The Economic and Labour Relations Review Vol. 18 No. 2, pp. 43–52

Labour Standards, Safety Nets and Minimum Conditions

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One day in the 1990s, I found myself sitting in a hospital cafeteria with a group of people I had just met. We were eating cheese and tomato sandwiches, drinking terrible coffee and talking about work. The nurses in the group — midwives — were chatting about the challenges and rewards of shift work and delivering babies in their small Tasmanian town. About how scheduled shift times and the arrival of babies did not always mesh.

I was in fact in the middle of one of the key processes by which the minimum standards for Australian workers have been fixed for about a century. The cafeteria group consisted of Commissioner Frawley of the Australian Industrial Relations Commission (AIRC), representatives of nurses and health workers unions (from the Tasmanian branch offices and in my case the union's national office in Melbourne), local shop stewards from within the hospital, midwives, senior nurse managers, hospital management and senior health service industrial relations officials. The Commissioner was 'on inspection': informing himself by direct interviews with workers and managers at their workplaces about the 'dispute' which unions had 'notified' to the AIRC under the then federal Act.

The dispute was about the intention of Tasmanian public hospitals to overturn the existing practice that an eight hour shift was inclusive of a paid meal break, and introduce a new arrangement where shift times would be eight and a half hours long to permit an unpaid half hour break in the middle.

Later in the week, most of us were back in the Court buildings in Hobart in a formal arbitration hearing before Commissioner Frawley. We lost our argument to retain the 'straight eights', and it was decided that nurses in Tasmania should work eight hour shifts spread over an eight and a half hours. Through his decision, Commissioner Frawley added another brick to the complex, multi-patterned edifice of labour standards, or minimum conditions, or safety net (the terms are really interchangeable) created through the processes of conciliation and arbitration. He had added to the Australian legal regulation of working time in ways which changed the working lives of those nurses and the ways in which the service they delivered was organised. The Commissioner's decision altered the overall cost of nursing labour in Tasmania (a net saving to the Government because the span of the working day was extended), and impacted upon the productivity of this sector of the workforce in ways yet to be measured. It goes

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https://doi.org/10.1177/103530460801800206 Published online by Cambridge University Press

without saying that the decision was unmarked by anyone outside those directly concerned, and like virtually all such similar (and much more significant) decisions on working conditions, unexamined in the literature.

I have perhaps already breached Professor Hancock's stricture that nostalgia is not helpful. This personal anecdote frames my response to the plenary sessions because it highlights some of the important aspects of standard-setting in Australia. In my opinion, the best of what used to be remains an option for the future development of institutions and processes for setting standards in this country. Nothing is to be gained by starting from the premise that Australian labour law fits neatly within a traditional picture of labour regulation, as so often is assumed.

This traditional picture derives from labour law discourse in the British tradition, which sees two distinct categories of such laws. First, there will be laws which structure and permit collective bargaining, so that unionised workers may meet employers with a measure of power and thereby shape their own working lives. Professor McCallum re-articulates the relevance of this vision of labour law for twenty-first century Australia. Secondly, where workers are too weakly organised, law should step in and determine the conditions which should apply in the absence of collective bargaining. This subsidiary 'regulatory' role for law (or legally binding instruments) is also recognised in all the plenary papers. For these workers (originally only women and children for much of the nineteenth and twentieth centuries until European Union law started to make in-roads into the British 'abstentionist' tradition), law provides the terms of the minimum conditions which, in Professor Hancock's phrase, are 'superior to those available in an unregulated market'(Murray 2001).

This simple view suggests that labour law is like a blank sheet of paper. A line could be drawn along the bottom of the page to represent the 'safety net', the hard floor of conditions below which it is unlawful to sink. Above the line, collective bargaining occupies the rest of the page, suggesting freedom and flexibility to bargain 'for more'. This picture implies a clear dichotomy between the two regulatory modes. It also feeds into the view of law-made standard-setting as minimalist, once-and-for-all, one-size-fits-all, centralised, inflexible, static and inherently disconnected from the vital world of bargaining.

In many important ways, this is not a reflection of the dynamics of traditional Australian labour regulation, and nor should it be for the future. In the following sections, I discuss some of the key divergences of Australian standard-setting from the traditional view. I then suggest that many of these elements should be vital components of any future standard-setting regime.

Tapestry, not Floor

The first thing to notice is that, even within the country which developed the traditional view of the legally enforced safety net, there is no net. There is no clear-cut floor 'below which' workers must not 'fall'. In England, early hours of work laws sought to limit dangerously long hours, but they did not do so by creating a single standard working day which is not to be lengthened under any circumstances. The creation of the concepts of overtime and shift work, and

https://doi.org/10.1177/103530460801800206 Published online by Cambridge University Press

the recognition of the demands of particular labour processes and seasonal requirements meant that the 'standards' were more like a complex tapestry of rules. There were special rules for people who pick berries and those who dry fish; people who worked in laundries may do so for more hours than workers in mines are permitted to be deployed, and so on. And the Australian story is if anything more complex still.

