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Labour-centred Politics and Judicial Institutionalisation: The Lineaments of an Early Proto-Regulatory State Model in Australia

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Abstract: Australia, since the early 1980s, has been a leading advocate and practitioner of the neo-liberal economic model, also known as the Anglo-Saxon (or Anglo-American) model due to its geographical origins in the UK and the US, and its subsequent ascendancy in Australia, New Zealand and Canada, prior to its global hegemony (Bayari 2012a). A major component of this model has been the deregulatory market policies that have come to dominate all aspects of life. There are prior discussions of Australia's deregulation dogmas and practices that this paper does not cover (Bayari 2012c, Bayari 2012d). Interestingly, Australia was a pioneer of a proto-regulatory economic model at the turn of the twentieth century. The emergence of the federal state in Australia in 1901 led to a level of hitherto unseen level of intervention in the market. Australia, like Canada, the US and New Zealand inherited the political, legal and other institutions of the UK. However, the Australian state followed a different path by regulating capital and labour relationship through the enforcement of compulsory conciliation and arbitration, which eventually led to the creation of a continuous system of minimum wage determination for unskilled labour, and skilled occupational categories (Bayari 2012b). This proto-regulatory state model of the Antipodes preceded the post-Second World War regulatory state in the West by decades. This paper does not argue that a proto-regulatory model of state continued to develop which is a question that is outside the discussion here, however the 1941-1949 Labor governments, under John Curtin and Ben Chifley, created new institutions for welfare, and health care provision, and attempted to create a new society, such as in terms of defining the content of citizenship, and creating the notion of entitlement to non-market wage, while the governments of the period from thereafter until 1972 can be characterised as calculatingly inert. This paper however focuses on the period ending with the 1907 *Harvester* judgment.

Keywords: Australia, institutions, labour, proto-regulatory state, unions.

Introduction: Labour-centred politics

The Australian Labor Party (the Labor)ⁱ arose from an atypical experience of labour-centred politics

in the nineteenth century. In 1891, the Labor Electoral League in New South Wales, and the Worker's Political Association in Queensland formed, and the latter succeeded in establishing a short-lived minority government in December 1899 (Markey, 1988; Murphy 1975). These two parties received impetus from the 1890s' strikes that troubled the nation (Bowden, 2010: 4). Workers and unionists in other Australian colonies (forerunners of the present states) also formed 'labour' parties, and on 8 May 1901, union delegates across the country decided to form the Federal Labour Party, which later became the Australian Labor Party (McKinlay, 1990). Chris Watson's Labor government was the first labour government in the world, which made the Labor a successful working class organisation and a rarity among the English speaking countries (Berger, 2007: 311, 314). In its early federal existence, the Labor remained divided over whether the tariffs would ensure higher wages or merely higher profits for employers, and the former opinion eventually prevailed (McMullin, 1991: 46). This became an issue connected to development of federal compulsory arbitration. The first Labor government, formed under the leadership of Chris Watson in 1904, was a short-lived minority government. In 1910-1913, the Labor formed its next government and ruled on its own right, and Australia's Labor prime ministers within the first decade of the Federation were Chris Watson (1904) and Andrew Fisher (who led three governments: 1908-1909, 1910-1913, 1914-1915).

In the UK, the Labour Party [note the different spelling] formed in 1906, but its predecessor organisation, the Labour Representation Committee dated back to 1900 (Foote, 1997). The Labour Party in the UK formed its first two governments, in 1924 and 1929, respectively, with the support of the Liberal Party, the first of which was a government of consensus on the promotion of free trade (Howell, 2002). After its foundation, the Labour Party of the UK grew rapidly but it did not gather the support of all labour voters. The Independent Labour Party, established in 1893, also became an affiliate of the Labour. The notion of free trade, promoted by the Labour in the UK, was diametrically opposite of the early twentieth century Labor platform in Australia. After its establishment phase, the Labor came to rely for its existence on tariff protection of the economy, minimum wage guarantees, and the exclusion of the competition from its "designated others".

