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The Origin of Minimum Wage Determination in Australia: The Political and Legal Institutions

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Abstract

This paper discusses the establishment of the minimum wage determination process in the early twentieth century Australia, following the institutionalisation of compulsory industrial arbitration between capital and labour. This process led to the 1907 *Harvester* judgment whereby the Commonwealth Court of Conciliation and Arbitration decision determined, for the first time, the amount of ‘fair and reasonable wage’ that the employers were required to pay. The discussion focuses on the role of the state in the labour market regulation, development of the related legislation, and the role played by Justice Henry Bourne Higgins. The paper briefly discusses the *Conciliation and Arbitration Act 1904 (Commonwealth)*, and the setting up of the Commonwealth Court of Conciliation and Arbitration. There is a comparison of the nature of minimum wage law developments in other Anglo-Saxon economies and the paper draws on the history of the state involvement in the regulation of the economy. The minimum wage became institutionalised in relation to the tariff protection of the Australian market from the twentieth century onwards, and the analysis herein includes the discussion of how tariffs contributed to the possibility of wage controls and labour market stability.

Keywords: Australia, labour, minimum wage, tariff, arbitration

Introduction

In the late nineteenth and early twentieth centuries, many regarded the Antipodean settler colonies of Australia and New Zealand, as being in the vanguard of legislative experimentation that promised a more just and

harmonious social order, according to Cox (2006: 107). Universal suffrage for women and men, social security benefits for the elderly, guaranteed minimum wage ('fair and reasonable wage') for male workers, and compulsory industrial arbitration for workers and employers, captured the imaginations of social liberals, reformers and radicals for whom the Antipodes constituted an exemplary model (Cox 2006: 107).

In the late nineteenth century, falling export prices had severely affected the Australian economy. The nation was suffering a continuous recession, business failures, and widespread unemployment. The continuing depression increased job insecurity and the lack of bargaining power for labour, and the he so-called period of great strikes of the 1890s diminished the power of labour unions and undermined their legitimacy (Markey 1994: 20-21). The strikes of the 1890s reduced unions and employers' opposition to a system of arbitration (ABS 2011). According to Beilharz, this period is the time of the origin the Australian Labor Party (the Labor), and the start of the social democrats, the Fabians and other political movements in the country, though "the statist" with their emphasis on the parliamentary path, would eventually win (Beilharz 1994: 52-55)

Despite the hegemonic liberal assumptions of the time, the Australian labour market of the late nineteenth century was not progressive, and was characterised by very low pay levels, dangerous, unsanitary and harsh conditions which forced the federal government to regulate the labour market, as per the official labour history (see ACTU 2009). Earlier in 1891, in a legislative proposal to avoid industrial strife, South Australian Attorney-General Charles Kingston had proposed *Bill for an Act to encourage the formation of Industrial Unions and Associations, and to Facilitate the Settlement of Industrial Disputes* to the Constitutional Convention (Parliament of Australia: Senate 2003: 1-4). This proposal did not have a positive outcome at the time but perhaps represented a bigger move in the same direction. Despite the set back, eventually the *Conciliation and Arbitration Act 1904 (Commonwealth)*, established the Commonwealth Court of Conciliation and Arbitration and gave it powers to prevent and settle industrial disputes.ⁱ The establishment of the new

rule in Australia in 1901 was in many ways the establishment of liberal principles that local reformers, 'social liberals' and labour movement had long sought, in Australia as well as in the nations from which they had migrated to Australia. It is important to recall that history is result of competing agencies and the successful side gets to establish its agenda (or what it thinks of as its agenda).ⁱⁱ McKenna states that, the UK granted responsible government powers to the Australian colonies in 1856, forty-five years before the Federation, [and whilst the convict transports from the UK were continuing], and a long while before the ascent of those powers, the ideas of a republic had been around in Australia (1996)ⁱⁱⁱ. In fact, in earlier decades, the courts served as a de facto parliament in the absence of political structures, according to McKenna (1996).^{iv}

Mitropoulos describes the social history from the Federation onwards as follows.

The 1901 Federation confirmed the regulation of labour (and money) as the core of the nation's constitution. Compulsory arbitration (in NSW since 1901 and federally since 1904) gave conventional form to struggles over the division and character of work time, and enshrined such forms in the 'basic wage' ruling of 1907. ... Arbitration also provided a formal means for the management of the transition from the structures of command of slave [a reference to kanakas?] and convict forms of labour, to wage labour and an identity centred on wage. Arbitration gave legal sanction to the wage as the appropriate form of existence of the working class, administering and formalising it as contradictory technique for the systematic deliberations over the social division of work time. By the early 1920s, most workers were subject to some form of wage regulation (Mitropoulos 1999: 111).

The Australian state took over the arbitration of labour and capital disputes with the ascent of the Constitution, which gave the Federal Parliament the power to do so in *Section 51(XXXV)* (Davidson 1997: 56). Following the 1901 Federation, trade barriers and industry protection have played a central role in industrial development as the new federal government created a system of tariffs via its exclusive power to impose customs duties (BIE 1996: 14). Following a review in 1908, tariffs were raised to an average of 20 per cent, enabling the protected industries to pay 'fair and reasonable wage' to labour (BIE 1996: 5).

