

## Regulating for Job Quality? Wages and Working Time under Australian Labour Law

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### Introduction

This chapter analyses some of the ways in which Australian law seeks to regulate for job quality – even if, as explained below, that term is not itself a familiar one within labour law discourse in this country.

Law constructs and shapes work in many ways. The main legal architecture of labour law in Australia comprises both legislation, which determines minimum conditions and regulates the conduct of workplace relations, and the common law of contract. These mechanisms form the chief focus of our chapter, but it is recognised at the outset that many other legal systems influence work, and its quality, in Australia (Mitchell, 1995; 2011).

We begin our analysis of job quality and the law by discussing various ways in which the ‘traditional’ labour law system that operated in Australia for most of the 20th century can be seen to have embraced notions of job quality. It is necessary to touch on the past in this way because aspects of that system have continued to cast a long shadow over Australian notions of the ‘good job’ and the best way for regulation to help secure it. At the same time, the historical arc of regulation enables us to see shifts in the conceptualisation of job quality over time. We look at the fragmentation of the traditional system, or as commentators such as Ewing (1989) and Vranken (2009) have put it, its ‘death’ from the 1980s onwards. Finally, we turn to contemporary Australian labour law, and attempt to chart some of the ways in which the current *Fair Work Act 2009* (Cth) constructs and creates notions of job quality.

Before going on, however, we need to acknowledge two critical points. The first is the highly selective nature of our treatment. There are many different ways in which law can influence or enhance job quality,

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(Bray and Stewart, 2013). This development can be seen in relation to the NES hours of work provisions, which are most likely to be interpreted in conversations at the workplace. It brings back into play the disadvantageous power dynamics that led to the creation of the system in the first place.

However, the job quality outcomes in contemporary Australian labour law cannot be so easily characterised: the Fair Work Act also reflects, in parts, cross-cutting political philosophies and goals, such as those promoted through the European discourses on regulation. In terms of the Muñoz de Bustillo et al map of concepts of job quality, a mix of economic and social concerns has shaped the Australian system. Generally, the Fair Work Act has established two potentially powerful institutions, the FWC and also the Fair Work Ombudsman, both of which are able to generate dynamic improvements in job quality and to levels of adherence to those standards.<sup>27</sup> There are also pockets of extraordinary development, as seen in the social and community services Equal Remuneration Case, discussed above. At the same time, there are gaps, oversights and contradictions throughout the current schema: casuals and non-employees do not have many of the protections of the law, attempts to overcome the male breadwinner SER model have been half-hearted, and little regulatory effort has been expended on empowering clients of the system through knowledge and information rights. While Justice Higgins' concept of 'something else' – something other than a purely market-driven outcome – is still relevant today, political contestation over exactly what this is and should be has produced a mixed regulatory agenda.

In conclusion, while Australian labour regulation has not evolved its own *explicit* discourse about job quality, that concept provides a fruitful lens through which to examine the system and its future development. How such a notion might be conceived, and what it might mean for regulatory design, is an intriguing question – and one to which we hope to return.

## References

- Ashagbor, D (2006), *The European Employment Strategy*, OUP, Oxford  
Australian Bureau of Statistics (ABS) (2013), *Employee Earnings and Hours, Australia, May 2012*, Catalogue No 6306.0, ABS, Canberra  
Australian Centre for Industrial Relations Research and Training (ACIRRT) (1998), *Australia at Work*, Prentice Hall, Sydney

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<sup>27</sup> As to the Ombudsman's role in promoting compliance, see eg Hardy, 2009; Hardy et al, 2013.