The differences in the nineteenth century characteristics of the Labor in Australia, and the Labour in the UK are, partially explainable by differences in social agency, (individuals and the organisations that were behind their respective foundations), at the periphery (Australia) and the centre (the UK), and differences in the economic development levels (represented by the trade and investment relations), all of which were also influenced by their respective geographic locations. The Labor in Australia became the earliest successful labour experiment in the world (McKinlay, 1981). In the first half of the twentieth century, the composition of the Australian labour movement was somewhat different from that of the UK, especially considering that the political history of Europe provided more of an impetus for the Labour. Europe was a place with a distinct rural and urban division of

population, and a swiftly sharpening conflict between labour and capital in which the latter had an overwhelming power over the formation of new institutions. Australia was born an urbanised nation, without the experience but the benefits of an industrial revolution, and in the last two centuries, the great majority of the population has only ever lived in the urban centres (Powell, 1991; Statham, 1990). The industrial workforce has only ever been urban-concentrated. When the rural population emerged in Australia the experience was more rapid, and under a social organisation that was distinctly different from that of the UK. As a tragic historical consequence, once the frontier of settlement in the southeastern and eastern third and the southwestern corner of the continent had reached the limits of pasturage by the 1850s, no traditional Aboriginal societies survived (see Lloyd, 2010: 36).

Broadly, the Labor in Australia developed out of organised labour movements, while the Labour in the UK was more of a movement of combined social forces and historically accumulated experience of social agents. The UK phenomenon was distinctly more bourgeois. Moreover, in the UK, the Labour historically relied on the support of Fabian socialists who were a political force in the UK from the nineteenth century onwards (Bevir, 1996; Britain, 2005: 15, 19). In Australia, the precursors of the Labor in Queensland and in New South Wales, and the first Fabian Society came into existence within months of each other in 1891 (Matthews, 1993: 2). Fabian socialists were a moderate part of the early labour movements in Australia in comparison to the socialist agitators and militants while the predominant trend within the Labor leadership appeared to be down to earth industrial reform (Matthews, 1993: 5). The Labor did not want to lose another major battle against employers, as had been the case with the 1890s' strikes. Prior to the *Conciliation and Arbitration Act* (Commonwealth) 1904, employers could pursue labour leaders through the legal system, and during the 1890s' Depression, the labour movement was continuously in a vulnerable situation (Murphy, 1983). The only way forward was to influence the state so that it would nominate itself as an umpire. Between 1890 and 1908, there appeared a rift between the Fabians and the Labor, the Victoria Fabian Society dissolved in 1909, and no successful association developed between the Fabian socialists and the Labor until the late 1960s (Matthews, 1993: 6). This was another difference between political contents of the Labor in Australia, and the Labour in the UK, and underlines the disparities in their respective cultural structures. The Labor was more pragmatic, yet could afford to be exclusive as discussed below, assured by the notions of social "cohesion" of that time. In contrast to the situation in the UK and Australia, in the US, a labour movement-based party has never emerged due to judicial antagonism towards union demands for reform, the structure of the nation's domestic capitalism, dominant unions identities, and labour leaderships' own attitude to political representation (Cobble 1999; Pierce, 2000). The structure and the functions of judiciary were different from that of Australia.

Economic development and the post-1901 federal politics

In Australia, from the 1820s onwards, petty bourgeoisie, professional elite, free settlers and private landowners began to change the demographics of the colony, and the part of the economy that relied on convict labour intensive agricultural production began to lose its weight (Clark, 1968). By the 1850s, the colony of Australia had become more than a government financed venture in a faraway land (Hughes, 2010). Australian economy had developed a private sector that equaled the size of the government sector by the 1850s, but the wages and conditions of labour contracts between workers and private employers were unregulated until the 1890s, which was in large part necessitated by the strikes across the country in the middle of a depression (Macarthy 1970b: 5). ‘The establishment of special tribunals in Australia for industrial relations purposes had its origins in the major strikes of the 1890s. These bitter struggles between capital and organised labour caused widespread dislocation and distress. The damage done to the social and economic fabric of colonial society led to a ‘new province for law and order’ enforced by arbitration of a third party’ (AIRC, 2006: 3). ‘During the period 1855-1900, colonial governments played a central role in the construction of economic infrastructure. ... A large share of the capital expenditure was financed through borrowing, with gross debt rising from around 3 per cent of GDP in 1855 to around 100 per cent of GDP in 1900 ... For the first decade following Federation, the Australian government did not have any public debt as budget revenues exceeded outlays’ (Di Marco et al., 2009: 8). International trade grew faster than the production in 1853-1872, about the same rate in 1872-1911, and the nineteenth century British Empire was a large discriminatory trade and investment bloc (Hirst and Thompson, 1999: 22, 31). This benefited Australia’s trade and fuelled economic expansion. The state and federal governments began to develop relatively stronger fiscal positions.

