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The H R Nicholls Society's XXVth Conference

**One Hundred Years of the Higgins Legacy:
Treasured Inheritance or Debilitating Folly?**

7 August 2004

“The Tragic Consequences of Justice Higgins.”

Ray Evans

My opening text comes from a speech which Henry Bournes Higgins made in the Victorian Parliament in 1895. In that year, the Chief Secretary, Mr Peacock, brought in a *Shops and Factories Bill* and stated that, whereas two years ago he would not have dreamed of a minimum wage for women and children, the conditions of sweating revealed by the investigations of Mr Harrison Ord had appalled him, and he had had the task of educating his colleagues.

Higgins played a prominent role in these developments. In the debate on sweating he argued that inspectors should have authority to enter private homes where women worked for piece rates.

The greatest evils of sweating existed not in factories, though these were bad enough, but where only one or two persons work. . . . To those who object that the State should not interfere with what goes on in private homes, I reply that to ‘interfere’ with workers in such conditions is no more than interfering to protect a prisoner in his cell. Every worker should be under an inspector: it has been too much the custom to play off the out-workers against the in-workers of a factory, keeping down the conditions of both.

H B Higgins is regarded by most people as the father of our system of labour market regulation, the unique Australian system of conciliation and arbitration. There is a federal seat named after him (now occupied by a founder of the HR Nicholls Society, the Hon Peter Costello), and a building in Little Bourke Street, occupied by barristers, is known as H B Higgins Chambers. A sympathetic and extremely revealing biography of Higgins was written by John Rickard, 20 years ago.¹ Higgins was the central character in the establishment of the IR system, but Alfred Deakin was the principal architect of the post-federation political structure which led to Australia's secular economic decline from the enviable place of the richest in per capita income terms in the world, which we enjoyed at the time of federation.

The structure which Deakin built is known as the Deakin settlement and Paul Kelly summarised it in his splendid book, *The End of Certainty*, as White Australia, Industry Protection, Wage Arbitration, Imperial Benevolence (by which he meant imperial defence), and State Paternalism². We are still trying to dismantle that structure and recover from the huge mistakes which Deakin inflicted upon us. It is worth remarking that Deakin still inspires both admiration or opprobrium. The great Australian economist, Colin Clarke, who should have won the Nobel prize, remarked that he was a lunatic.

Twenty years ago John Hyde and John Nurick at the Perth based Australian Institute for Public Policy edited a book of essays, *Wages Wasteland*,³ which included my first essay on Higgins. For convenience I repeat some of that text in this paper.

In February 1870, the 18 year old Henry Bournes Higgins arrived at Station Pier, Port Melbourne, with his mother and siblings. His father, who was a Methodist Minister, had stayed behind in Ireland to serve out his contracted appointment. An important factor in driving the family from Ireland to Australia was Henry's health. He suffered from respiratory diseases and it was believed that he would benefit from the warmer climate. And so he did. He got a job immediately on arrival, teaching in a private school in Fitzroy. (This was before the Victorian 1872 Education Act). He won scholarships to the University of

Melbourne and studied Latin, Greek and Roman History. His mother urged him to study law; he graduated in 1875, and was called to the Bar in 1876. During this process he lost his faith in Christianity but concealed his loss from his family by writing about it in code. But nature abhors a vacuum and he was taken up by the reigning philosophical fashion of the time, a doctrine (for want of a better word) known as “Idealism”.

James Franklin has recently published a great book on the history of philosophy in Australia.⁴ His comments on H B Higgins are highly relevant to this debate, and in this context he cites David Stove, a preeminent figure in Australian philosophy during the second half of the 20th century.

“Nineteenth-century idealism, accordingly, provided an important holding-station or decompression chamber, for that century’s vast flood of intellectual refugees from Christianity; or at any rate, for the more philosophically inclined among them. The situation of these people was truly pitiful. The burden of their biblical embarrassments had become intolerable . . . The problem was how to part with the absurdities of Christianity, while keeping cosmic consolation: no one dreamt of parting with the latter as well (it should hardly be necessary to say), or at any rate no philosopher did.”

H B Higgins continued to conceal his agnosticism, at least from the public, but in secret he became an Idealist, and before long set out on a political career to implement Idealist nostrums on a hapless Australia. It is very difficult, today, to untangle what it was that Idealists actually believed in. But they clearly believed in progress and particularly in the capacity of wise leaders to accelerate progress through benevolent legislation. Given the extraordinary changes which had taken place in the UK during the 19th century (the population had tripled and per capita incomes had quadrupled) such beliefs did not seem unreasonable at the time, and indeed, in spite of overwhelming evidence to the contrary, are still widely held.

Higgins was called to the Victorian Bar in 1876 and a decade later could afford

to take a year away from his practice and spend the time travelling the world with his bride, Mary Alison Morrison, eldest daughter of George Morrison, the founder of Geelong College. He could also afford to buy a very large house in Glenferrie Rd, Malvern.

In 1892 Alfred Deakin, at this point a major figure in the Victorian Parliament, a leader of federalist movement, and a protege of David Syme, the all-powerful proprietor of the Melbourne Age, urged Higgins to run for the seat of Geelong, where his wife's family, the Morrises, were influential. He did so but failed to gain one of the seats. (Many electorates were then multi-member constituencies). But at the 1894 election he succeeded and he helped to pass legislation in 1895 which established minimum wages. This measure, like every similar measure passed subsequently, made unemployment worse, at a time when, after the collapse of the land boom in 1891 and the subsequent banking crash in 1893, Victoria was in a state of awful economic depression. The primary cause of this depression was the combination of very high levels of government debt that had been incurred during the 1870s and 1880s, and the collapse of wool prices which occurred in 1891. The money had been borrowed to pay for gold plated, government owned and operated railways most of which were never going to be viable.

