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Creating value and mitigating harm: Assessing institutional objectives in Australian industrial relations

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Abstract

The degree to which legislation on labour relations and other societal institutions creates value and mitigates harm is explored in this article through a framework designed to guide both the authoring and the analysis of objects of such legislation. Creating value and mitigating harm are typically explicit in the objects of public policy and implicit in adjudication, administration and adherence under public policies. Although conceptually distinct, creating value and mitigating harm can be both complementary and detrimental to each other. This article reviews various combinations of legislative objects over more than a century of Australian labour and employment relations policy. The objects examined include the prevention of industrial disputes, the introduction of a social minimum wage, the expansion of enterprise bargaining, expansion or curtailment of tribunal powers by government and other developments. Questions of 'for whom?' value is created or harm is mitigated are key. As an inductive study, the article concludes with hypotheses to guide future research, including implications that reach beyond Australia and employment legislation.

JEL Codes: K31; K38; M14; M52

Keywords

Arbitration and conciliation, creating value, enterprise bargaining, income policy, industry awards, institutional work, institutions, labour policy, mitigating harm

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Introduction

When Australia's Fair Work Commission was charged with advancing 'cooperative and productive relations' in 2013, in addition to ensuring fair treatment in the workplace, the Members of the Commission, their staff and the parties all had to adjust. This focus on creating value in the absence of conflict required expanded facilitation of employment relations, in addition to the more traditional conciliation and adjudication of disputes. This is just one instance in a century of experience in Australia of adjusting to the stated objects of legislation that call for various combinations of mitigating harm and creating value. Important as these objects are, there is surprisingly little by way of theory or frameworks to guide analysis and practice.

When the law is used to establish new labour and employment institutional arrangements, the object or intent of the law is typically spelled out. Industrial relations and labour law scholars will often cite these statements of legislative intent to motivate analysis of impacts, but the objects themselves are rarely analysed closely. It is the thesis of this article that the way these objects are formulated involves choices around the interplay of mitigating harm and creating value, and these choices matter. We present a framework for classifying and analysing the objects of legislation, drawn from over a century of historical experience in Australia.

Broadly speaking, government gains greater legitimacy from mitigating harm, so that is more common with legislation in a new domain, and objects designed to create value are harder to specify. The relative emphasis on mitigating harm or creating value (as well as the issues of harm to whom and value for whom) will have considerable implications for the associated adjudicatory, regulatory and administrative procedures set up under the law and for the outcomes that can be expected by society.[1]

This is not a labour market regulation study. Rather, the analysis is of the way actual statements of the objects of legislation are formulated and subsequently administered. This is an inductive study designed to present a new framework and generate hypotheses, rather than to test them. Published inductive research is less common than deductive studies, but crucial for identifying potential new directions for scholarship.

To anchor the framework development, a review of over 100 years of labour and employment legislation in Australia is provided. Australian labour and employment legislation is particularly informative because there have been many minor and major shifts in focus over the years – so there are many observations to consider. The history begins with objects primarily centred on mitigating harm and expands to incorporate various types of objects designed to create value. We define 'mitigating harm' as reducing or eliminating adverse impacts on individuals, collectivities, organisations, institutions or the environment. We define 'creating value' as expanding opportunities or positive outcomes for individuals, collectivities, organisations, institutions or the environment.

Mitigating harm typically involves setting minimum conditions below which sanctions may be imposed or interventions take place, though mitigating harm can also involve preventive initiatives for which resources or incentives are provided. For example, health and safety legislation is primarily orientated around mitigating harm with sanctions when standards are not met but can involve various initiatives centred on

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prevention. In contrast, creating value generally requires resources and attention to the value creation process. Sanctions for the failure to create value can happen when new rights are intended to create value, but sanctions are harder to formulate for legislative objects such as cooperative and productive relations.

The two overarching objects identified here correspond to two fundamental questions that have been identified as guiding foreign policy: 'What is in our interest to prevent?' and 'What is in our interest to accomplish?' (Kissinger, 1968). Both overarching objects also have implicit questions: Mitigating harm for whom? Creating value for whom? The first question centres on preventing possible negative things from happening to some or all parties, while the second centres on seeking to accomplish something positive for some or all parties – two related, but distinct, undertakings.

In the context of labour and employment policy, there are at least three primary actors whose interests are at stake – labour, management and government (Dunlop, 1960; Walker, 1956), and many others possible (communities, families of workers, investors, customers, suppliers and others). In this article, we focus mainly on the interests of labour and management, though the analysis is extended to others in places, including the society at large. In all cases, there is an implicit social contract. Political leaders who fail to mitigate harm or create value as promised will generally be held accountable. Indeed, Australian governments have lost power for failure to deliver on expectations about mitigating harm or creating value.

There are three major contributions of this article. First, although the terms 'creating value' and 'mitigating harm' are not new, we offer what we believe is the first unified conceptual framework for applying these two concepts in the formulation of labour and employment legislation. Second, the theoretical analysis of the two concepts is advanced by placing them in the context of more than a century of Australian labour and employment relations legislation yielding new insights into this history. Third, the stage is set with hypotheses to guide analysis in other settings (outside of Australia) and contexts (outside of labour and employment policy). We conclude that the inter-related yet distinct dynamics associated with creating value and mitigating harm are essential for policy makers, practitioners and scholars to consider, with creating value requiring different types of institutional work as compared to mitigating harm.

Part I: Framework

The year 2004 marked the 100th anniversary of national industrial, conciliation, arbitration and employment legislation in Australia (Isaac and Macintyre, 2004). In this article, we have used this historical record (including developments since 2004) for the inductive task of building a framework around the two constructs of creating value and mitigating harm. We only deal with the federal system in this article, which, for most of the period, has dominated the Australian industrial relations scene as a pace setter and which, since 2005, has had almost exclusive jurisdiction over the whole country. We identify ways in which the two constructs can operate independently of one another, in tension with one another and in complementary ways. We also see that the articulation of these objects has implications for various combinations of administration, adjudication and adherence.

A conceptual framework

Articulating the objectives of public polices is a form of institutional work, which Lawrence and Suddaby (2006) define as 'creating, maintaining and disrupting institutions' (p. 215). Institutions, according to Douglas North (1990), 'are the humanly derived constraints that shape human interaction' (p. 3). In focusing on constraints, North (1990) emphasises that institutions proscribe 'what individuals are prohibited from doing' and 'under what conditions some individuals are permitted to undertake certain activities' (p. 4). In general, prohibitions are designed to mitigate harm. Permissions, by contrast, are more likely to be designed to create value. Note that North's definition centres on constraints (prohibitions or permissions). As we will see in this analysis, the long arc of policy history in the Australian case goes beyond North's definition and points towards institutions that do not just permit certain activities but that provide affirmative encouragement of various activities.