Regulation of labour disputes prior to the 1901 Federation was on the agenda of respective colonies. There was strong political will for the institutionalisation of compulsory arbitration in order to prevent a repeat of the 1890s’ strikes. In 1890, Charles Kingston, South Australian Attorney General (later acting Premier, and Premier, barrister, and member of the first Australian Parliament) introduced compulsory *Conciliation and Arbitration Bill* in South Australia. In 1891 he proposed, to The First National Australasian Conference in Sydney, *A Bill for an Act to encourage the formation of Industrial Unions and Associations, and to Facilitate the Settlement of Industrial Disputes* (Parliament of Australia, 2003: 1-4, Rowse, 2004: 21-22). Following the 1901 Federation, the labour movement, along with the reformist politicians, wanted labour market regulation across the new nation (Turner, 1979). Kingston also drafted the first *Commonwealth Conciliation and Arbitration Bill* 1903, which never got introduced to parliament but consequently became the basis of *The Conciliation and Arbitration Act* 1904 (Hamilton, 2011:22- 23).

Minority governments and legislative consensus

From 1901 to 1910, Australia had several minority governments with fluctuating degrees of support from various parliamentary parties. Edmund Barton was the first prime minister (1901-1903), and thereafter followed Alfred Deakin (the first Deakin government) (1903-1904), Chris Watson (minority Labor government of 1904), the Reed/McLean government (1904), the second Deakin government (1905-1908), the Deakin/Cook Fusion government (1909-1910), and the first Labor majority government under Andrew Fisher in 1910-1913 (Carroll, 2004: 47-54). All of the Deakin governments depended on the support of the Labor (La Nauze, 1968). Neither the Barton government (1901-1903) nor the Deakin government (1903-1904) could get Parliamentary approval for the *Conciliation and Arbitration Bill*. The Labor wanted the Arbitration Court to go beyond the limits imposed by the Constitution to have the authority to deal with disputes between State governments and their public servants but the 1904 Watson Labor government also failed to pass the *Conciliation and Arbitration Bill* (McMullin, 2005: 20-21). The Labor, along with major reformers like Kingston, had not forgotten the effects of the 1890s' depression on labour, and the attacks on unions, and thus wanted an unconditional federal jurisdiction over arbitration of industrial relations (McKinlay, 1981:19). The points that the Labor insisted upon went into *The Conciliation and Arbitration Act* 1904 passed by the Reed/McLean government of George Reed's Free Trade members and Allen McLean's splinter group of Protectionists (Scalmer, 2009: 48). The coverage of the *Act* extended to designated groups, agricultural workers, and domestic servants, with a 'preference to unionists' provision, which essentially promoted registration of industrial organisations, preference to unionists, thus stimulating unionisation growth (Brett, 2009: 26; Marsh, 1995: 21). One this new avenue for union power opened up there began attempts to limit the content of union memberships, as discussed below. The legislation curtailed a repeat of the 1890s' proto-fascist employer tactics against unions for a period of time but the federal government in the 1920s attempted radical rollback of these reforms (see Bayari 2012b). The 1904 *Act* became an institutional milestone. In 1906, the Deakin government increased the number of the High Court of Australia justices to five, in line with the 1901 *Constitution*, and one of the newly appointed justices was H. B. Higgins, who also got appointed as the new president of the Commonwealth Court of Conciliation and Arbitration (Macintyre, 2004: 56-57). This period was the beginning of the institutionalisation of the minimum wage, as a condition of the labour contracts in Australia, a particular experience that was lacking in all other Anglo-Saxon economies with the exception of New Zealand. The process of judicial institutionalisation in Australia however went further than was the case in New Zealand.

The period of 1904 (the establishment of the Commonwealth Court of Conciliation and Arbitrationⁱⁱ) to 1907 (the *Harvester* judgment, which is the establishment of minimum wage scales for different skill levels, including unskilled work, and the origin of the notion of 'fair and reasonable wage') was

arguably characteristic of the emergent fiscally secure federated state (see Turner 1978). There is prior coverage of the *Harvester* judgment history elsewhere (Bayari 2012b). The process that began with the 1907 minimum wage determination followed in the footsteps of a history of legislations that included the creation of responsible government in New South Wales, in 1822 (see the chronology in Chart 1). Wage regulation politics (at state and federal levels) of the late nineteenth and early twentieth centuries were a result of the consensus of social actors brought together by unusual historical circumstances (Macarthy, 1970a: 182-183). The political class was preoccupied with federal matters. The business class was divided along primary and manufacturing industries which were themselves divided among sweatshop owners and those who preferred to deal with unions to ensure reliable business conditions. Unionised labour preferred government assurances, and its arbitration enforcement powers, to employer promises (Macarthy, 1970a: 183). Many nations were preoccupied with protecting their markets at the time (Chang, 2003). Setting up of an arbitration court to enforce a minimum wage for unionised workers was however a phenomenon exclusive to the Australian federal state.