## REGULATING FOR JOB QUALITY?

- Australian Government (2005), *WorkChoices: A New Workplace Relations System*, Australian Government, Canberra
- Barnard, C (2012), 'The financial crisis and the Euro plus pact: A labour lawyer's perspective' 41 *Industrial Law Journal* 98
- Baird, M (2005), 'Paid parental leave in Australia: The role of industrial relations' in Murray, J (ed), *Work, Family and the Law*, Federation Press, Sydney
- Baird, M, McFerran, L and Wright, I (2014), 'An equality bargaining breakthrough: Paid domestic violence leave' 56 *Journal of Industrial Relations* 155
- Bennett, L (1994), *Making Labour Law in Australia: Industrial Relations, Politics and Law*, Law Book Co, Sydney
- Berns, S (2002), *Women Going Backwards: Law and Change in a Family Unfriendly Society*, Ashgate, Hampshire UK
- Bosch, G (2004), 'Towards a new standard employment relationship in Western Europe' 42 *British Journal of Industrial Relations* 617
- Bray, M and Stewart, A (2013), 'From the arbitration system to the Fair Work Act: The changing approach in Australia to voice and representation at work' 34 *Adelaide Law Review* 21
- Chapman, A (2010), 'Industrial law, working hours and work, care and family' 36 *Melbourne University Law Review* 190
- Charlesworth, S and Campbell, I (2008) 'Right to request regulation: Two new Australian models' 21 *Australian Journal of Labour Law* 116
- Charlesworth, S, Welsh, J, Strazdins, L, Baird, M and Campbell, I (2014) 'Measuring poor job quality amongst employees: The VicWAL job quality index' 24 *Labour and Industry* 103
- Clegg, HA (1979), *The Changing System of Industrial Relations in Great Britain*, Basil Blackwell, Oxford
- Collins, H (1989), 'Labour law as a vocation' 105 *Law Quarterly Review* 463
- Collins, H (2001), 'Regulating the employment relationship for competitiveness' 30 *Industrial Law Journal* 17
- Collins, H (2002), 'Is there a "third way" in labour law?' in Conaghan, J, Fischl, RM and Klare, K (eds), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities*, OUP, New York
- Conaghan, J (2003), 'Labour law and "New Economy" discourse' 16 *Australian Journal of Labour Law* 9
- Creighton, B and Forsyth, A (eds) (2012), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective*, Routledge, New York
- Creighton, WB (1991), 'Enforcement in the federal industrial relations system: An Australian paradox' 4 *Australian Journal of Labour Law* 197
- Dabscheck, B (1995), *The Struggle for Australian Industrial Relations*, OUP, Melbourne
- Dabscheck, B (2001), 'The slow and agonising death of the Australian experiment with conciliation and arbitration' 43 *Journal of Industrial Relations* 277
- Edwards, J, McCallum, R and Moore, M (2012), *Towards More Productive Workplaces: An Evaluation of the Fair Work Legislation*, Australian Government, Canberra
- European Union (EU) Commission (2007), *Towards Common Principles of Flexicurity: More and Better Jobs Through Flexibility and Security*, COM, 359
- Ewing, K (1989), 'The death of labour law' 8 *Oxford Journal of Legal Studies* 293
- Fenwick, C and Howe, J (2009), 'Union security after Work Choices' in Forsyth, A and Stewart, A (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy*, Federation Press, Sydney
- Forsyth, A (2006), 'Arbitration extinguished: The impact of the Work Choices legislation on the Australian Industrial Relations Commission' 32 *Australian Bulletin of Labour* 27