The concept of 'mitigating harm' has a long history in diverse contexts. In medicine, 'first do no harm' (or, in Latin, *primum non nocere*) does not appear with this exact wording in the Hippocratic Oath as is commonly assumed but has been traced back to at least the 1600s (Smith, 2004). Interestingly a variant on this phrase does appear in the Hippocratic Corpus, which also signals that 'to do good' is distinct from 'to do no harm': *'the physician must ... have two special objects in view with regard to disease, namely, to do good or to do no harm'*.[2] Regulatory interventions designed to mitigate harm may be motivated by threats to human safety, security or welfare – sometimes manifest as efforts to mitigate externalities in markets. Some institutional arrangements are almost entirely centred on mitigating harm, such as the International Red Cross.

Creating value is traced by anthropologists to the very origins of human civilisation, with an emphasis on assigning value to objects for gift giving and exchange (Graeber, 2001; Mauss, 1954). This perspective highlights that value is fundamentally a socially constructed concept (Berger and Luckmann, 1991), though the creation of something new can have tangible as well as intangible benefits (Follett and Graham, 1996; Lax and Sebenius, 1986). For organisations, creating value has emerged as the primary measure of success, focusing on value to customers (Gale, 1994; Van der Haar et al., 2001) and involving value discovery, a specified value proposition and value delivery (Murman et al., 2002). Creating value at the institutional level of analysis involves a combination of politics, substance and administration (Moore, 1995) in order to generate what Porter and Kramer (2011) call 'shared value' (expanding the pool of economic and societal value). Although not mentioned by Porter and Kramer, our framework points to the analogous counterpart of 'mitigating collective harm'.

Mitigating harm and creating value are not always present or prioritised to the same degree and they can interact with each other in either complementary or detrimental ways. We argue here that they are conceptually distinct, even if they are inter-related. Consider creating employment and mitigating unemployment – they are closely related but not fully inverse sides of the same coin. A spectrum of possible combinations of creating value and mitigating harm is illustrated in Figure 1. Note that even at the extremes at both ends of this spectrum in Figure 1, there is some of each dimension present, signalling interdependence. Creating value can complement efforts to mitigate harm. For example, with the object added to the current Australian Fair Work Amendment

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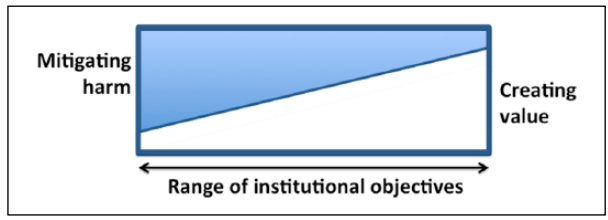

Figure 1. Proposed relationship between mitigating harm and creating value.

Act 2013 of 'promoting cooperative and productive workplace relations and preventing disputes' (s.576(2)(aa)), the improved relations in a cooperative workplace and the expanded pie in a productive workplace are both likely to help prevent disputes.

The mix of mitigating harm and creating value under a given policy objective will often be seen differently by labour and management. Preventing discrimination is primarily a form of mitigating harm, though there is considerable research demonstrating the value added in workplaces associated with increased respect for and appreciation of diversity (Kossek et al., 2003). In a study of racial diversity and economic performance in the banking industry, Orlando Richard (2000) concludes that 'cultural diversity does in fact add value and, within the proper context, contributes to firm competitive advantage' (p. 164).

At the same time, some efforts to mitigate harm can negatively affect the creation of value. The effort to mitigate the harm of high inflation can lead to wage and price controls that could result in reduced productivity growth, affecting firms and even households adversely. Similarly, the effort to create value through higher wages for workers can create harm in the short-run in the form of reduced profits for employers and, possibly, increased unemployment.

An additional way of viewing the relationship between creating value and mitigating harm is as a two-by-two matrix, as presented in Figure 2.

Policy objects that are high on mitigating harm and low on creating value are ones where a perceived risk is the primary focus – the question, what do we want to prevent? Policy objects that are high on creating value and low on mitigating harm are ones where a perceived opportunity is the focus – the question, what do we want to accomplish? Of course, situations that are low on both dimensions are unlikely to be a policy priority. Situations that are high on both dimensions, such as simultaneously promoting full employment and preventing inflation, are often presented as complex societal challenges worthy of considerable policy attention with a combination of sanctions, incentives, interventions and resources. A given policy issue might be seen differently by labour and management, such that one side's opportunity is the other's risk.

We offer both Figure 1 and Figure 2 as ways of conceptualising this inter-relationship, each of which has strengths and limitations. Figure 1 has the advantage of signalling a continuous interplay between the two concepts, with more of a potential for dynamic movement over time. Figure 2 has the advantage of signalling distinct states with recognisable combinations of each. In both visualisations, the objects are clearly inter-related, but conceptually distinct.

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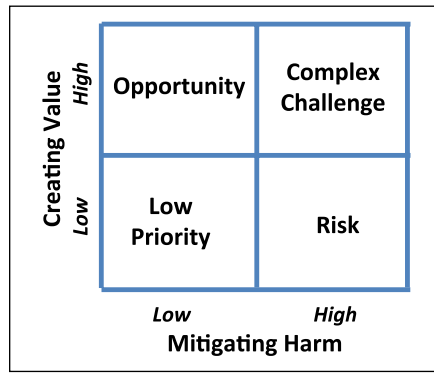

Figure 2. Two-by-two representation of mitigating harm and creating value.

How institutions work

Institutions are most often seen as the relatively stable context within which organisations operate. Indeed, institutions are often criticised for being too stable – that is, for not being innovative and for being slow to change (DiMaggio and Powell, 1983; Michels, 1915). Independent action is possible within institutional boundaries – this is what is termed 'embedded agency' (Battilana, 2006). But institutions can also be malleable. The specification of legislative objects is part of the work of 'creating, maintaining and disrupting institutions' (Lawrence and Suddaby, 2006: 215). This institutional work can involve what is termed 'institutional entrepreneurship', where individuals combine agency, opportunity and mobilisation of resources to change institutions (Dorado, 2005).[3] Underlying institutional work is what is termed the 'paradox of embedded agency' where individuals and organisations shape the very institutions in which they operate (Lawrence et al., 2009).

The institutional work of specifying the aims or objects of policy invariably contemplates its adjudication and administration, as well as the ultimate adherence by key stakeholders (Figure 3). In this cascading or alignment model, there are successive conditions or steps before the final result is achieved. Even if the proximate policy objectives are clearly stated, adjudication and administration can reinforce, shift or undermine them. Similarly, adherence by the parties can also reinforce, shift or undermine administrative and adjudicatory actions.

As Figure 3 illustrates, for there to be a chance to create value or mitigate harm in a given way, there must be some degree of enabling language in the Act. However, there are many ways in which the capacity to create value or mitigate harm on any one dimension can be undercut. Administrative procedure can enable or undermine the intent of public policy, and key individuals and organisations can subvert it. Weil (2005) notes an underlying collective goods problem whereby individuals or organisations who seek redress under public polices benefit others in clarifying rights and protections, while bearing all the costs and risks. There is also the risk of policy capture, where regulated parties gain influence over the interpretation or administration of policies in ways that advance their individual interests at the expense of others' interests (Laffont and Tirole, 1991).