The idea of using the tariff system as a way of insulating the economy was not

new at the time, nor was it exclusive to Australia.^v The Australian ‘tariff policy was designed to protect the Australian economy from cheap imported goods and to provide employment for an expanding labour force. It also enabled wages to be determined by tribunals more on social and equity grounds than in accordance with productivity and market forces’ (Lansbury and Davis 1987: 99). Thus, in Australia, being on a wage contract entitled workers to a standard of living, which was a situation that did not exist elsewhere (Castles 1996: 89).^{vi}

The protectionist policies were connected to the desire to increase employment with relatively higher wages that would not have been otherwise possible (Hagan 1983). The policy of imposing immigration restrictions also protected workers in the local labour market from a possible influx of the providers of competitively priced labour (see Cahill 2007: 18). The benefits of the tariff increases, and the speed in which they occurred were a point of debate because the ‘free trade’ advocates were always present (see Carmody 1952, Corden 1957). The 1901 Federation was a culmination in consensus of competing ideals (and politicians and parties) of protectionism versus free trade. By 1901, the protectionists had won but the free traders never went away.^{vii} Overall, the import substitution policy of the 1930s benefited from the preceding protective policies (Forster 1970: 13). Thus, the state was conscious of its responsibilities for the development of the continent when it instituted the protectionist system (Smyth and Cass 1998). This shows that there was continuity in the ideas that governed development strategy.^{viii}

The state and the market

Australia is often perceived as an extension of the UK in terms of culture, language, and market structure (Bayari 2011: 9, 10, 17). This has been historically accurate for many institutions, but Australia is also distinguishable as having had a peculiar development in terms of the extension of its legislature that dictate social structures via the construction of legality (Davidson 1991). In particular, the development of the idea of the Australian state intervening in the market has unique characteristics. Sydney was the first settlement in the British colonisation of Australia. The number settlements increased and formed

into the states of New South Wales, Victoria, Tasmania, Queensland, Western Australia, and South Australia. The two territories of Northern Territory and the Australian Capital Territory (ACT which was first named 'the Federal Capital Territory') came later.^{ix} Australia's colonial governments saw their activities as a way of ensuring the continued supply of labour and capital from overseas, while simultaneously delivering the infrastructure and communications services (Butlin 1982: 82-84). Long before the age of Keynes, there was an overriding need for an interventionist state in Australia. The Australian market developed because of state initiatives, and an Australian economy could not have come into being without this state paternalism, according to Kelly (1992). White Australia policy, tariff policy and compulsory labour-capital arbitration all accompanied this paternalism (Kelly 1992: 8). One element that made the development of Australia different was relatively higher levels of urbanization of the white population (Statham 1990). Unlike Europe, there was no mass of a rural population. The early twentieth century reformers in Australia sought state intervention to realise their vision of 'garden city' for which they emphasised private ownership versus leasehold and co-partnership housing (Murphy 2009). This is an example where a social movement sought to redefine ownership categories in a new vision of urban life. This perhaps complements the notion of the existence of radical ideas, pertaining to the white society, in the continent since the First Fleet in 1788 (see McKenna 1996).

The capitalist market everywhere has emerged through an extended period of state interventionism, and even the implementation of *laissez faire* was planned by the state (Polanyi 1957: 140). The liberal notion that *laissez faire* represents liberation from the state power is quite an unrealistic perspective, in the case of Australia where the market had to be assisted for its growth and the labour market was regulated for industrial peace. Economic historians recognise that government investment encourages capital formation under conditions of capital shortages, and that state expenditure on public works attracts private investment when the economic infrastructure is undeveloped (Barbalet 2001: 99). Colonial Australia lacked private capital, and the continent's size meant that any infrastructure spending would have to be free of profit concerns, at least in

the immediate term (see Encel 1970). The state's activities were seen as necessary for the existence and management of the continent's economy. For over a century, beginning with the early colonial days, industrial growth was sustained, protected and regulated by the state, and there was little that was outside the domain of this economy/state partnership (Encel 1970: 319). The *Harvester* judgment, as discussed below, can perhaps be viewed in this context. The state chose to regulate the labour market and its conditions, which the state in the UK had chosen not to do.

The Australian economy was thus characterised by a state structure that had a form of authority over the economy, from very early on.^x The federal state through 'its controls over tariffs and industrial relations, and a direct control over wages and thus over the distribution of national income ... held and used its power both to resist private capital interests and, within that large measure of relative autonomy, form or at least protect the social structure' (Pusey 1991: 213). The protection offered by the state extended to guaranteeing a minimum wage very early in the twentieth century, and the central wage-setting and tariff protections for industry complemented that (Macintyre 1983: 105). Australia's living standards were highly dependent on the tariff policy. The 1929 Brigden Committee Report called *The Australian Tariff: An Economic Inquiry* (Brigden 1929) discussed the question of protectionism and the co-dependency of tariff increases and wage increases. As a rise in the latter led to an increase in the former, the report expressed some doubt that this was sustainable in the long run, and concluded that the level of average income in Australia could not be maintained without the levels of protection existing at the time (Capling and Galligan 1992: 93). Australia did have to face these issues from the mid-1970s onwards, which principally affected the manufacturing labour market and the types of foreign investment (Bayari 2008).

The state and minimum wage

Since the industrial revolution and the accompanying rise of labour-centred social movements, the Western style industrial relations, its social actors, institutions and the state apparatuses have pondered on the question of the

lowest end of pay scale in the labour market which is often referred to as the minimum wage.^{xi} The Australian federal state (the Commonwealth) came into existence in 1901 unifying the states and territories, separated by the vastness of the continent and that had developed from the previous colonial administrations. The notion of minimum wage entered the federal industrial relations with the 1907 *Harvester* judgment.