Of course, if there were to be a simple line on the page in Australia it would not be the sole product of direct legislation. For the most part, our systems of state and federal conciliation and arbitration system were empowered by legislation to regulate through another instrument, the industrial award. (Legislation did play a role in making standards over the years, and from the 1990s onwards Professor Gardner shows that an increased emphasis on legislation to define and defend individual rights was seen in the federal system.)

Some of the plenary contributions talk about enterprise bargaining as if it completely displaced award regulation as the dominant mode of governance. This might be more true in relation to wages than it is in relation to conditions, where award provisions appear to remain a mainstay even where workplace agreements exist. This occurs either because award standards are reflected in enterprise agreements or because agreements are silent on the award terms and they apply where they are not completely displaced. Thus, this richly detailed and specific patchwork of rules continues to be of relevance to many workers other than those who are characterised as 'award reliant' (Cooney, Howe and Murray 2006).

And while Professor Niland is right to remind us that arbitration 'encouraged a mentality of comparability', the fact remains that award conditions (and pay) provide a vast panoply of standards, even after the post-1996 pressures to reduce their scope. While some award standards are identifiably part of a national standard, many awards continue to provide for localised, specific and peculiar provisions derived from interactions such as my hospital discussion. In some awards, for example, apprentices receive additional protections against long hours of work while in other industries such standards don't exist.

So prior to the major shift to the legislature as the regulator mode of minimum standards under Work Choices, if there could be said to be a 'line on the page' of Australian labour law, it was in fact hundreds of different lines. As the fairness test and the no disadvantage test have taught us, it is not always easy to say whether or not one particular condition is 'better' than or 'higher' than another. So just where on the page those lines should be placed is a further complication when trying to squeeze Australian regulation into the traditional picture.

Centre of Gravity of Regulation

Implicit in the traditional picture of minimum legislated standards is that a central body, Parliament, makes the rule for everyone. The language of the safety net or floor of conditions bolsters this view. However, within the pre-WorkChoices system, the institutions of conciliation and arbitration were structurally equipped to adjust their focus to different loci depending on the demands of the parties and the issues raised. The demands of Tasmanian hospitals could be addressed in great detail and on that location; but at the same time

https://doi.org/10.1177/103530460801800206 Published online by Cambridge University Press

centralised hearings affecting nursing conditions as a whole across all federal awards were also held by a Full Bench of the tribunal.

Professor Niland's plenary discussion uses the evocative phrase 'to lower the centre of gravity for processing industrial relations' in relation to the shift to enterprise bargaining, but my point here is that the capacity to reach down to the micro-level (even of the single workplace) has always been a feature of tribunal standard-setting. The tribunal panel system meant that members of the Commission got to know their industries in at least some detail. I have vivid memories of finding out about working conditions in a run-down ward for terminally ill dementia patients in Perth with Senior Deputy President MacBean, and watching Commissioner Smith sitting on a chair in the red Alice Springs dirt talking to health workers about the particular demands of working in the Territory. The outcomes of these cases were to set the boundaries of worker classification for these jobs (and the minimum rate of pay), a mode of standard-setting unique to the Australian system.

This capacity to adjust the centre of gravity is also present within the national set pieces of the AIRC's national 'test case' function, where the views of a wide range of actors are contested (Murray 2005).

Symbol, not Rule

The traditional picture of minimum labour standards is that they are an inflexible, hard-edged rule. Minimum standards *may* be cast in this form. One of the architects of the British minimum wage told me that a single hourly rate for adults had been selected so that it could be 'written on the back of a bus' to enhance public awareness of this basic entitlement of (then) four pounds fifty pence per hour. A very large bus would be needed to describe the multiple minimum wages extant in Australian labour law, although the rock-bottom federal minimum wage could be so expressed. Hours of work regulation, by stark contrast, is much more complex and subtle. Often what we take to be a 'hard' standard (eg the eight hour day) is in fact a fuzzy principle around which many permitted variations are elaborated. Just how these deviations flow from the symbolic central rule is as important as the rule itself — think about the importance of overtime and its actual implementation on the ground. Australian awards combine both hard and soft rules when dealing with conditions of employment.

In the Australian system, such rules create processes for their implementation and adjustment over time because of the dispute settling role of the AIRC in overseeing their implementation. The AIRC generally adopts a cautious approach to standard-creation and implementation, based on an iterative process of continual dialogue between regulator and interested parties. In my view this is one of the key flexibilities of the Australian conciliation and arbitration system.