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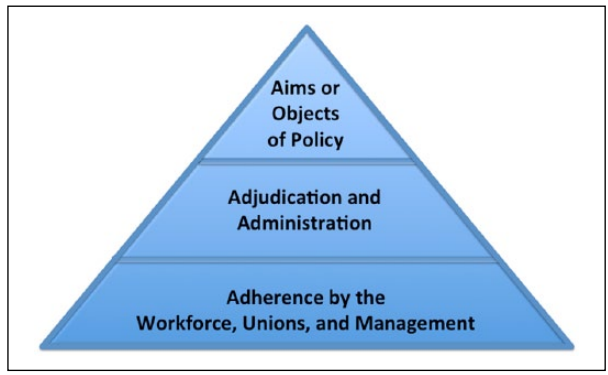

Figure 3. Three domains for creating value and mitigating harm.

The legitimacy associated with creating value (cognitive legitimacy) may be distinguished from the legitimacy of mitigating harm (pragmatic or moral legitimacy). Applying negotiations theory (Walton et al., 1994), the strategies of forcing, fostering and escape may all be reflected in policy objects (a negotiated-order view of policy). Creating value is primarily a fostering activity, while mitigating harm is primarily a forcing activity. In both cases, there is the risk of escape if parties do not see the policies as legitimate (Suchman, 1995). Escape can involve the overthrow of a party in power, which has happened at times in Australia.

In turning to the historical record, the key research questions associated with this framework are as follows: (1) Can objects centred on mitigating harm be distinguished from those centring on creating value? and (2) Can the implications of the relative degree of emphasis on mitigating harm and creating value be identified. That is, is there evidence that the framing of objects in public policies matters?

Methods

First, we apply the framework to pivotal points, as reflected in legislation, in the history of public policy on labour and employment relations over more than a century in Australia. Focusing on these pivotal events reflects a punctuated equilibrium view of history (Baumgartner et al., 2014). There have been over 100 changes to the original Australian industrial relations legislation – many minor and some significant – as illustrated in Supplementary Appendix 2. We focus on changes to the Objects of Acts (level 1 of Figure 3) in 1904, 1927, 1947, 1956, 1993, 1996, 2005, 2009 and 2013. In focusing on these pivots, we concentrate on major policy shifts that introduced new objects or that revised existing objects. Among the eight pivots selected, the objects (level 1) of five of them – – 1904, 1947, 1993, 2005 and 2009 – are the most consequential. In classifying objects as either creating value or mitigating harm, our focus is on what we term the 'proximate' objects as stated in legislation at passage, since all language can have additional or different implications over sufficient time.

There is a considerable period of time between 1956 and 1995 in which various issues are not addressed in this article. While there were important developments during this

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period addressing equal pay, two-tier wages and other matters, these were decisions of the Commission rather than legislative pivots, spelling out new objects. Developments during this time period are instructive, however, such as power shifts favouring employers that were then expressed as new objects in subsequent legislation (Bennett, 1994). Such developments represent the context in which objects are drafted and are important to take into account. The context is the focus of the second stage in our analysis – going beyond just the wording of the objects of Acts.

Specifically, our framework was elaborated and adjusted to reflect the lessons learned in the historical review. This includes the context in which the objects were drafted and associated actions at what we term levels 2 and 3. For example, although the objects of the 1930 Act were not pivotal, we extended our analysis of the 1904 Act to this time period since the action of the institution (level 2) was highly significant in dealing with the prevailing economic circumstances.

It is important to note that the historical analysis is not presented here as a test of the framework (examining all possible pivots) but rather as an inductive vehicle for illustrating and advancing it. This is a pragmatic approach to induction with a focus on the system's stated goals and on generating knowledge through the study of those goals in context and in use. In the language of Holland et al. (1989), the pivotal events studied here are 'triggering conditions' that lead to new inductive insights. A more deductive test of the framework will require the application of the ideas generated here to additional time periods or issues in Australia and elsewhere.

The write-ups are in the format of pivotal events, as presented in the Cutcher-Gershenfeld et al. (2015) study of the Ford-UAW transformation, where a pivotal event was defined as 'a time-bound event with highly consequential potential'. In some cases, however, the pivot is examined in the context of an extended time period following the change in the objects, in order to trace implications for adjudication, administration and adherence. At the beginning of each pivot, we summarise the degree to which the object had the aspirational objective of mitigating harm or creating value from the perspectives of labour and management. In each case, we use a qualitative rating of high, moderate and low.

Part II: Policy and practice: The Australian experience

In over a century, industrial relations have figured prominently in policy discourse, with governments rising or falling at times because of labour policy issues. An outstanding feature of the Australian industrial relations system has been the operation, under federal and state laws, of an extensive network of legally constituted bodies to deal with industrial disputes by conciliation and arbitration. The impetus for the establishment of this system came from the Great Strikes of the 1890s amid a serious economic depression in which the trade unions were almost decimated. The central issue of the strikes was the right of unions to represent workers in collective bargaining as against the 'freedom of contract' position held by employers (a similar theme emerged more than a century later under Australia's Work Choices Act). The disruption caused by the nationwide strikes and the collapse of collective bargaining led to a political drive for a system of compulsory conciliation and arbitration as an adjunct to collective bargaining.

In 1904, Australia passed one of the world's first comprehensive industrial relations Acts of parliament, legitimising unions, collective bargaining and the orderly resolution of industrial conflict through machinery for compulsory conciliation and arbitration. One of its strong promoters and later leader in its development, Henry Bourne Higgins (1922), saw this system of industrial relations as 'a new province for law and order'. The Constitutional basis of the system was section 51(xxxv):

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to: Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.

The federal tribunal has had several name changes but will be referred to until 1956 as 'the Court' and thereafter as 'the Commission'.[4] Over this period, the Acts under which the system operated have been changed frequently under pressure from economic and political forces. In assessing the institutional objectives of Australian industrial relations, we focus on the pivotal times where significant changes were made to the Objects and, where relevant, other sections of the Acts or administrative procedures. While a single article cannot do full justice to the great sweep of this history, the selected instances serve to illuminate the concepts of creating value and mitigating harm at the institutional level.

In each case, we first indicate our rating of the pivotal event and then provide an analysis of how this rating came about – revealing what is involved in applying the framework.

The Commonwealth Conciliation and Arbitration Act of 1904 (No. 13 of 1904)

The first Act giving rise to the system of conciliation and arbitration in Australia was enacted in 1904. Based on our framework, we rate this pivotal event as 'high' on mitigating harm for labour and 'low' on mitigating harm for management. We also rate it as 'moderate' on creating value for labour and 'low' on creating value for management. The balance of this section is the historical record that leads us to this assessment. The classification of the objects of the Act also points to the difference between substantive objects and procedural ones, with the classification of substantive objects easier than the procedural ones.

The first object, 'To prevent lockouts and strikes in relation to industrial disputes', was substantive and designed to mitigate harm to society. Most of the other objects were procedural, mixing the aims of mitigating harm and creating value. For example, Object (iii) provided for 'the exercise of the jurisdiction of the Court by conciliation', with the aspirational 'view to amicable agreement between the parties'. Value creation is hinted at by the focus on 'amicable relations', as well as harm mitigation by avoiding strikes and lockouts. The full text is in Supplementary Appendix 4.