The establishment of systems of conciliation and arbitration marked an important departure from the British style industrial relations that had characterised Australia before the 1890s (Lansbury and Davis 1987: 98). Australia's distant location from the rest of the Western world, its political structures, and social traditions have often provided a possibility for a relatively independent political economic trajectory which is also based on its history of its labour movement, its history of regulatory institutions and a tradition of social egalitarianism (Stilwell 2008: 53).^{xii} Thus, the judicial decision on minimum wage, and legislative history, as discussed herein, all occurred in this context. The first registered political party in Australia was the Labor, which formed in 1891, and held power on its own in 1910-1913 (McKinlay 1981). It has always affiliated itself with unions and labour councils. The Labor ran candidates in federal seats in the 1901 election right after the Federation. At the first federal election, The Labor called for, among other policies, a 'White Australia' policy, and compulsory industrial arbitration (Faulkner and Macintyre 2001: 3).

The British Labour Party formed, by contrast, in 1906. It was the distance between the centre (the UK) and the periphery (Australia), which contributed to the emergence of new ideas within the Australian labour movement. These in turn countered the periphery's liberal hegemonies. Australia and the UK shared (and continue to do so) a common reference point anchored in the UK legal and political system. That is to say, the UK did possess legal foundations to develop conciliation and arbitration laws similar to that of Australia but that did not happen. In the US, the domain of industrial relations was highly decentralized from the beginning [though a minimum wage was introduced in 1938] with lesser role for substantive governmental rulemaking be it legislative or

administrative (Dunlop 1983: 215)^{xiii}. Hence, this liberal tendency for the US state to decline to involve itself was somewhat similar to the situation in the UK.

The development of the labour market

Convict labour history is the origin of the present labour market in Australia. The institution of convict labour was constructed in the UK. It was a product of the UK's social tribulations, and the main mechanism of discipline of labour. The convict labour history of Australia is connected to the national and regional labour markets, regulations, courts and all other institution of the times in the UK and its colonies (Nicholas 2007). It is not a coincidence that E. P. Thompson identifies 1780-1832 as the period in which 'most English people came to feel an identity of interests as between themselves and against their rulers and employers. This ruling class was itself much divided, and in fact only gained in cohesion over the same years because certain antagonisms were resolved (or faded into relative insignificance) in the face of an insurgent working class' (1963: 11).

The beginning of the Australian labour market is the arrival of the First Fleet in 1788. However, the labour market was subsequently supplanted, at different times, by the so-called "indentured labour"^{xiv} of "kanakas" from the Pacific islands, Australia's own indigenous population^{xv}, subsequent waves of free settlers, and the post-war migration period (Collins 1988). The convict labourers, who were sent to Australia, in order of their population size, were English, Irish, Scottish and Welsh, and foreigners who were sentenced in the UK courts (Hughes 2009). According to Nicholas and Shergold (2007a: 4), eighty per cent of the convicts were men who were on average 26 years old, and fifty-two per cent sentenced to an average of seven-year sentence. Eighty-one per cent of males and eighty-three per cent of females were sentenced for crimes against property, mostly larceny. It is possible to see the labour force profile in the convict population. The UK courts preferred the younger convicts for the transportation to Australia, and the transportation history is directed migration of unpaid workers to construct a society in a distant land (Nicholas and Shergold 2007b, 2007c, 2007d). This also applied to the female convict population. The masses of Irish and British women who were transported to the colony of New

South Wales in 1826-1840 were also mainly young, with work and literacy skills, and were mostly first time offenders, according to Oxley (1996) in *Convict Maids: The Forced Migration of Women to Australia*. They were subjected to the punishment of the intercontinental transport because the imperial colony needed females and female labour, Oxley states. Without the demand from Australia, they would have remained in their homelands. Being active in labour movement could get one transported. In *The Making of the English Working Class* E. P. Thompson mentions William Ashton, a linen-weaver, was transported to Australia in 1830 for alleged complicity in strike riots, was brought back in 1838 by the subscription of his fellow weavers, but as a result of his leading role in Chartist movement suffered further imprisonment (Thompson 1963: 325). Ashton appears to have been a dedicated labour market reform seeker, and an objector to the state, which had all the tools and methods at its disposal in its eternal dedication to discipline its subjects. Overall, more than 100 Chartists were transported to Australia as convicts but many more came as free settlers and were among the pioneers of an early Antipodean labour movement that demanded eight hour work days (Cahill 2007: 17).

The total number of convicts sent to Australia was 160,000, and the transportation stopped in 1868 (Frost 2011). By that time, the Australian population had become 1.2 million (ABS 2008). In fact, earlier in 1856, the year when the UK granted responsible government to colonies in Australia, the population was already close to 900,000 people (ABS 2008). By the 1880s, half the workforce was born in Australia and the rest were British born, but most of the former group were only one generation removed from British origins, and by the 1890s the state was getting involved in capital-labour industrial disputes (Hagan and Wells 1994: 2-3). At the time of the Federation, in 1901, the population had swelled to 3.8 million (the two most populous states were NSW 1.4 million, Victoria 1.2 million), and at the time of *Harvester* judgment, 1907, the number of Australians had reached 4.2 million (NSW: 1.6 million, Victoria: slightly over 1.2 million) (ABS 2008). In the late nineteenth and early twentieth centuries, the labour market consisted of rural, urban centres and the state capitals, and Australia was highly urbanized in comparison to other nations, but

unlike other nations, most Australians lived in the state capitals (Statham 1990). The union movement was divided along lines of these labour market centres. Where they existed, the unions had high membership coverage even if they were not yet federated [i.e. nation-wide instead of state-based] organisations (McFarlane 1972: 36).

The Court case

The Australian state, from the nineteenth century onwards, assumed regulatory powers in market domains that were governed relatively weakly in other countries. The state was a party to the capital-labour relationship in the industrial settings in the early phase of capitalist growth. From the colonial period onwards, there was broad acceptance of the notion of the state oversight of the market as well as state ownership of services (ports, hospitals, printing, railroads, urbanization, schools, postal service etc.). The state also intervened in the market more directly, as in the case of the *Conciliation and Arbitration Act 1904 (Commonwealth)*. The intention of this was to judicially force the labour and capital to accept the compulsory state arbitration to reduce industrial conflicts.