The current Government's policy proposal will de-couple the 'right to request' standard (and others proposed in the draft National Employment Standards) from the dispute resolution function of the new tribunal. Not only does this undercut the benefit of the new rule, but it also needlessly limits the regulatory capacity of the proposed system to learn from experience and re-shape standards accordingly.

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We should also remember that a rule is not a picture of reality. Where standards are very flexible they give rise to many possible compliant outcomes. The very concept of the minima implies space to do more above it, even this is done outside the boundaries of formal collective bargaining. Just how this regulatory space is filled is little studied in labour law scholarship, because it relates to the sphere of human interactions at the workplace. The reach of labour law is limited, and the ways in which people select from the options provided for them by available regulation (often in the absence of collective labour relations) repays close examination. Public education and the fostering of vibrant civil society are crucial to ensuring that flexibility is activated to meet the overall systemic goals of labour law in Australia, more of which below.

The Interconnectedness of Minimum Standards and Bargained Standards

Professor Niland's observation that 'the dynamics and the culture of enterprise bargaining are quite different from those in tribunal based conciliation and arbitration' is no doubt true. And Professor Gardner is right to draw our attention to the shift in the AIRC to 'arbiter of safety net rather than regulator'. However, I believe that too decisive a distinction between the regulatory modes of tribunal standard determination and collective bargaining may be unhelpful to future planning.

Feminist labour law scholars have led our understanding of the fact that socio-legal concepts both derive from and construct our notions of reality. The concept of 'employee', for example, constructs the boundary between employee and non-employee. Another example is the way in which the award and legislated concept of annual leave constructs a realm of paid time away from work at the expense of the employer, whereas the award and legislated realm of maternity leave is one of time away from work paid for by the employee (supported by the social security regime).

Such legal constructs are the product of complex interactions within and between social institutions and power relations at particular historical periods. The ideas and assumptions underpinning our view of work are pervasive and influence both collective bargaining and minimum standard setting. It is no accident that neither collective bargaining nor institutional standard setting created entitlements to paid maternity leave in Australia.

Perhaps we need to think about the potentially rich interaction between rule-setting in the two regulatory modes. Test case decisions of the AIRC, for example, might help to set the agenda for bargainers by providing an institution clearing house for regulatory ideas.

There are two key issues here. One is how to institute change in socio-legal concepts which have outlived their purpose. The pervasive influence of the archetype of the full-time standard worker concept is central to systemic discrimination against women workers and men with domestic care responsibilities. The exclusion of dependent workers from systems designed for the worker in a standard employment relationship needs to be contested, as Professor Gardner did in her work in Queensland. The second issue is how to ensure that Australia

https://doi.org/10.1177/103530460801800206 Published online by Cambridge University Press

benefits from the circulation of fresh ideas and information about the impact of the contemporary paradigms on existing workers, employers and businesses. This cannot be achieved if we start from the assumption that workers and their employers determine these matters only through private bargaining.

Of course, as Professor McCallum makes clear in his piece in this volume and in his extensive contributions to the field over many years, these questions arise from the contested terrain inhabited by capital and labour. Professor Niland also alludes to the necessity to deal with potential conflicts between equity and flexibility. Ultimately, many debates about labour conditions are settled through the exertion of actual or implied power.

But even here there is room to note the more complicated picture of power relations evident in the hospital scenario mentioned at the start of this paper. What agenda did the human resource manager of the hospital bring to the issue at hand? Was the union head office opinion the same as the Tasmanian branch office opinion, and where did the shop stewards fit in? Did the rank and file nurses see the issues in the same way as the nurse managers? Were all the parents sitting around the table thinking about the time of the birth of their children, and the importance of continuity of care by midwives? Was everyone a bit in awe of the Commissioner, and so constrained in their expression of their real views? Did the mere fact of the inspection take some of the industrial heat out of the issue, so that the unions were able to tamp down any backlash concerning management's decision after their arguments failed?

In other words, institutional and legal arrangements and constructs will shape the exercise of voice and power, not always in a neat binary fashion where labour lines up against capital.

Voice and Standards

The simple picture of minimum labour standards as set by a remote central authority suggests that the workers subject to this protection have no say in the determination of standards, other than their role in electing the parliamentarians who made the laws. Of course, the first protective labour laws were made to help those who did not then have the right to vote at all, so those workers didn't even have this basic right of participation. Parliament spoke for them.

As much of what I have said above shows, the conciliation and arbitration system and what Professor Gardner calls its 'web of regulation' has been remarkable in its openness to many different voices and the scope of its regulatory tools to develop, assess, refine and implement new standards. Conciliation and arbitration provided elements of adversarial procedure (with all the rigour and scope for canvassing issues that entailed) and the opportunity to deploy modes more akin to inquisitorial civil law processes.