The 'fair and reasonable wage' adopted in the *Harvester* judgment of 1907 became established through the explicit exclusion of women, Indigenous Australians, (Aboriginal Australians and Torres Strait Islander Australians), Pacific Islanders, and migrant labourers, a course of action which often accompanied an exclusion from occupational categories, and union membership (Hearn, 2005: 329-330; Lake, 2004: 199-200, Martinez, 2011, McCorquodale, 1985: 3-6; Shnukal, 2011; Whitehouse, 2004: 210). For Aboriginal Australians, this narrative paralleled that of the successive policies of 'protectionism', at missions and reserves, and 'assimilation', which regulated their lives throughout the nineteenth and the early twentieth centuries, when many Aboriginal men and women were drafted into the ranks of either lowly paid or unpaid labour, or labour that were (fully or partially) recompensed in non-monetary terms (see Bennett, 2005; Cole, 2010: 205-218, 210-211; Grimshaw, 2011: 67, Taffe, 2005, White, 2010; Young, 2010).

This history of exclusion from minimum wage entitlement was socially conditioned. Australian colonies of the nineteenth century were preoccupied, among other matters, with the maintenance of the presence of the white population in a geographical environment that was far, and different from the colonial centre, which influenced the state's population policies for several decades following the 1901 Federation (see Anderson 2006, Falconer 2003). Labour political movements relied on the support of social groups, legal and political elite, urban intelligentsia, and reformist employers (Beilharz, 1994). Yet even the most radical individuals, including labor pioneers, of the late nineteenth and early twentieth century Australian politics had strong racial opinions, [which was also common in other imperialist powers' dominions], more specifically targeting the migrant labourers in Australia, and they wanted to avoid the inflow of cheap foreign labour supply [such as the subjects of

the British Empire from the territories in Asia] that could undercut local labourers' wage demands, and thus they looked at the state to formulate policies reflective of their convictions (Dyrenfurth, 2005: 126, Jupp, 2007: 9). These policies, in part, originated from the apprehension over possibility of uncontrolled migration, the rise and/or expansion of new colonial powers [Dutch, Portuguese and Spanish empires already held territories around the Australian waters and the French Empire annexed New Caledonia in 1853, and the German Empire annexed northeast New Guinea in 1884], and the desire, on the part of the local workforce, to curb the practice of indentured Pacific Islanders (Barclay and West, 2006: 75). Overall, most of the white population in the nineteenth century Australia arguably wanted a structured avoidance of competition from others who could offer their labour at lower levels of pay. In the sectors they wanted to work, they did not want the introduction of new factors into the capital and labour conflict, which could undermine their bargaining position against employers.

The major social tragedy in this narrative was the consequent exclusion of women, Indigenous Australians, Pacific Islanders, and migrant labourers from the federally set minimum wage entitlement, a situation that lasted for a long time. Inequality at the level of minimum wage determination, and the social consequences continued due to socially conditioned and politically and judicially maintained weaknesses of these labour categories. The histories of significant reforms and developments from the 1940s to 1970s, even much earlier in some cases, to remove these exclusions will have to be the content of other papers (see Bayari 2014). While subsequent legislations over a period of several decades remedied these social exclusions, this paper has focused on the political parties, politicians and of the late nineteenth and early twentieth centuries when a strong proto-regulatory state existed in Australia.

Conclusion

In the late nineteenth and early twentieth centuries, capitalist nations took different paths in governing their respective populations. State policies that governed labour markets were double-edged. They were attempts to be economically competitive, but at the same time, they sought to maintain a discipline over the population. This is why some of the most competitive economies have never felt obligated to neither determine a national minimum wage to guarantee a living wage for people, nor enforce it, for example, in the way they enforced laws protecting private property owners. Frequently, even most rudimentary political acts to intervene in the labour market came to be considered "radical", and this history is too broad-layered and elongated to treat here appropriately. Australia's experience did not follow these trends, and the paper has defined this to be due to the lineaments of a proto-regulatory state in Australia. Following the expansion of white settlement in the aftermath of the establishment of the penal colony in 1788, the composition of the Australian

economy began to resemble those of its European counterparts. The expansion of manufacturing transformed the labour force and the labour market. In the first decade of the twentieth century, Australia had the largest manufacturing sector in south of the equator (Bayari 2013). The principal form of ownership in the sector was domestic. Labour market-determined social issues influenced Australian politics, and labour-centred politics from the last decade of the nineteenth century onwards reached a phase of workable political system in the first decade of the twentieth century. The era of new politics created new judicial institutions such as Commonwealth Court of Conciliation and Arbitration along with new categories of judicial authority. This paper presented the crucial developments in the later part of the nineteenth century, and through 1904 and 1907 when the compulsory arbitration system came to be established. The hegemonic ideals behind these developments ranged from notions that were ahead of their time to convictions of acute social conformity. The minimum wage history in Australia emerged from specific domestic conditions. However, this history did not follow a model of some kind of innate progress to contain the entire labour market, and reforms of new dimensions proved continuously necessary.