The *Harvester* case developed through a complex issue that was connected to local manufacturing and the formation (and reproduction) of industrial labour in Australia. H. V. McKay was the owner of the major harvester machinery manufacturer, Sunshine Harvester Works in Victoria, and had several factories that gave him a significant market share, which was reinforced by a popular model called the Sunshine Harvester (Olwen 2001)^{xvi}. The company was set up in Braybrook Junction (in the state of Victoria), which was renamed Sunshine, after McKay's company, which created a workers' settlement there in the fashion of the 'garden city' movement of the time (Victorian Heritage 2012). By 1904, McKay was the owner of the largest manufacturing facility in the Southern hemisphere and was the richest manufacturer in Australia. The nation had been federated for three short years. A company as large as Sunshine Harvester Works had an effect on manufacturing wage levels, and as would have been expected, the *Harvester* judgment did have major ramifications.

In 1904-1905, McKay became involved in a protracted case against International Harvester Co. (Lack 2012) ^{xvii}. According to Lack, McKay claimed that the company had copied the design of 'combined harvester machine' (also known as 'combine' and 'stripper harvester'), and that it was 'dumping' the copies to the Australian market at a lower price (2012). As a result, McKay had to seek tariff protection against these imports. The local capital could petition the state in this newly emerging economy in order to protect itself from unfair competition. At the time of the *Harvester* judgment, the *Excise Tariff (Agricultural Machinery) Act 1906 (Commonwealth)* governed the relationship between wages and machinery manufacturing sector by exempting Australian manufacturers from an excise as long as they paid workers 'fair and reasonable wages'.^{xviii} This particular rule shows the early involvement of the government in the market regulation. A year after The *Excise Tariff (Agricultural Machinery) Act 1906 (Commonwealth)* went into effect H. V. McKay requested a judgment from the Commonwealth Court of Conciliation and Arbitration to be exempted from the 'excise' because he paid his workers 36 shillings per week, which he claimed to be 'fair and reasonable'. However the Agricultural Implement Makers Society, a trade union organisation which represented McKay's workers argued in the Court that this amount of wages were not at all 'fair and reasonable'. Justice Higgins determined that a minimum wage of 42 shillings, not 36 shillings, was 'fair and reasonable' and further ordered McKay to pay a £20,000 duty to the Commonwealth. McKay successfully appealed the decision 'on the duty' to the High Court^{xix} but the 'fair and reasonable wage' was set and Justice Higgins applied his *Harvester* reasoning in his following cases.

It was on 8 November 1907 Justice Higgins determined what was a 'fair and reasonable' wage in Australia, which '... is not dependent on the profits of the ... employer' [page 1]^{xx}. He states in his judgment that H. V. McKay had applied for a 'declaration by the President [of the Court] that the conditions as to the remuneration of labour in the applicant's [McKay's] factory were fair and reasonable' [page 1]. Justice Higgins sets up his judgment criteria so as to the flow on effects of wages paid by larger manufacturers. 'I selected Mr. Kay's application out of some 112 applications made by Victorian Manufacturers

because I found that the factory was one of the largest; and had the greatest number and variety of employees; and because his application was to be keenly fought” [page 2]. Justice Higgins, in the judgment, clarifies the separation of ownership types. “There is a difference between publishing the profit of a public company’s transaction, and publishing the profits of a private manufacturer’ [page 1]. Justice Higgins also highlights the place that trade unions have in arbitration and conciliation. “The provision for fair and reasonable remuneration is obviously designed for the benefit of the employees in the industry; and it must be meant to secure to them something which they cannot get by the ordinary system of individual bargaining with employers’ [page 3]. The full text of the *Harvester* judgment is available at <http://www.fwa.gov.au>.

The judgment set a minimum wage, ‘minimum remuneration’ [page 16]. Justice Higgins considered this as a ‘... standard appropriate [for] the normal needs of the average employee, regarded as a human being in a civilized community’ [page 3] and that this wage would be so that ‘... an unskilled labourer could maintain himself and his family’. Justice Higgins adds that ‘... wages shall be sufficient to provide these things [‘proper food and water, and such shelter and rest as they need’], and clothing, and a condition of frugal comfort estimated by current human standards. This ... is the primary test ... which I shall apply in ascertaining the minimum wage that can be treated as “fair and reasonable” in the case of unskilled labourers. Those who have acquired a skilled handicraft have to be paid more than the unskilled labourer’s minimum ... ‘ [page 4]. Further, he stated that ‘... unless society is to be perpetually injured in industrial unrest, it is necessary to keep this living wage ... beyond the reach of bargaining ... [page 17]. Thus, compulsory conciliation and arbitration began a new federal phase in Australia. In other words, in the future, ideally, any capital and labour negotiation could not be about the amount of the minimum wage, which the state had begun to regulate.

Justice Higgins’s judgment also emphasised the separation of ‘legislature’ and ‘judiciary’. ‘It is the function of the Legislature, not of the Judiciary, to deal with social and economic problems; it is for the Judiciary to apply, and, when

necessary, to interpret the enactments of the Legislature' [page 3], but also acknowledges possibility of differing opinions on the matter being brought to the Court. Australian employers who refused to pay this 'fair and reasonable wage' were required to pay an additional excise tax under the *Excise Tariff Act 1906 (Commonwealth)*, as Justice Higgins emphasises. In other words, he sees his judgment to be in context of the state powers to sanction manufacturers that did not pay the prescribed 'fair and reasonable wage'.

