platforms have harnessed previously untapped energy and skills already existing in the workforce is testament to the stifling effect of our existing employment framework. In this sense, platforms like Freelancer, Airtasker, Uber and others provide a glimpse of what a deregulated labour market would look like: people freely transacting on the basis of what they perceive to be their own best interests unencumbered by the law.

A lifeline for the low-skilled and unemployed

For the unemployed in particular, the beauty of the sharing is that it clears away every barrier to employment laid down by the Fair Work, reducing the costs of entering the labour market to practically zero.

For instance, the only hurdle to selling your skills or labour on Airtasker is providing your service at a price someone is willing to pay. The barriers to entry for becoming an Uber driver are a little higher – a reasonably modern and clean car, reputable driving history and, in most states, a driver authorization obtained from the department of transport at a cost of around \$40. Still, compared to the rigmarole of gaining traditional employment as a handyman, labourer or professional driver, the barriers are slight.

For the low-skilled and long-term unemployed facing bleak prospects in today's highly competitive job market, this is a major windfall. It allows even the most undesirable candidate for the most rudimentary job to go directly to the market and compete on perhaps their only competitive advantage; the price of their labour.

Regulation – why resist it?

Yet a recent deal between Unions NSW and Airtasker to impose minimum wages on tasks performed on the platform amid growing calls around the world for Government to pull the reins on sharing economy platforms threatens to stop these burgeoning job creators dead in their tracks.

When moving apartments last year, I paid two Airtasker users; a husband and wife with a ute, to move my belongings the short distance of 2km. The job took around two hours from start to finish and cost \$70. By contrast, the minimum fee for using a professional removalist was a staggering \$250. Yet despite that both parties' left fully satisfied, our arrangement would have fallen clearly foul of the Unions New South Wales pay rates.

Minimum pay rates are just the first of a laundry list of worker entitlements trade unions, plaintiff and class action lawyers are

pushing to be mandated across the world. A key recommendation from a recent report by the World Bank and International Labour Organisation is that countries should legislate to extend social protections to temporary and part time work, a view agreed with by the plaintiff law firm Maurice Blackburn.⁴⁸

If we are serious about maintaining the sharing economy's job-creating firepower, these calls must be vigorously resisted.

For example, Uber's business model is based on the trade-off that while drivers have the freedom to work as much or as little as they want, there are no guaranteed hourly rates if you're unable to pick up a fare. For thousands of Australians who want to earn money around the rest of their lives, the premium of flexibility at the expense of wage certainty is clearly worth it.

Yet merely the imposition of a minimum hourly wage would render Uber's system of drivers voluntarily opting in to meet fluctuating consumer demand wholly unworkable. At a bare minimum, Uber would have a strong incentive to prevent drivers claiming wages for sitting in empty cars by restricting available shifts, seriously proscribing the flexibility its drivers prize so highly.

The fatal blow to the sharing economy would be bringing workers under the purview of unfair dismissal laws as author and Huffington Post Journalist Steven Hill has fervently argued. This would render the peer review ratings systems utilized by most platforms toothless and impose huge compliance costs for platforms that would ultimately reduce opportunities for eager workers.

Similarly, compulsory superannuation deposits make no sense for the vast share of sharing economy workers using the platform as a flexible supplement to their income.

At a surface level, there is – it is easy to understand why people would want to bequeath the same rights and security associated with employment on sharing economy workers – same ones enjoyed by all workers.

Unfortunately, this seemingly well-intentioned view threatens to deprive workers of the dignity and independence of work itself.

Industrial relations in Australia: time for a top-down rethink

As the spectre of an aging population and technological disruption casts a long shadow of uncertainty over the future of the Australian workforce, reform of the industrial relations system is sorely needed for Australia to scale the coming challenges and realise its economic potential. But the impetus for change won't come unless there is a serious challenge to the conventional wisdom that industrial relations isn't something that should be conducted by workers and businesses, but managed for them, by a quasi-judicial tribunal, for their own good. Until that changes, the productive, intellectual and creative energies of Australia's working age population will remain chronically underutilized.

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INDUSTRIAL RELATIONS IN AUSTRALIA: A HANDBRAKE ON PROSPERITY

Since the defeat of the Howard Government, industrial relations has come to be seen as the third rail of Australian politics. However, Australia faces a number of major demographic and technological challenges that require much more than piecemeal changes to penalty rates. In order to overcome these challenges, we need substantial reforms to our industrial relations framework.

Unfortunately, the fundamental structure of Australia's employment law has broad, bipartisan support. There is, at least publicly, a consensus that a statutory agency with no special economic expertise should lay down a set of national pay rates and working conditions for 122 occupations that cover a sizeable share of Australia's workforce of over 12 million people. There's also consensus that collective agreements which diverge from these national minimums should be negotiated within a strictly regimented framework that grants extraordinary power to trade unions and next to no autonomy for individual workers.

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