## JOB QUALITY IN AUSTRALIA

- Forsyth, A and Stewart, A (2013), 'Of "kamikazes" and "mad men": The fallout from the Qantas Industrial Dispute' 36 *Melbourne University Law Review* 785
- Fredman, S (2004), 'The ideology of new labour law', in Barnard, C, Deakin, S and Morris, G (eds), *Essays in Honour of Bob Hepple*, Hart Publishing, Oxford
- Fredman, S (2006), 'Transformation or dilution: Fundamental rights in the EU social space' 12 *European Law Journal* 41
- Galenson, W (1991), *New Trends in Employment Practices: An International Survey*, Greenwood Press, New York
- Gollan, P, Markey, R and Ross, I (eds) (2002), *Works Councils in Australia: Future Prospects and Possibilities*, Federation Press, Sydney
- Hancock, K (2012), 'Enterprise bargaining and productivity' 22 *Labour and Industry* 289
- Hardy, T (2009), 'A changing of the guard: Enforcement of workplace relations laws since Work Choices and beyond' in Forsyth, A and Stewart, A (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy*, Federation Press, Sydney
- Hardy, T, Howe, J and Cooney, S (2013), 'Less energetic but more enlightened? Exploring the Fair Work Ombudsman's use of litigation in regulatory enforcement' 35 *Sydney Law Review* 565
- House of Representatives Standing Committee on Employment and Workplace Relations (2009), *Making it Fair: Pay Equity and Associated Issues Related to Increasing Female Participation in the Workplace*, Commonwealth Parliament, Canberra
- Howell, C (2004), 'Is there a third way for industrial relations?' 42 *British Journal of Industrial Relations* 1
- Independent Inquiry into Insecure Work (2012), *Lives on Hold: Unlocking the Potential of Australia's Workforce*, ACTU, Melbourne
- International Labour Organization (ILO) (1999), *Decent Work*, Report of the ILO Director General to the 87th Session of the International Labour Conference, ILO, Geneva
- Isaac, JE (1967), *Wages and Productivity*, FW Cheshire, Melbourne
- Isaac, J and Macintyre, S (eds) (2004), *A New Province for Law and Order: 100 Years of Australian Conciliation and Arbitration*, CUP, Melbourne
- Johnstone, R, McCrystal, S, Nossar, I, Quinlan, M, Rawling, M and Riley, J (2012), *Beyond Employment: The Legal Regulation of Work Relationships*, Federation Press, Sydney
- Johnstone, R and Tooma, M (2012), *Work Health and Safety Regulation in Australia: The Model Act*, Federation Press, Sydney
- Kahn-Freund, O (1972), *Labour and the Law*, Stevens, London
- Klare, K (2002), 'Labour law at century's end: An identity crisis?' in Conaghan, J, Fischl, RM and Klare, K (eds), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities*, OUP, New York
- Langmore, J and Quiggan, J (1994), *Work for All: Full Employment in the 1990s*, MUP, Melbourne
- Layton, R, Smith, M and Stewart, A (2013), *Equal Remuneration under the Fair Work Act 2009*, Fair Work Commission, Melbourne
- Lee, S and McCann, D (eds) (2011), *Regulating for Decent Work: New Directions in Labour Market Regulation*, Palgrave Macmillan, Houndsmill Basingstoke
- McCann, D and Murray, J, 'Prompting formalisation through labour market regulation: A "framed flexibility" model for domestic work' 43 *Industrial Law Journal* 319
- McCarthy, E, Jenkin, E and Stewart, A (2011), *Parental Leave: A User-Friendly Guide*, Lawbook Co, Sydney
- McCrystal, S (2010), *The Right to Strike in Australia*, Federation Press, Sydney
- Macdonald, F and Charlesworth, S (2013), 'Equal pay under the Fair Work Act 2009 (Cth): Mainstreamed or marginalised?' 36 *University of New South Wales Law Journal* 563