The *Excise Tariff Act 1906 (Commonwealth)* was later repealed, which will have to be topic of another paper. However, the Court adopted the approach taken by Justice Higgins and the minimum wage was awarded in every determination of the Court (Parliament of Australia: Senate 2003: 2). The problem was the effects of the judgment only extended to the members of the unions that were in federal award range, a minority segment at the time, and the situation did not change greatly until the early 1920s (Macintyre 2009). The *Harvester* judgment impacted slowly upon wage structures and the minimum wage did not cover a majority of the workforce until the 1920s but the unionised workers began to become mainly members of interstate unions, and subsequently in federal awards, the 48-hour working week was introduced (Markey 1994: 35). State labour markets were now forming interstate segments that would eventually develop into the national labour market. The coverage that *Harvester* judgment offered to federal unions would have been one of the reasons for this development. The essence of Justice Higgins' minimum wage calculation system survived until the early 1920s (Wells 1994: 57). Following that, the conciliation and arbitration system has had its different phases but has remained intact, in different forms, to this day. A 'national minimum wage' was included in The *Fair Work Act 2009 (Commonwealth)* that was legislated under the Rudd Labor government (2007-2010). The *Harvester* judgment was a turning point. However, it was not enforceable without opposition. In 1910, the Labor Party tried without success to ensure access to common sets of conditions for all workers, but employers were clogging up the courts with appeals, state workers were moved from the federal jurisdiction, strikes increased, and some state governments acted against striking workers (Markey 1994: 35-36). The fact that

the state would put sanctions against workers suggested that the emergent modern state was reserving its right of discipline of population.

The Labor's leadership over labour movement was challenged by the establishment of the first Australian branches of the Industrial Workers of the World (IWW) in 1911, registering significant gains against the Labor in 1914-1918, as the Labor attempted to introduce compulsory military service due to its loyalty to imperial authority (Mitropoulos 1999: 111). Compulsory military service did not have majority support. In the following decade, the representatives of imperial authority in NSW, the British Governors, violated the Constitution by inhibiting the functioning of the Labor governments in the 1920s, and by illegally removing a democratically elected government from power (Cain 2005: 63-70). The wartime deference to imperial policies now stood out of kilter, especially after the disagreement over loan repayments between the NSW government and the UK government, in which the Australian government sided with the latter.^{xxi} The period from the late 1920s that led to the World War 2 was characterised by economic depression, and record unemployment.^{xxii}

According to Justice Kirby, in a 1896 speech Justice Higgins referred to *Rerum Novarum Rights and Duties of Capital and Labor* by Leo XIII, and quoted from it that '... a state can ... alter the economic condition of the poor ...', and this is referred to as the origin of Higgins' reasoning in his 1907 *Harvester* judgment (Kirby 2004: 1-2). Beilharz also refers to the notion of 'living wage' as enshrined in 1907 *Harvester* judgment being sourced from *Rerum Novarum Rights and Duties of Capital and Labor*, the 1891 Encyclical of Pope Leo XIII (Beilharz 1994: 68-69). *Rerum Novarum* states, among other opinions, that 'if a worker receives a wage sufficiently large to enable him to provide comfortably for himself, his wife and his children, he will, if prudent, gladly strive to practice thrift ...' (# 65).^{xxiii} Hearn provides several important cases on the 1907-1920 period in the Commonwealth Arbitration Court under Justice Higgins, that refers to the status of women, Chinese and Indigenous workers in the Australian labour market (2005):

Evidence presented in the 1911-12 Riverina Fruitpickers case challenged Higgins' unwillingness to grant equal pay for women in the industry, a decision that established the precedent of gender wage inequality in Australian arbitration. Higgins was confronted with powerful claims for wage equality from women employed in the industry, and strong union submissions in support of their claim ... by William Guthrie Spence, the president of the Australian Workers Union and a member of the Commonwealth Parliament. Spence argued that while he did not wish to encourage the employment of women in what should be 'distinctly men's work', he acknowledged that equal pay 'is a universal idea' ... and concluded that 'I do not think there has been a sufficient allowance for a woman's needs in any award' to which Higgins replied: 'it is new to this court' ... An ardent supporter of a White Australia, Higgins rarely expresses his views on race in his judgments. The transcripts provide some insights into how his racial views nonetheless influenced his judgments. In the 1911 Pastoral industry proceedings Higgins accepted that the Australian Workers Union's prohibition on the enrolment of Chinese as AWU members, and the marginalisation of aboriginal workers (Hearn 2005: 229-330).

Is it possible to argue that the 1907 *Harvester judgment* and the cases before the Court in the 1907-1920 period were not meant to be universally applicable? The Court could have made universally applicable decisions, as it possessed a level of authority that existed in only one other country at the time, the other Antipodean nation; New Zealand. Justice Higgins did not readily challenge the ruling assumptions on race, ethnicity, and gender, Hearn argues (2005). Reforms had intrinsic limits in those days of great leap forward. Bourke outlines how, in the 1910s, F. W. Eggleston, among others, likened Australia, to 'a laboratory of social experiment', 'but that it had not carefully investigated and tabulated the results so as to guide its future action' (1988: 147).^{xxiv}

People, political parties, and nations

Justice Higgins and numerous other legal minds and politicians were themselves migrants from the UK and its colonies^{xxv}, the legal system of which was the source for Australia. Justice Higgins was an Irishman from County Down and had emigrated Australia in 1870 when he was nineteen. By 1876, he had gained a Bachelor of Laws and Masters of Laws, had begun his legal practice at the Bar. Justice Higgins' career chronology, as documented in Sir Richard Kirby Archives (AIRC 2011), is as follows. In 1894, he was elected to the Victorian Legislative

Assembly, and was involved in the *The Factories and Shops Act* that introduced minimum wage in the state of Victoria. In 1897, Justice Higgins was elected as a Victorian delegate to the Constitutional Convention (1897-1898) which drew up the Australian Constitution that paved the way for the Commonwealth of Australia. In 1901, he was elected to the House of Representatives, and was appointed Federal Attorney General in 1904.