Subsequent tribunal decisions and the administration of the Act (level 2) resulted in principles for determining pay and conditions of employment in domains where the Act

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was silent. Justice Higgins, President of the Court from 1907–1921, pioneered this approach. Object (iv) mentions an 'equitable award' and Higgins built on this, establishing a number of wage fixing principles including those related to the basic wage, margins for skill (relative wages) and women's wages. His legacy in this connection influenced the Court long after his retirement.[5] This form of mitigating harm to workers at level 2 is not apparent simply from the stated objects in the Act.

Object (vi), 'to facilitate and encourage the organisation of representative bodies of employers and employees', raised questions of mitigating harm for whom and creating value for whom. The tribunal could not deal effectively with unorganised individual employees, to settle industrial disputes. Registered unions were given legal status and union preference clauses were inserted in many awards, establishing the right to represent members in collective bargaining and appearances before the tribunal. This created value for workers, reflected in union density growth from 6% in 1901 to nearly 52% in 1921 (Rimmer, 2004: 278).

Unions saw provisions for compulsory arbitration and sanctions against strike action, as tolerable following the strikes of the 1890s and in light of the generally favourable principles articulated by the tribunal. They also continued to strike when expedient to do so (see Supplementary Appendices 3 and 4). In this regard, a policy that on its face might be seen as creating harm for unions (by limiting collective strike action) came to be seen as creating value (by providing administrative procedures that at times replaced the risks associated with such action).

On the contrary, prohibitions against strikes would likely be seen as favourable to employers. However, employers were hostile to the system and its administration for the first 25 years of its existence (Plowman, 2004). They saw compulsory arbitration as interfering with their right to manage (although they welcomed occasions when wages were reduced and they were prepared to pay some workers more than award rates in times of labour shortage). Even with employer opposition, the policy objects and their administration did not change during the next three decades.

Sorting out harm mitigation and value creation in the 1920s, long after the passage of the Act, is more complicated. Rising prices ahead of wage increases resulted in the real basic wage falling. By 1920, the Higgins basic wage (often referred to as the 'Harvester Standard') had fallen by 20% in real terms but more than recovered later in the 1920s. Furthermore, the tribunal reduced standard weekly hours generally from 48 to 44. Although productivity also rose substantially, it was accompanied by rising unemployment, which peaked at 12% (Hancock and Richardson, 2004: 49). This is a case of administrative action long after the specification of the objects of the Act where the intent was to create value (through wage setting), but the results were more complicated.

In an effort to better grapple with these complex realities, the Government in 1927 amended the 1904 Act to include s25D, requiring the Court to 'take into consideration the probable economic effect of the award or agreement in relation to the economy in general and the probable economic effect upon the industry or industries concerned'. Then, in 1929, the federal government lost the election and the Prime Minister lost his seat on what was seen as a policy of abandoning the federal arbitration system. History repeated itself in 2007 on the *Work Choices* legislation as discussed below.

During this first pivot, the object of mitigating harm (preventing strikes and lockouts; legitimising unions), while primarily focused on protecting the public interest, was also attentive to labour's interest. The more limited object of creating value (equitable awards) ended up enabling administrative action (level 2) that went well beyond the stated objectives with additional value creating actions in the form of wage determination principles. Until 1931, this value creation clearly advanced the interest of workers, while employers did not see the imposed standards as in their interest – confirming the importance of asking 'for whom'.

Developments in the 1930s are elaborated in Supplementary Appendix 5. We note here that the Labour Government, elected in 1929, enacted for the repeal of s25D, surprisingly in view of the onset of the Great Depression and rapid increase in unemployment, from 11% in 1929 to 19% in 1930, 27% in 1931 and peaking at 29% in 1932 (Commonwealth Bureau of Census and Statistics, Canberra, 1929, 1932). The s25D, requiring the tribunal to take into account economic effects of wage awards, can be seen as mitigating harm for employers and possibly also for workers, in reducing unemployment. However, its removal presumably reflected the unions' interest in removing a constraint on bargaining power. In the face of an application from employers for a reduction in the basic wage in these dire economic circumstances, despite the absence of s25D, the Court used its wide discretionary powers to take into account the capacity of the economy to sustain the existing wage level. A full-scale economic inquiry took place, with economists presenting detailed accounts of the state of the economy and suggesting the appropriate course for the tribunal. The outcome was a 10% reduction in the basic wage and margins. The procedures in this case provided the model in all future national wage and hours cases. These events illustrate how the Court, operating at level 2 (administratively), can initiate principles and proceedings which it considers to be in the public interest even if they go beyond the stated objects.

The Commonwealth Conciliation and Arbitration Act: 1947 (No. 10 of 1947)

The chief objects of this Act (Supplementary Appendix 4) stand out as initiating the most significant review of the level 2 procedural role of the system. They emphasise conciliation, informality and speed in proceedings, avoidance of legalism and technicality as well as 'preventing' disputes which are 'threatened, impending and probable'. We rate the pivot as 'high' on mitigating harm for labour and management and also as 'high' on creating value for both parties since that is how these procedural changes were presented by the government and generally accepted by the parties.

This Act changed the operation of the system significantly. The changes were widely welcomed and henceforth became the expected standard of proceedings, at least in relation to the role of commissioners. However, national cases conducted by the Court remained for some time extraordinarily lengthy, a form of level 2 harm due to administrative delays. The Standard Hours case, which resulted in standard weekly hours being reduced from 48 to 44, commenced in November 1945, involving 225 witnesses, and took 22 months to complete (Hancock, 1979).

The system resulting from the 1947 pivot endured from the 1950s through to the 1980s, in the face of the economic developments discussed in Supplementary Appendix 7. These include the severe postwar inflation which posed new problems for the tribunal. How to apply the principle of 'economic capacity' under full employment and inflation in order to mitigate harm? This dilemma resulted in the rate of inflation being considered as one of the relevant factors for consideration in wage adjustments. Should 'automatic quarterly cost of living adjustments' be discontinued in order to mitigate harm to the economy? The tribunal discontinued such adjustments, but changes in the Consumer Price Index were considered along with other factors in national wage cases. Should equal pay be awarded to women? The question of equal pay for men and women had gathered momentum in the postwar years. Women had entered a number of occupations during World War II previously the sole domain of male workers and performed with equal skill. In 1952, the tribunal decided to raise the ratio of the female/male basic wage to 75%. However, in 1972, it conceded to pressure to apply the ILO principle of equal pay for work of equal value (Isaac, 1958; Whitehouse, 2004). The dire consequences for female employment predicted by employers (invoking harm mitigation to justify the lower wage) turned out to be wrong (Gregory and Duncan, 1981).

The embrace of equal pay and other developments in the period from 1947, and the next major pivot in 1993 was not without important industrial relations developments, but there were no major changes in the objects of industrial relations legislation. The Employment Act of 1988 did provide for minimum wages, compensation for work-related accidents, requirements for safe working practices, and guidance on conciliation, adjudication and review. These are primarily focused on mitigating harm, but no overarching objects are stated beyond these specific areas of focus and, as such, it is not included as a pivot for analysis here.