Chart 1: 1770-1907 Judicial Acts

1770

Lieutenant James Cook annexes east coast of Australia for the British Empire

1787

The British Parliament passes The Act Constituting a Court of Criminal Judicature in New South Wales

1788

The First Fleet of British ships arrives in Sydney and the Colony of New South Wales is established

1822

The British Parliament passes The New South Wales Act, creating the Legislative Council, the first Australian legislature

1841

New Zealand splits from The Colony of New South Wales to form a separate colony

1842

The British Parliament passes the New South Wales Constitution Act

1850

The British Parliament passes The Australian Colonies Government Act. South Australia, Tasmania, and Victoria gain self-rule based, on the New South Wales model of the Legislative Council

1851

Victoria splits from New South Wales

1852

The British Parliament passes The New Zealand Constitution Act. New Zealand becomes a self-ruling colony

1855

The Colony of New South Wales passes The Constitution Act, which increases the membership of the Legislative Council

1856

The Colony of New South Wales established "responsible government"

1857

New South Wales, Victoria, and South Australia discuss the establishment of a federation

1858

The New South Wales Electoral Reform Act establishes male franchise and the world's first secret ballot for parliamentary elections

1859

Queensland splits from New South Wales

1863

Intercolonial Conference of Treasurers held in Melbourne to discuss tariffs and customs unification

1870

The start of Australia's twenty-year long economic boom.

1873

The Australian Colonies Duties Act passed by British Parliament.

1876

New Zealand Parliament passes The Abolition of the Provinces Act forming a single united political entity.

1883

State Premiers formally agree to establish Federal Council

1885

An Act to Constitute the Federal Council of Australasia passed by the British Parliament.

1886

The Federal Council meets for the first time in Hobart. The agenda includes French Empire's annexation of New Caledonia, and the German Empire's annexation of northeast New Guinea.

1890

Melbourne Conference held. Australia's economic boom ends. The Depression starts. Labour strikes begin. The collapse of the union movement begins under employer offensive. The nation suffers from mass unemployment.

1891

Australian labour seeks to form political organisations. The Labor Electoral League in New South Wales and The Worker's Political Association in Queensland formed. The First National Australasian Conference meets in Sydney.

1892

The New South Wales government passes the Trades Disputes Conciliation and Arbitration Act but does not compel employers to appear in court, unions are dissatisfied.

1895

Premiers meet in Hobart.

1896

Bathurst hosts People's Federal Convention.

1897

The Second National Australasian Convention begins, ends in 1898.

1899

Premiers meet in Melbourne, amend the Constitution, and decide on a new capital city.

1900

The British Parliament passes The Commonwealth of Australia Constitution Act.

1901

1 January. The Commonwealth of Australia is proclaimed. 29 March, the first federal elections held, the first Prime Minister is Edmund Barton. 31 March, the first census held. 8 May, the decision is made to form the Federal Labour Party.

1901

9 May. The first Commonwealth Parliament opens in Melbourne.

1901

The Immigration Restriction Act 1901.

1903

The Commonwealth Naturalisation Act 1903.

1904

The Conciliation and Arbitration Act 1904. The Act enforces federal compulsory arbitration, ensures employer recognition of unions to avoid the possibility of the repeat of the 1890s' anti-union actions.

1907

The Harvester judgment sets basic wage for male workers who are members of federal unions.

Source: The author's compilation.

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- ⁱ The present day American method of spelling of the party's name was adapted later, partly in an attempt to distinguish it from the UK's Labour Party, and the British political context (see Hoyle 1981).
- ⁱⁱ Several times, new legislations modified the title, powers, and responsibilities of the Court. In 1956-1973, it became Commonwealth Conciliation and Arbitration Commission, in 1973-1988, Australian Conciliation and Arbitration Commission, in 1988-2009, Australian Industrial Relations Commission. After 2009, it became Fair Work Australia.

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