The Protectionist Party (that existed in 1889-1909) produced four Australian prime ministers, Edmund Barton (1901-1903) who was the inaugural prime minister, and three governments under Alfred Deakin (1903-1904, 1905-1908 and 1909-1910). Justice Higgins, before his career in the court, ran as a candidate of the Protectionist Party, and won in 1901 federal elections. In 1904 when the Labor formed its first federal government under Chris Watson, Higgins was appointed the Attorney General, even though he was not in the Labor Party. Beilharz states that Australian labour movement had contracted out the brain work to Higgins, the social liberal (1994: 117). Later, the Protectionist Party prime minister Deakin appointed Higgins a Justice of the High Court of Australia in 1906, and, in 1907, to the newly instituted Commonwealth Court of Conciliation and Arbitration. Justice Higgins was an advocate of state protection of employers, public ownership, and women's suffrage^{xxvi} (Rickard 1984). He was a social liberal, not a Labor member, and a pioneer of citizenship rights for he contested the right of capital to infringe upon the rights of labour, defined as a decent but frugal family existence, according to Beilharz (1994: 40).

There may exist an assumption that there is a link between the Australian minimum wage legislation and the UK political-legal system. The UK did not have a minimum wage law until 1999. This is one of the reasons the Australian case is celebrated as unique. The precedent of compulsory arbitration and minimum wage belongs to New Zealand. The *Industrial Conciliation and Arbitration Act 1894*, in New Zealand set the minimum wage and decreed compulsory arbitration for industrial disputes. By contrast, in the UK, the state was not keen to be a party to capital-labour relationship especially on behalf of

labour (Fox 1985). The UK state's attitudes towards the organized labour may have been in part due to the hegemony of the liberal attitudes when the main characteristics of modern labour organisations and the parameters of their social domain were being defined. This is however outside the current discussion.

In 1906, the British Labour party was established with an aim to directly represent the unions' interest in the Westminster. With the *Trade Boards Act 1909 (Commonwealth)*, the state began a series of limited interventions in wages and conditions in the UK but refrained from setting a general minimum wage (Bamber and Snape 1987: 44). It was only in 1999 that the UK legislated for a minimum wage. The paper does not make any case so as to the social aspects of the minimum wage levels, and whether they keep an individual above the poverty line, in any of these countries. As discussed above, in its original 1907 application in Australia, the level of minimum wage was reportedly representing a form of 'minimum remuneration' that was indexed to costs that are associated with 'frugal comfort'.

The US federal minimum wage legislation came to force in 1938 (Barbash 1967). Later on, in 1997, under the Clinton administration, the states were allowed to set their own minimum wages. In Canada, Manitoba and British Columbia were first to introduce minimum wage in 1918 but not all the industrial sectors and workers were covered (Woods 1973). These Canadian legislations came much later than Victoria and New South Wales in Australia that set a minimum wage in 1896 and 1902 respectively. As the Commonwealth of Australia came into existence in 1 January 1901, Victoria was still a colony, not a state, when it set governmental mechanisms for wage determination. Overall, the federal minimum wage ruling of 1907 in Australia is historically only second to the New Zealand example.

Conclusion

In the early part of the twentieth century, the Australian federal state was visible as an interventionist force in the market process of capital accumulation, and could attempt to set legal limits to this process by forcing employers to pay a

set wage to gain tariff protection. In this sense, the Australian state undertook to regulate the asymmetrically reciprocal interests of capital and labour through compulsory state arbitration, which, as stated above, followed the example of New Zealand. The success rate of the subsequent attempts has fluctuated over the decades^{xxvii}, and this paper focused on the period of the late nineteenth and the early twentieth centuries. Beilharz reflects on the earlier description of the early economic formation in Australia as ‘a social laboratory’.^{xxviii} In this laboratory, Fabians and liberals sought to civilize capitalism, not least through the use of institutions such as arbitration, where the just wage was to be decided not by markets or capitalist criteria but by addressing needs, or labour criteria, via the agency of the third, middle class of social engineers and moderators” (Beilharz 2004: 433-434). The innovators in this social laboratory were many. Labour’s share of accumulated capital was arbitrated through the state, not only by labour itself, but also by other social classes and groups of professionals especially in the legal practice. Justice Higgins was considered a social reformist as he had a keen interest in labour market regulation and reform when he was a lawyer and then later as a legislator and finally as a Justice of the High Court.^{xxix} The workers’ demands for compulsory arbitration were canonized by the *Harvester* judgment of Justice Higgins and tariff protection and White Australia were part of the social settlement (Hagan 1981: 14). Of course, it is arguable whether all sectors of the labour market sought a system of compulsory arbitration at all times but the *Harvester* judgment is the start of centralised wage fixing in Australia. The judgment came about as part of a historical process in which the state was willing to be involved. Unions received some legal protection with the 1907 *Harvester* judgment. From the time of Federation, onwards the state was a countervailing force on the market, and because of a ‘class settlement’, a ‘wages earners’ welfare state’ emerged [Pusey’s reference to Frank Castles’ phrase] (Pusey 2003: 41).