At the same time, it must be recognised that the Australian tribunal system was something of a club, and that the loudest voices heard were organised labour and capital. The constitutional foundation of the traditional system meant that there was often only limited opportunities for other groups and individuals to be heard. The new constitutional basis of the federal system has done away with the underlying adversarial premise of conciliation and arbitration, and it

is hoped that the opportunity to open the dialogue about labour standards even more broadly will be taken up by the Government and its new institutions.

In the Public Interest

It is often assumed the protecting 'voice' is an end in its own right. But I would argue that an overarching systemic goal of acting in the public interest should be strongly entrenched in any new system. In 1988 I participated in 'second tier' bargaining in the health industry. At this time, wage fixing was shifting from a purely centralised approach (it was never pure, but that is another story) to a mixed approach whereby a first increase was given to all but a second percentage change was dependent on productivity bargaining at the workplace. I attended a meeting of union members, all of whom were male, where it was proposed that we give up entitlements to paid maternity leave in exchange for the second tier increase. Of course, as custodian of *future* workers' conditions, the union could not approve their members' approach in this instance.

My point is that the democratisation of decision-making should not be the final systemic goal of any system adopted. Input from outside the employment relationship is a vital part of a healthy process. Professor McCallum suggests that Australia is a country where 'the concept of gender equality is less developed': if we adopted gender equality as a systemic goal, the rules of the standard-fixing game should be adapted to ensure that any decisions contrary to this end would be overridden. There are already examples of such an 'override' function in the current Act.

The Future

My response to the plenary papers has been to argue for a conservative approach to minimum labour standards which starts with the proposition that much of our existing Australian federal labour law is relevant to modern, public, democratic, flexible, effective, productivity-oriented standard-setting.

I agree with the concerns raised by Professor Hancock about the role of Parliament in setting standards. Professor Hancock raises issues of politicisation, which are certainly pertinent, but I am more worried about the loss of regulatory capacity and flexibility entailed in such an approach. However, it seems that the government is committed to the WorkChoices model where minimum conditions are set by federal law. Given this, it is important not to fall into the stale concepts of the static, minimalist safety net to shape our view of the work these laws should do. This means that it is a legitimate function of the Parliament to critically analyse existing constructs to ensure that they meet the needs of modern Australia, and to develop new ones as necessary. The boundaries between 'employee' and other vulnerable workers is a key area which requires careful consideration in any new legal framework. Processes for the on-going determination of this boundary may be part of the future work agenda for Fair Work Australia.

One job for the new federal laws is to provide the overriding systemic elements which will disallow bargained or other outcomes inconsistent with broad, agreed goals such as decent work (the ILO's omnibus goal), gender equality (Professor McCallum), the dignity of workers and productivity-enhancement

https://doi.org/10.1177/103530460801800206 Published online by Cambridge University Press

(Professor Hancock) and the furtherance of the public interest. Another is to ensure that the standards set are open-textured enough to permit flexible application in different workplaces and for workers with different needs. This flexibility must be balanced with the 'plugging in' of the standards to some kind of independent process for dealing with disagreements about the standards or receiving information about difficulties in their application. Such tasks were meat and potatoes to the old Commission, and its repertoire of regulatory devices ranging from conciliation to arbitration should be reflected in the new institutional arrangements of Fair Work Australia.

The institutional arrangements will of course be vital. I endorse Professor Hancock's comments about the positive aspects of the Fair Pay Commission which should be extended to the proposed Fair Work Australia. Innovative and creative regulation will be furthered if FWA is permitted to act on its own motion to conduct investigations and enquiries.

FWA's public outreach functions should have a strong educative focus aimed at ensuring the broadest possible knowledge of rights and standards. In an earlier section I argued that flexible rules are not designed to create a single real world outcome, and that many people operate around (or despite) existing rules. FWA should be obliged to educate workers and employers in this realm, especially about some of the overarching and non-derogable standards mandated by the system. My emphasis on the flexibility and localisation of standards in other cases might seem inimical to any straightforward education campaign (the sign on the back of the bus), but most workers are interested in and knowledgeable about their entitlements and would be receptive to relevant information if it were appropriately presented. On some matters, of course, the 'back of the bus' approach would be both necessary and appropriate: procedural minimum standards, such as the right to join a trade union of the worker's choice, should be publicised as broadly as possible. Information systems and processes should also be established to provide feedback to and from the bargaining and minimum standard-setting processes, so that good ideas are circulated and problems identified before they become entrenched.

Old features such as the institutional capacity to intervene at various levels in the industrial relations system, the ability to make specific local rules and hear from ordinary people about their impact, and capacity to create overarching goals which override such localised outcomes (whether bargained or not) should all be re-constituted in Fair Work Australia. In this way, Australian traditions of regulatory flexibility and innovation will continue under the new regime of the Rudd government.

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