The Industrial Relations Reform Act 1993

The 1993 Act, which was enacted by a Labour government, was the most significant change in government industrial relations expressed policy since 1904. Its principal object (Supplementary Appendix 4) was to provide a framework for the prevention and settlement of industrial disputes (mitigating harm) in order to promote the economic prosperity and welfare of the people of Australia (creating value). Here the two objects were presented as flip sides of the same coin. We rate this as moderate on mitigating harm for labour and management and high on creating value for both parties.

Enterprise collective bargaining was advanced as the dominant feature of the industrial relations system, with the role of the tribunal directed at promoting enterprise agreements. Conciliation was presented as the preferred role of government, while compulsory arbitration was relegated to a minor role in the system. Implicit in the objects of the Act was the view that private negotiated agreements at the enterprise level would better create value by promoting increased productivity: the imposition of arbitration awards was now a harm to be mitigated.

The reference in the Objects to meeting Australia's international obligations in (b)(ii) is noteworthy. Australia ratified ILO Conventions 87 and 98, which deal with right to collective bargaining and (implicitly) the right to strike. The original 1904 object had outlawed strikes as harmful to the economy. The year 1993 was the first occasion when

the right to strike on interest matters, although regulated by the requirements of notice and membership approval, was recognised by the Act as part of a 'good faith' collective bargaining process.

In a sense, the expectations on collective bargaining are reminiscent of those expressed by Higgins in the founding of the system – collective bargaining was to be the main feature of the system with compulsory arbitration as the last resort. The big difference is that, under Higgins, strikes were regarded as never warranted or permissible (harm to be mitigated) and hence subject to sanctions. But Higgins' expectations about the spread of collective bargaining were not borne out in practice. By 1993, greater emphasis was given to conciliation with compulsory arbitration as a last resort, whereas in Higgins', time arbitration was commenced readily. Furthermore, enterprise bargaining was actively promoted by the government and the trade union movement and by and large accepted by employers. Strikes and lockouts had evolved from harm to be mitigated into potentially adding value as part of a process of making agreements reflecting the economic realities facing an enterprise.

The inclusion of 'Reform' in the title of the Act emphasised the intent of the new approach. The departure from 'Conciliation and Arbitration' in the title of the Act arose from the change in the name of the tribunal to *Australian Industrial Relations Commission* in 1987.

Three new items of importance should be noted. First, as indicated above, the right to strike on interest matters was allowed, subject to certain procedural rules. Second, the reference to discrimination in paragraph (g) opened a new set of rights for workers. The main focus was on mitigating harmful discrimination, though we have already noted the value adds associated with diversity. Third, the Act provided a procedure for dealing with unfair ('harsh, unjust and unreasonable') dismissals – another mitigation of harm.

The proportion of employees covered by enterprise agreements soon increased and the safety net protected a decreasing proportion of the population (Rimmer, 1998). Although duration, number of disputes and person days on strike all fell in the 1990s (Harley, 2004), it is difficult to relate these figures to the spread of enterprise bargaining in a causal sense. The decline in union density, the rise in unemployment and the remaining spirit of the Accord are all factors. However, the evidence that enterprise agreements would promote productivity proved elusive.[6]

This 1993 pivot reveals the degree to which creating value is dependent on many inputs compared to mitigating harm. To realise the full value of productivity growth, enterprise bargaining is only one aspect of the production function for an enterprise and the object alone cannot deliver the intended result. There is a considerable literature on the degree to which industrial relations practices can contribute to productivity growth, but this literature clearly demonstrates that such gains are the product of bundles of inter-related practices.[7] In contrast, the new protections against discrimination and unjust dismissal – aimed at mitigating harm – were readily translated into adjudicatory and administrative procedure.

The Workplace Relations and Other Legislation Amendment (More Jobs, Better Pay) Act 1996 (No. 60 of 1996)

The election of a Coalition Government in 1996 resulted in the replacement of the 1993 Act with one including an object (Supplementary Appendix 4) signalling an intent centred on creating value. The opening clause, 'to provide a framework for cooperative

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workplace relations which promotes the economic prosperity and welfare of the people of Australia', was aspirational, with the rest of the objects serving as mechanisms to accomplish it. We rate the *aspirations* as reflected in the objects as 'low' for labour and 'high' for management in mitigating harm, and 'moderate' for labour and 'high' for management in creating value (based on the emphasis on enterprise agreements and the provision to balance work and family responsibilities).

The Government intended to implement its '*Jobsback*' agenda, foreshadowed in 1992 which, among other things, envisaged an end to compulsory arbitration and national wage cases. Instead, the intent was a shift from awards to individual employment contracts with what were termed 'minimum conditions' (though neither the conditions nor the mechanism for determining them was fully specified). This intention was thwarted by the Government's lack of a Senate majority. The result was to go a little beyond existing provisions by encouraging agreements between 'employers and employees', implicitly without union or tribunal involvement.

To mark a break with the past, the Australian Industrial Relations Commission was re-named Australian Workplace Relations Commission, with 'Workplace' signifying the intended focus of the Act. As in previous Acts, inherent in the objects were 'high employment, improved living standards, low inflation and international competitiveness'. Importantly, a new object was articulated in (i) balancing 'work and family responsibilities' (Cooper and Baird, 2015). The intent had elements of mitigating the harms of work undercutting family responsibilities or family matters interfering with work and carried the implication that balancing work and family responsibilities would create value in society.

The object (k), giving effect to Australia's international obligations, was not borne out by the government's policy on unions. Other provisions also departed from the 1993 Act: penal sanctions against strikes were strengthened and any 'union preference' provision in agreements was forbidden. The Commission's role was reduced to making awards on only '20 allowable matters' which would effectively be the basis for the 'safety net'. The Commission's other tasks were confined mainly to *voluntary* conciliation and arbitration. A government subsidy was provided for those who sought private mediation; collective bargaining was no longer subject to 'good faith', which meant that a party could refuse to engage in collective bargaining and determine issues unilaterally.

The Government's focus on reducing the role of the Commission further and strengthening the hand of employers was reflected in a provision for individual bargaining between an employee and employer through Australian Workplace Agreements (AWAs), to be administered by a newly created body, the Employment Advocate, operating outside the Commission. Although AWAs were intended as the outcome of 'individual bargaining', they were in practice generally not individually differentiated: each enterprise utilised a standard set of terms for a large number of employees doing the same or similar work who were handed the agreement en masse on a take-it-or-leave-it basis.

Apart from the provision of a safety net on specified items, the government was expressing the view that reduced Commission involvement and reduced union power were the primary means of advancing the object of promoting higher productivity. Its object was to create value for many in the employer community at the expense of the

power of the Commission, unions and workers, relegating the latter to an inferior position through individual bargaining.

In weakening union power (Pocock and Wright, 1997) and reducing the scope for Commission intervention, the Minister argued that a decentralised approach could enable employees to have more of a say at work, to have their interests catered for in more flexible work arrangements, to be better rewarded for their particular efforts and skills and to have real wage increases and greater job security (Reith, 1999: 1). This mix of aspirations involved creating value and mitigating harm, though evidence was never presented of capacity to deliver on these aspirations.