According to Justice Higgins in his 1915 *Harvard Law Review* article, his judgment had emphasised the fact that without the existence of labour unions no arbitration system could function (Higgins 1915: 23). Moreover, the *Harvester* judgment provided protection not only for labour (by setting a minimum wage)

but also for employers in the manufacturing, construction and service industries who could not afford labour disputes, and who sought protection from foreign competition (Macintyre 1983: 105). To sum up, the Commonwealth Court of Conciliation and Arbitration set the 'minimum remuneration' in 1907. The Court was an outcome of the *Conciliation and Arbitration Act 1904 (Commonwealth)*. By 1910, every Australian state had set up its own administrative unit to set 'minimum remuneration' in its political domain. The 1907 *Harvester* judgment was a partial failure because it only covered white male union members who worked under federal awards, and the judgment did not guarantee regular re-indexation of this 'remuneration'. Hence, the federal and state governments in Australia became directly involved in regulating the labour market by regulating potential conflicts. The *Harvester* judgment had one clear outcome. The Court, based on the powers granted to it by the government, gained a regulatory status, whereby it enforced a definition of the 'minimum remuneration' as a desirable and necessary standard for people in a labour contract.^{xxx}

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Notes: The public information provided by the two federal government bodies, Australian Industrial Relations Commission (www.airc.gov.au) and its replacement Fair Work Australia (www.fwa.gov.au) are summarised here as follows. The Commonwealth Court of Conciliation and Arbitration existed in the period of 1904-1956. In 1956, the High Court of Australia ruled that it was not constitutional for the Commonwealth Court of Conciliation and Arbitration to have both arbitral and judicial powers. *The Conciliation and Arbitration Act 1904 (Commonwealth)* was amended to establish two different bodies. These were:

1) The Commonwealth Conciliation and Arbitration Commission. This had duties to enforce conciliation and arbitration of industrial relations disputes. This became the Australian Conciliation and Arbitration Commission in 1973.

2) The Commonwealth Industrial Court. The function of this Court was to exercise judicial power. It became the Industrial Division of the Federal Court in 1977. From the 1980s onwards, there have been four main legislative milestones in the Australian industrial relations that represent the politics of different governments.

I-The *Industrial Relations Act 1988 (Commonwealth)* under the Hawke Labor government (1983-1991) whereby the Australian Industrial Relations Commission (AIRC) replaced the Arbitration Commission.

II-The *Industrial Relations Reform Act 1993 (Commonwealth)* under the Keating Labor government (1991-1996) whereby the Industrial Relations Court of Australia replaced the Industrial Division of the Federal Court and workplace bargaining began to be emphasised.

III-The *Workplace Relations Act 1996 (Commonwealth)* and the *Work Choices Act 2005 (Commonwealth)* under the Howard Liberal-National Coalition government (1996-2007). This government introduced a national industrial relation system based on the Corporations Power of the Australian Constitution. These two acts maintained the Australian Industrial Relations Commission as an arbitrator while making it more difficult for unions to be a part of worker-employer work contracts (see Australian Industrial Relations Commission 2006: 2-9).

IV-The *Workplace Relations Amendment (Transition to Forward with Fairness) 2008* and *Fair Work Act 2009 (Commonwealth)* under the 2007-2010 Rudd Labor government which also saw Australian Industrial Relations Commission's functions being taken over by Fair Work Australia which absorbed Workplace Authority and Workplace Ombudsman. This has created the 'national workplace relations system' covering all private sector employment (with some exceptions in Western Australia) and public sector employment in Victoria, Australian Capital Territory, and Northern Territory. The main features of this national system are 'a national minimum wage', 'awards that apply nationally for specific industries and occupations', and 'protection from unfair dismissal' (see Fair Work Australia 2011).

ⁱ The state legislatures passed laws to the same effect in Western Australia (1900), New South Wales (1901), South Australia (1915) and Queensland (1916).

ⁱⁱ This is represented in the words of William Morris (quoted in Thompson 196: 56): ‘I pondered ... how men fight and lose the battle, and the thing they fought for comes about in spite of their defeat, and when it comes, it turns out not to be what they meant, and other men have to fight for what they meant under another name’.

ⁱⁱⁱ Instead, the contemporary form of constitutional monarchy has come to evolve.

^{iv} Also, see Neal (2002).

^v See for example Milton Friedman on the nature of protectionism. ‘Alexander Hamilton, in his famous report on manufactures, praised Adam Smith to the skies while at the same time arguing that the United States was a special case in that it had infant industries that needed to be protected, including steel, which is still being protected 200 years later’ (Friedman 1999: 6).

^{vi} Nor is it the case in many places in the contemporary West.

^{vii} In fact, they came back with a vengeance from the late 1970s onwards.

^{viii} This was, of course, not the case later on, and the debate has never ended, but this is outside the present topic. For a discussion of the policies on the post-war development and the end of consensus from the 1970s onwards, see Bayari (2012). It is easy to see that the post-World War 2 manufacturing sector in Australia was a product of the protectionist policies.

^{ix} The ACT was established in 1908 in order to move the capital from Melbourne to a central location between Sydney and Melbourne. An area was selected from New South Wales to build Canberra as the capital inside the ACT and the federal legislature moved there in 1927.

^x See Connell and Irving (1980), and Davidson (1991).

^{xi} In contemporary societies, the notion of wage minimum wage frequently defines a living standard that is below the poverty line with serious disadvantages on health, housing, education levels, and social integration.

^{xii} See Bayari (2012) on a discussion of the state involvement in the Australian market.

^{xiii} See Bayari (2011) for a brief discussion of the similarities between Anglo-Saxon economies.

^{xiv} This is not same as the ‘indentured’ defined by Justice Higgins in the *Harvester* judgment (page 21), which refers to legal employment contracts entered into by workers.