## REGULATING FOR JOB QUALITY?

- Macintyre, S and Mitchell, R (1989), *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration, 1890-1914*, OUP, Melbourne
- Mitchell, R (1995), *Redefining Labour Law: New Directions for Teaching and Research*, Centre for Employment and Labour Relations Law, Melbourne
- Mitchell, R (2011), 'Where are we going in labour law? Some thoughts on a field of scholarship and policy in process of change' 24 *Australian Journal of Labour Law* 45
- Mitchell, R, Gahan, P, Stewart, A, Cooney, S and Marshall, S (2010), 'The evolution of labour law in Australia: Measuring the change' 23 *Australian Journal of Labour Law* 61
- Muñoz de Bustillo, R, Fernandez-Macias, E, Anton, J-I and Esteve, F (2011), *Measuring More than Money: The Social Economics of Job Quality*, Edward Elgar, Cheltenham UK and Northampton US
- Murray, J (2001), 'The international regulation of maternity: Still waiting for the reconciliation of work and family life' 17 *International Journal of Comparative Labour Law and Industrial Relations* 25
- Murray, J (2005a), 'The AIRC's test case on work and family provisions: The end of dynamic regulatory change at the federal level?' 18 *Australian Journal of Labour Law* 325
- Murray, J (2005b), 'Work and care: New legal techniques for mechanisms for adaptation' 15(3) *Labour and Industry* 67
- Murray, J (2006), 'Work Choices and the radical revision of the public realm of Australian statutory labour law' 35 *Industrial Law Journal* 343
- Murray, J (2008), 'Labour standards, safety nets and minimum conditions' in Riley, J and Sheldon, P (eds), *Remaking Australian Industrial Relations*, CCH Australia, Sydney
- Murray, J and Owens, R (2009), 'The safety net: Labour standards in the new era' in Forsyth, A and Stewart, A (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy*, Federation Press, Sydney
- Naughton, R (2011), 'The low paid bargaining scheme: An interesting idea but can it work?' 24 *Australian Journal of Labour Law* 214
- Nolan, DR (ed) (1998), *The Australasian Labour Law Reforms: Australia and New Zealand at the End of the Twentieth Century*, Federation Press, Sydney
- O'Higgins, P (1997), "'Labour is not a commodity": An Irish contribution to international labour Law' 26 *Industrial Law Journal* 225
- Owens, R (1993), 'Women, atypical work relationships and the law' 19 *Melbourne University Law Review* 399
- Owens, R (1995), 'The traditional labour law framework: A critical evaluation' in Mitchell, R (ed), *Redefining Labour Law: New Directions for Teaching and Research*, Centre for Employment and Labour Relations Law, Melbourne
- Owens, R (2002), 'Decent work for the contingent workforce in the new economy' 15 *Australian Journal of Labour Law* 1
- Pocock, B (2003), *The Work/Life Collision*, Federation Press, Sydney
- Short, C (1986), 'Equal pay: What happened?' 28 *Journal of Industrial Relations* 315
- Skinner, N, Hutchinson, C and Pocock, B (2012), *The Big Squeeze: Work, Home and Care in 2012*, Centre for Work and Life, University of South Australia, Adelaide
- Smith, B (2006), 'Not the baby and the bathwater: Regulatory reform for equality laws to address work-family conflict' 28 *Sydney Law Review* 689
- Smith, B (2011), 'What kind of equality can we expect from the Fair Work Act?' 35 *Melbourne University Law Review* 545
- Smith, M, Burchell, B, Fagan, C and O'Brien, C (2008), 'Job quality in Europe' 39 *British Journal of Industrial Relations* 586

## JOB QUALITY IN AUSTRALIA

- Smith, M and Stewart, A (2014), 'Equal remuneration and the Social and Community Services Case: Progress or diversion on the road to pay equity?' 27 *Australian Journal of Labour Law* 31
- Sorrell, GH (1979), *Law in Labour Relations: An Australian Essay*, Law Book Co, Sydney
- Standing, G (1997), 'Globalisation, labour flexibility and insecurity: The era of market regulation' 3 *European Journal of Industrial Relations* 7
- Standing, G (2008), 'The ILO: An agency for globalisation?' 39 *Development and Change* 355
- Stewart, A (2006), 'Work Choices in overview: Big bang or slow burn' 16(2) *Economic and Labour Relations Review* 25
- Stewart, A (2009), 'A question of balance: Labor's new vision for workplace regulation' 22 *Australian Journal of Labour Law* 3
- Sykes, EI (1980), 'Labour arbitration in Australia' in Ford, GW, Hearn, JM and Lansbury, RD (eds), *Australian Labour Relations Readings*, 3rd ed, Macmillan, South Melbourne
- Tham, J-C (2007), 'Towards an understanding of standard employment relationships under Australian labour law' 20 *Australian Journal of Labour Law* 123
- Thorntwaite, L and Sheldon, P (2012), 'Employer and employer association experiences of enterprise bargaining: Being careful what you wish for?' 22 *Labour and Industry* 255
- Todd, P and Preston, A (2012), 'Gender pay equity in Australia: Where are we now and where are we heading?' 38 *Australian Bulletin of Labour* 251
- Townsend, K, Wilkinson, A and Burgess, J (2013), 'Is enterprise bargaining still a better way of working?' 55 *Journal of Industrial Relations* 100
- Vranken, M (2009) *Death of Labour Law? Comparative Perspectives*, MUP, Melbourne
- Whitehouse, G (2004), 'Justice and equity: Women and indigenous workers' in Isaacs, J and Macintyre, S (eds), *A New Province for Law and Order: 100 Years of Australian Conciliation and Arbitration*, CUP, Melbourne
- Workplace Express (2013), 'Employers fight expanded arbitration, right of entry' *Workplace Express*, 20 March
- Wright, S and Buchanan, J (2013), *Award Reliance*, Research Report 6/2013, Fair Work Commission, Melbourne