The move towards greater flexibility inherent in this and the previous Acts, with the object of promoting productivity, resulted in reduced concern for 'fairness' or 'comparability' among enterprise agreements. Furthermore, multiple-employer/industry bargaining, which would allow greater uniformity of employment terms, was discouraged by the removal of protections for strike action at this level of bargaining, as well as by the introduction of prohibitions on pattern bargaining, in conflict with Australia's international obligations (Creighton, 2012: 276). Arguably, this decentralisation of bargaining could lead to greater productivity, thereby advancing the primary object of the Act. Moreover, the transaction cost for unions, now having to deal with a large number of small and medium-size employers, reduced the scope of enterprise bargaining for widespread areas of employment. However, with the experience of wage inflation of earlier years still fresh in mind, the government and employers may have considered that multiple-employer bargaining could generate a wage outbreak. It is often the case that the objects of new legislation are in response to the recent past, rather than a strategic look to the future. In this case, the past was not likely to foreshadow the future, in an increasingly open economy, subject to global competition. These provisions allowed differences in pay for comparable work to arise – creating value for enterprises in different circumstances, while doing harm by transgressing the principle of equal pay for equal work.

Although AWAs were subject to a 'No Disadvantage Test' (relative to the Safety Net), this test of fairness was not applied in all AWAs. There was also no requirement for identical AWAs to be developed for comparable employees. The multiplicity of awards and their contents came in for detailed review by the Commission under an 'award simplification' process. This process has continued under successive Acts and was later referred to as 'award modernisation', whereby some 1500 awards were reduced to 122. In this regard, the value to employers of enterprise specific agreements stood in contrast to the harm mitigation created by reducing the number of awards comprising the safety net.

Although the move to enterprise bargaining was justified as leading to higher productivity, as noted earlier, the causal connection between enterprise bargaining and faster productivity growth was not established (Hancock, 2012: 3; Productivity Commission, 2015).

This 1996 pivot was characterised by lofty objects ('more jobs, better pay'), combined with sharply changed assumptions on how best to achieve these objects: the power of the Commission and of unions was decreased, while the greater primacy given to individual bargaining effectively increased employer power. In this pivotal period, there was a blurring of the distinction between creating value and mitigating harm, while the

question 'for whom?' gained urgency. While this pivot was not as consequential as it might have been, it had a lasting legacy in setting the stage for the next pivot.

The Workplace Relations Amendment (Work Choices) Act 2005

Having secured a majority in both Houses of Parliament, the Coalition Government under Prime Minister John Howard further enacted its industrial relations agenda (Supplementary Appendix 4). The intended mitigation of harm was 'high' for management and 'low' for labour, given the power imbalance in individual agreements. Expected value creation was also 'high' for management and 'low' for labour.

The government's hand was strengthened by its resort to the corporations power of the Constitution (s51(xx)) rather than the industrial power (s51(xxxv)) on which governments had relied since 1904. This shift enabled the government to legislate directly to extend coverage of the Commission's power to set employment terms and conditions to 85% of employees. The balance of jurisdiction between the government and the Commission was fundamentally changed.

The Government maintained that the Act would both create value and mitigate harm by 'advancing prosperity and fairness' (Andrews, 2005). But its underlying assumption was that this was best achieved without unions and by a Commission with more limited powers. For example, unions were not required to be involved in greenfield operations. Determination of the minimum wage was passed on to a separate body, the Australian Fair Pay Commission, to report directly to the government. The role of the Australian Workplace Commission was confined mainly to *voluntary* conciliation and arbitration. The Minister's justification for setting up this body was to 'move away from the adversarial and legalistic nature of the current wages setting process'. However, no evidence was presented in support of this critique. Furthermore, if there was such evidence, the government could have easily legislated for a more informal procedure. To reinforce the Government's preference for individual bargaining, 'good faith' in collective bargaining was no longer required. This effectively gave the stronger party the option whether or not to engage in collective bargaining.

Statutory AWAs became the centre point of the system in driving 'individual bargaining', which could go below safety net conditions. The new legislation was intended to increase the number of AWAs and diminish the role of unions. There was extensive evidence of individual contracts being effectively used in mining and communications to de-unionise workforces, sometimes through offering higher wages in return for signing individual contracts and refusing to promote or give pay rises to those who refused.[8] The protection afforded by the previous 'no-disadvantage-test' to ensure that workers would not fall below the safety net, was downgraded insofar as a smaller number of items were included in the new safety net to be determined by the Fair Pay Commission. This allowed for various established conditions of work – overtime and other penalties – to be taken away from workers in the name of flexibility.

AWAs were union-free and they prevailed over agreements and awards. The restriction on the Commission to make new awards meant that workers with limited labour market power or collective organisation could only fall back on AWAs and lagged further behind those workers who were strong enough to engage in enterprise bargaining. The

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procedure for protected strike action was drawn out while union entry into workplaces was made more difficult. Protection against unfair dismissal was confined to the larger firms (with more than 200 employees), covering only half the workforce and giving unions less scope for representing workers in dismissal cases. In greenfield cases, the employer was free to determine pay and conditions without worker representation. Collective agreements were prohibited from including certain items, such as restrictions on the use of labour hire, mandatory union involvement in grievances, trade union training leave, remedies for unfair dismissal and prohibiting AWAs – all served to weaken unions. Since 1996, the ILO's supervisory bodies repeatedly asked the Australian Government, to no avail, to amend provisions of the Workplace Relations Act, including AWAs, as violating the ILO's collective bargaining Conventions.

In response, the trade union movement organised stop-work meetings and large protest marches of workers in all parts of the country, testifying to their opposition to the new policy. With the federal election looming, the Labour Opposition issued its industrial relations manifesto *Forward with Fairness*, promising to remove what were seen as offending aspects of *Work Choices*. The government was resoundingly defeated and Prime Minister Howard lost his seat. These events repeated those of 1929, again with industrial relations as the pivotal election issue.

In this 2005 pivot, the stated language of the Objects did not match the realities in practice. Workers around the country felt that the policies neither created value nor mitigated harm. There was not the promised economic growth and individuals felt they were at greater risk of adverse treatment in the workplace. Moreover, while the Objects were presented as creating value for employers through greater flexibility, they were also perceived as being motived by political self-interest, creating value for the coalition government by weakening the Labour Party (Isaac, 2007). This pivot revealed that a government can be displaced if its object as expressed in the Act fails to meet its espoused promise, to mitigate harm and create value for large sections of the workforce.

The Fair Work Act 2009

A newly elected Labour Government passed legislation under the banner of workplace fairness. The Object of this Act (Supplementary Appendix 4) departed in many ways from its predecessors. Although 'national economic prosperity' again headed the list of objects, it was now associated with 'social inclusion for all'. 'Fairness' featured in many of the clauses. The tribunal was to be re-named, unusually, 'Fair Work Australia' (changed to Fair Work Commission in 2014). The safety net was underpinned by a *National Employment Standard*. The Act enumerated a list of items in the safety net more comprehensive than those in the previous Act. In contrast to the 2005 pivot, workers' interests were advanced in 2009. We rate this pivot as 'moderate' in mitigating harm and creating value for labour, and 'low' for management along both dimensions. The concept of fairness should imply balance, but the actual wording of the objects was more focused on a return shift of the pendulum.