^{xv} Indigenous Australians, the Aboriginal people of Australia, were part of the continent’s labour market as early as the 1820s (Bennett 2005: 19-20). The trade unions began amending their constitutions that barred Indigenous Australian workers in the 1960s (Taffe 2005: 468). According to Rea, the main union body, ACTU, Australian Council of Trade Unions, has performed poorly in terms of initiating actions on behalf of Indigenous Australians (see Rea 2005: 417). Rea states that ‘... with a few exceptions, there is little evidence in the history of the ACTU of support for Indigenous Australians in either industrial or political struggles. Rarely has national leadership been provided by the main trade national trade union federation despite the ACTU’s prominence in Australian national affairs. Most of the initiatives in supporting Indigenous workers and political campaigns have been taken by state and territory branches, state and regional trades and labour councils and a few national unions’ (Rea 2005: 417).

^{xvi} McKay also developed a distribution business. See also the discussion by Pripps and Morland (2006: 21) on the history of Massey Harris, the products of which were distributed in Australia by H. V. McKay Company.

^{xvii} Interestingly, though not of any particular relevance, the heir of International Harvester Co. Katharine McCormick, the famous MIT alumni, was the financier of the work of Dr Gregory Pincus and Dr John Rock and their clinical trials in, among other countries, Puerto Rico and later Haiti (Cooke 2010).

^{xviii} As stated by Lack (2012), in 1905, Reid-McLean government formed the Tariff Commission, and following its recommendations, the Deakin government increased tariffs on the International Harvester Co. machines with *The Excise Tariff (Agricultural Machinery) Act 1906 (Commonwealth)*, which meant that the local manufacturers could be protected by tariffs so long as they offered competitive prices to consumers and reasonable wages to workers.

^{xix} In legal quotation method: *R v Barger* (1907) 6 CLR 41.

^{xx} In legal quotation method: *Ex Parte HV McKay* (1907) 2 CAR 1. The full name of the judgment: *Ex Parte H. V. McKay Excise Tariff 1906 (No. 16 of 1906)-Application for declaration that wages are fair and reasonable-Test of fairness and reasonableness*.

^{xxi} Also, see Bayari (2012: 65-66).

^{xxii} In 1928, the Nationalist Party of Australia and Australian Country Party coalition under Melvin Stanley Bruce attempted to abolish the Commonwealth

Court of Conciliation and Arbitration, after attempting to transfer state industrial powers to the Commonwealth in 1926. The Bruce government's 1926 referendum was rejected, and it provoked the first national meeting of unions (and the formation of the ACTU, Australian Council of Trade Unions in 1927), and the 1928 attempt led to the defection of five Bruce government members to the Labor Opposition, that led to the collapse of the government, and its annihilation in 1929 Federal elections (Gould 2005). Therefore, the Commonwealth Court of Conciliation and Arbitration had come under attack by the Federal government after only two decades of its existence. This challenges any popular view of a continuous application of enlightened ideals in the circles of government from the late nineteenth century onwards. See for example Davidson (1991), Connell (1977), and Connell and Irving (1980).

^{xxiii} In *Rerum Novarum Rights and Duties of Capital and Labor*, Leo XIII also states that '... Care must be taken ... not to lengthen the working day a man's capacity ...' (# 43). The workday length was not part of the debate in the *Harvester* judgment. The Commonwealth Arbitration Court approved the '40-hour week' on 8 September 1947, because of a long movement for the codification and reduction of Australian working hours that began in the mid 1850s (Cahill 2007: 16).

^{xxiv} Most positivist narratives do not describe the official and civil intentions on the inclusion of Indigenous inhabitants of the Antipodes, the Aboriginal people of Australia and the Maori people of New Zealand, in the stated processes such as those that have been reported by Cox (2006) and Bourke (1988). According to Connell, Australia is historically the product of British colonialism's violent encounter with a very ancient indigenous civilisation (Connell 2009: 29). The issue of race relations was a preoccupying matter for the ruling opinions from the early 1800s onwards in Australia (Anderson 2006, Pattel-Gray 1998). By the early to mid-nineteenth century, the development of the colonies had taken a severe toll on the Indigenous Australians, destroyed communities, and languages (Clark 1999, Gray 2011, Maddison 2011). For most of the colonial history, the Indigenous Australians remained excluded from being full members of society (Peterson 1998).

^{xxv} For a discussion on the Australian workforce and the labour migration from the UK, see Hagan and Wells (1994b).

^{xxvi} The *Commonwealth Franchise Act 1902 (Commonwealth)* introduced the women's suffrage in Australia. In 1962, the government amended the *Commonwealth Electoral Act* to extend the "universal" franchise to Indigenous Australians.

^{xxvii} Even when it is achieved, wage injustice is impermanent. This is not limited to the period under discussion. In Australia, the political utility of the equation of 'tariff system-wage determination' peaked in the 1970s (Fagan and Webber 1999). The neo-liberal deregulation from the 1980s onwards especially led to an astronomical wage injustice in the labour market. As it is assumed to be

dictated by market rationality, such injustice is readily ignored under the facade of competitiveness and productivity. Such overtly false assumptions are plenty. Since competitiveness and productivity apparently set the wage levels then the state cannot intervene. Thus, the state now enforces the fragmentation. Watson et al. (2003), for example, display the vertical and horizontal breakup of the Australian wage structures in this century in their *Fragmented Futures: New Challenges in Working Life* while Peel shows, in *The Lowest Rung*, the contemporary dimensions of what minimum wage affords the people in the suburbia of three major cities of Australia (2003).

^{xxviii} See the above quote by Bourke (1988: 147).

^{xxix} Such a reformist streak was also present in The 1945 *White Paper on Full Employment* by the Commonwealth government.

^{xxx} This leaves much to discuss about the labour market policies of contemporary governments, but that is best left for another paper.

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