Under this legislation, the safety net could 'no longer be undermined by the making of statutory individual employment agreements of any kind'. This provision aimed to mitigate harm to individuals with low bargaining power relative to employers, who had

been at risk under the prior regime. 'Good faith' collective bargaining was reinstated (Cooper and Ellem, 2009). The 'good faith' aim both mitigated harm to weaker employees and created value when more integrative forms of bargaining were facilitated.

The task of determining the minimum wage and other elements of the safety net returned to the Commission, with the addition of three outsiders to constitute a Minimum Wage Panel. The Act also established the Fair Work Ombudsman as an independent statutory body to ensure compliance with the workplace laws (mitigating harm); to educate working people about their rights, responsibilities and obligations (primarily mitigating harm), and 'building strong and effective relationships with industry' (creating value). Rights to protection against unfair dismissal were restored (albeit with a 12 month qualifying period for workers in enterprises with fewer than 15 employees).

While '*Work Choices*' identified unions and the Commission as harm to be mitigated (for the benefit of employers), the Fair Work Act identified the erosion of collective bargaining under the prior regulatory scheme as harm to be mitigated (for the benefit of workers and unions). At a higher level, the very concept of 'fairness' was more about mitigating harm (preventing unfair treatment), but it did have proximate elements of creating value (asserting good things that can come in a climate of fairness).

The 2009 Act did not mark a full return to the 1993 Act. Protected strikes were not extended to multi-employer bargaining and pattern bargaining was illegal. Moreover, *compulsory* arbitration was limited to where a party refused to bargain in good faith or to stoppages threatening public safety or the economy or in low-paid occupations in which it can deal with the issue on a multi-enterprise basis. Enterprise bargaining remained a central feature of the system. However, the Commission was entrusted to continue to make 'modern awards' as part of the safety net for industries and occupations. This can be seen as an attempt to advance the creating of value through productive enterprise-level agreements and the mitigation of harms based on unfair treatment of individuals, as well as, to a limited extent, to advance the role of unions as collective representatives.

The changes were accepted and industrial relations proceeded uneventfully in the face of the global financial crisis beginning in 2006 and extending through 2010 (and beyond in some nations). Although there was a change of government in 2013, there was no immediate move to depart from the overall focus on fairness, and the basic structure of a Commission, an Ombudsman and other elements remained.

Fair Work Amendment Act 2013

The Commission's responsibilities were extended in a 2013 pivot under the *Fair Work Amendment Act 2013* 'to promote cooperative and productive workplace relations and prevent disputes'. Pursuant to a new provision, cases of active mediation and facilitation were successfully undertaken by the Commission to assist the parties in 'cooperative and productive' enterprise bargaining (Fair Work Commission, 2014). Studies of these cases highlighted conciliation and mediation roles (given special emphasis in the 1947 Act) that went beyond just mitigating the harm of strikes and lockouts. We rate the objects as moderate for labour and management in terms of mitigating harm, based on shared interests in preventing certain types of harm, such as workplace bullying and poor work/life

balance. For creating value, we rate the objects as 'high' for both parties – focusing on the aspiration of cooperative and productive workplaces.

Preceding the 2009 Fair Work Act and indeed well before the formal encouragement of enterprise bargaining under the 1993 Act, it had been commonplace for commissioners to bring together parties – generally covered by industry awards or agreements – to settle matters amicably in conciliation proceedings. Commissioners might even go on-site on an ad hoc basis to work with the parties to settle differences and, where necessary as part of the conciliation, to foster workplace innovation. Nevertheless, the considerable extension of enterprise bargaining since the 1990s found firms, especially small and medium-sized enterprises (SMEs), lacking in experience and capacity to engage meaningfully in collective bargaining. They tended to rely instead on awards, with over-award extras wherever necessary. In a survey of SMEs in 1991, only 10% of respondents expressed preference for enterprise bargaining (Isaac et al., 1993).

The *Fair Work Amendment Act 2013*, which was consistent with a long history of conciliation and mediation processes, directed commissioners to engage with the parties more actively in order to establish new capabilities. Recent examples point the way for promoting cooperative mechanisms, creating shared value for employers and workers. In the case of Port Stephens Council, beginning in 2006, three enterprise agreements and on-site facilitation by the Industrial Relations Commission of New South Wales, predated the new federal legislation (Oxenbridge et al., 2015). These initiatives resulted in more flexible work rules, increased workplace safety and other arrangements that enabled the port to expand operations and jobs in the region. Interestingly, the Commissioner involved developed an important way to signal to labour and management when he was acting in an adjudicative role (by meeting in his chambers) and when he was acting in a facilitating role (by meeting at their worksite). These mechanisms extended to front-line operations, utilising workplace teams and continuous improvement methods. In another example, under the 2009 Act, Orora Fibre Packaging and the Printing Division of the AMWU (Australian Manufacturing Workers Union) came to Commission offices in the context of a risk of jobs leaving Australia owing to inefficient operations. The legitimacy and conciliation supplied by the Commission, combined with expertise in business strategy and high performance work systems supplied by outside consultants, resulted in a turnaround of the business and expansion of jobs throughout their Australian operations (Macneil and Bray, 2015).

Assisting the parties with operational and workplace culture improvements to foster cooperative and productive relations involved the intersection of level 2 and level 3 (Figure 3). At level 2, systematic support was added for on-site facilitation, including an application form (F79) for cases under this object of the Act. Such facilitation was an extension of the long-standing roles of Commissioners and Commission staff centred on arbitration, mediation, conciliation and ad hoc facilitation (usually in the context of a dispute).

In parallel with the collective bargaining activities, the work of the Ombudsman in preventing bullying in the workplace was a form of harm mitigation, involving not just education and awareness, but mechanisms for enforcement of rights. The role of the Commission in fostering balance in work and family responsibilities involves both miti-

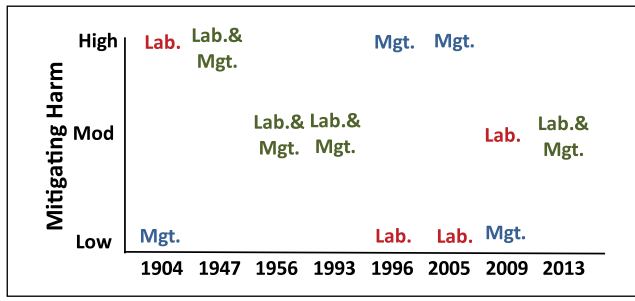

Figure 4. Intent to mitigate harm – labour and management perspectives, based on the objects of pivotal Australian legislation.

gating harm and creating value (imposing sanctions when the object is at risk and providing support for experimentation and innovation).

The recent pivots are the latest in a history of swings of the pendulum where the harms to be mitigated favour labour or management and where very different assumptions are implicit in the objects for creating of value. In contrast with the 1996 and 2005 pivots, this latest period features increased specificity on a range of adjudicatory and administrative initiatives and mechanisms for both creating value and mitigating harm.

Conclusion

Over the years, under the influence of changing economic, social and political forces, the objects and associated sections of the various Australian industrial relations Acts have changed greatly, as has the way the tribunal operates. These changes have included various mechanisms to mitigate harm and have been accompanied by an expanded emphasis, over time, on creating value. With each focus has come the clear set of questions, 'value for whom?' and 'harm to whom?' Supplementary Appendix 6 summarises the substantive gains over the years for labour and management.

In assembling the ratings for the eight pivots, Figure 4 illustrates that the initial mitigating of harm in 1904 favoured labour and then was followed by three legislative pivots in which the implications of efforts to mitigate harm were relatively balanced for labour and management. The 1996 and 2005 pivots were more favourable to management in mitigating harm, followed by a reverse swing of the pendulum and most recently by objects that had a more balanced intent.

The ratings for value creation in the nine pivots are collected in Figure 5, with initial periods that are unbalanced, followed by three pivots in which the objects are intended to create value for labour and management. The separation begins in 1996, broadens in 2005 and then the pendulum swings in 2009. Under the most recent legislation, there are a small, but growing, number of cases where the tribunal is serving as a facilitator with the express purpose of creating value by advancing mutual interests – an approach that depends on a measure of leadership from the parties and a sufficient balance in power. It remains to be seen if the cooperative and productive models will spread more widely.

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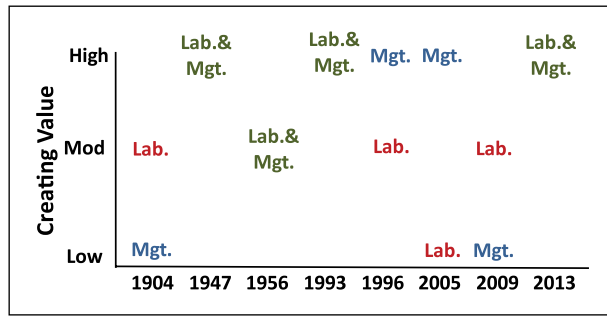

Figure 5. Intent to create value – labour and management perspectives, based on the objects of pivotal Australian legislation.

In focusing on 'creating value' and 'mitigating harm' as overarching institutional objectives in public policy, we find that the two concepts are analytically distinct, though highly inter-related in practice. They have different implications with respect to incentives, penalties and administrative support. Australian history has seen a number of policy initiatives that have used the rhetoric of creating value while actually mitigating or doing harm from the perspective of either labour or management.

It is appropriate to conclude this inductively developed framework with hypotheses that can guide future research and policy development:

Hypothesis 1. Substantive objects or aims of public policy as reflected in legislation can be classified as creating value, mitigating harm or a combination of the two for all stakeholders.

Hypothesis 2. There are three successive steps in creating value and mitigating harm: legislative specification of aims or objects of policy (level 1), adjudicating and administrating the policy (level 2) and adhering to the policy (level 3) — with alignment needed across all three levels.

Hypothesis 2a. Since objects at Level 1 are aspirational or proximate, subsequent economic or institutional forces at levels 2 and 3 may prevent or enable the objects from being achieved in whole or in part.

Hypothesis 3. Within a given policy domain, the initial or foundational objects tend to give more emphasis to mitigating harm than creating value.

Hypothesis 4. Objects designed to create value will require more adjustment or alignment at level 2 and level 3 than objects designed to mitigate harm.

Hypothesis 5. Objects that create *shared* value or that mitigate *collective* harm will be sustainable across multiple government regimes.

Hypothesis 5a. Objects that only create value or mitigate harm for some key stakeholders (one-sided or partisan objects) risk reversal when governments in power change.

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Hypothesis 5b. Objects that promise to create *shared* value or to mitigate *collective* harm risk reversal if they violate expectations and end up generating one-sided or partisan results.

Hypothesis 5c. Administrative actions (level 2) that go beyond stated objects (level 1) can be pivotal and sustainable so long as they are creating *shared* value or mitigating *collective* harm.

Elaborating on these hypotheses, this historical review illustrates how public policies on labour and employment relations can be classified and analysed according to the degree to which the intent is to create value and mitigate harm. The analysis also illustrates the risk of terminological blurring and the potential for administrative action that goes beyond the stated objects of legislation. As a result, the stated objects need to be viewed in the larger context of mechanisms for adjudication and administration (level 2) and adherence (level 3).

It is particularly the alignment between level 1 and level 2 that we have explored. Many tribunal initiatives, especially in determining the safety net for workers in line with the capacity of the economy, have contributed to the public good in the form of rising standards of living and improved working conditions. These developments had roots in level 2 initiatives that went beyond the level 1 stated aims or objects. Such initiatives can be seen as a form of institutional entrepreneurship (Dorado, 2005). Restrictions in the power of the tribunal since 2005, however, have reduced the prospects of applying level 2 initiatives at a time when creating value through cooperative and productive relations will need alignment between levels 1 and 2 or level 2 entrepreneurship.

The challenge going forward is to more fully articulate and advance the shared public interests associated with both creating value and mitigating harm. This history teaches us, however, that truly creating shared value or mitigating collective harm is easier said than done. Narrowly stated objects can be expanded administratively in unexpected ways. Seemingly shared objects can have intended or unintended one-sided impacts. Nonetheless, being clear about the aim to create value or mitigate harm and being appropriately critical when there is no alignment across levels in support of the object are crucial first steps in labour and employment policy that delivers on the broad aim of advancing the public interest. More than a century of legislative history in Australia teaches us that it is possible and often necessary to combine the objects of mitigating harm and creating value, even if it is hard to do so.

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Notes

1. Organising the analysis of labour law around 'creating value' and 'mitigating harm' was first introduced by Joel Cutcher-Gershenfeld on 2 December 2011, in a keynote address at the Chicago-Kent College of Law's 27th annual Illinois Public Sector Labor Relations Law Conference, though it was not until this article that the full theoretical framework has been developed.
2. Cite to *Epidemics*, book I, sect. 11, trans. Adams.
3. See Dorado (2005).
4. Commonwealth Court of Conciliation and Arbitration until 1956, Commonwealth Conciliation and Arbitration Commission until 1974, Australian Conciliation and Arbitration Commission until 1987, Australian Industrial Relations Commission until 2009, Fair Work Australia until 2012 and Australian Fair Work Commission since 2012.
5. In formulating the basic wage concept, Higgins based it on 'the normal needs of the average employee, regarded as a human being living in a civilized community'. He maintained that, '[o]ne cannot conceive of industrial peace unless the employee has secured to him wages sufficient for the essentials for human existence' (Higgins, 1922 [1968]). In relation to women's wages, Higgins adopted the conventions of the times that generally only single women worked and decided that the minimum wage for women should be based on the 'needs of a single woman supporting herself by her own exertions'. He estimated this to be about 56% of the male basic wage (Higgins, 1912, The Fruit Pickers' Case, 22 CAR 247). In 1922, Higgins' successor added automatic quarterly adjustments based on a consumer price index to the basic wage principles. This continued through to 1956 when the index became one of the relevant factors taken into account in determining the basic wage, and later, the minimum wage.
6. See K. Hancock (2012).
7. See J.E. Cutcher-Gershenfeld (1991), J.P. Macduffie (1995), Ichniowski et al. (1995).
8. Peetz D and Preston A (2009).

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