In the election of Victorian delegates to the 1897-8 Constitutional Convention Higgins won the tenth (and last) place. He scraped in because David Syme placed Higgins on the how-to-vote card published in the Melbourne Age, and we can presume that this happened because of Alfred Deakin's influence. At the convention he succeeded, with Charles Kingston, in persuading (22-19) the Convention to adopt Sec 51(xxxv), the industrial relations power. Up till this point the constitutional framers had refused to entertain any such proposal but during the debate Sir John Forrest, the WA Premier, changed his mind over lunch, and persuaded other delegates from WA to follow suit. In this way Australia became the victim of Deakin's and Higgins' schemes for regulatory control of the labour market, an outcome which has cost us dearly ever since.

When the first Commonwealth Parliament was elected Higgins won the seat of

North Melbourne, and in 1904 served in the first Labor Government under J C Watson (although not a member of the ALP) as Attorney General. He pushed the 1904 Arbitration and Conciliation Act through the Parliament, and was appointed by the Deakin Government in 1906 to the High Court, and twelve months later, to the Presidency of the Conciliation and Arbitration Court as well. He continued in that role until 1921.

The Harvester judgment of 1907 became the doctrinal core of the new regime of labour market regulation. It had its beginning in a deal done by Alfred Deakin with Billy Hughes, the most effective member of the new Parliamentary Labor Party, to get the 1902 Tariff Bill through the first federal parliament. That Act specified that tariffs were to be granted only to those industries which paid ‘fair and reasonable wages’.

So H V McKay, inventor of the Sunshine Harvester and in 1907, Australia’s largest manufacturer of agricultural machinery, (an industry in which Australia led the world), duly asked the new President of the Arbitration Court to grant him the required certificate. He was seeking protection from US imports, notably implements made by International Harvester. We can only sympathise with McKay as he slowly realised the trouble he was in. Higgins seized the opportunity to decide what was “fair and reasonable”. As he later wrote in the Harvard Law Review,

Many household budgets were stated in evidence, principally by house-keeping women of the labouring class⁵; and, after selecting such of the budgets as were suitable for working out an average, I found that in Melbourne, the average necessary expenditure in 1907 on rent, food and fuel in a labourer’s household of about five persons, was about one pound, twelve shillings and five pence, but as these figures did not cover light, clothes, boots, furniture, utensils, rates, life insurance, savings, accident or benefit societies, loss of employment, union pay, books and newspapers, tram or train fares, sewing machine, mangle, school requisites, amusements and holidays, liquor, tobacco, sickness or death, religion or charity, I could not certify that any wages less than 42

shillings per week for an unskilled labourer would be fair and reasonable.

This decision represented a 20 percent increase on the market rate of the day. McKay went to the High Court and got the decision overturned by Higgins' fellow High Court judges, most of whom couldn't stand him, although their decision was based on sound constitutional reasoning⁶. But the damage was done. State tribunals, whose constitutional power was beyond questioning, picked up the 20 percent increase implicit in this Basic Wage, and applied it state by state. The impact on unemployment was appalling and hit most acutely the unskilled labouring class of whom Higgins claimed to be particularly mindful. It was not until the post-World War I inflation reduced the value of these statutory minima, that employment amongst the unskilled recovered.⁷ Jim Franklin quotes Higgins from his 1922 tract "A New Province for Law and Order" written after he had not sought reappointment to the C&A Court in 1921. He was well aware that Billy Hughes, now Prime Minister, would not have appointed him. He continued, however, as a justice of the High Court.

"Though the functions of the Court [the Arbitration Court] are definite and limited, there is opened up for idealists a very wide horizon, with, perhaps, something of the glow of a sunrise . . . Give them (the workers) relief from their materialistic anxiety; give them reasonable certainty that their essential material needs will be met by honest work, and you release infinite stores of human energy for higher efforts, for nobler ideals, when "Body gets its sop, and holds its noise, and leaves soul free a little" (The quotation is from Browning)."

And thus we have, as Higgins' legacy, a huge regulatory apparatus, in which employment contracts are regulated to an extraordinary degree; but most importantly, employment contracts which would benefit the least skilled, the least qualified, the least physically and intellectually endowed, are declared unlawful by our regulators, because the wages which would make these people employable are deemed by the regulators to be inadequate, exactly as Higgins prescribed in the Harvester judgement.

If we move quickly from the Australia of the pre-WWI era, to May 5, 2004, we will have noted the minimum wage case decision brought down by the Australian Industrial Relations Commission, the AIRC, the direct descendant of Higgins' C&A Court. A record \$19 per week -- approx 50 cents per hour -- was welcomed by the unions but criticised by the federal government and the ACCI. In defending its decision AIRC President Geoffrey Giudice said,

“there was cause for optimism on the state of the economy into the future, with strong GDP growth, low inflation and encouraging growth in employment.” “We think that economic conditions generally, including the level of domestic demand, indicated that a significant increase is sustainable on this occasion”

What is most irritating about this nonsense is that while the unions asked for \$26.60, the government and the employers accepted the legitimacy of this job destruction process, and asked for \$10. The unions, of course, are in their core business of maintaining the power and prestige of union officials. Although they purport to represent those who are affected by minimum wage increases, they are clearly indifferent to the fate of those who are already locked out of the labour market, and are wilfully blind to the prospect of people now employed losing their jobs as a consequence of the continuing shift from labour intensive to capital intensive arrangements that is driven by high minimum wages. In addition there will be firms already at the margin, whose sustainability will vanish with the new increase, and whose employees will find themselves jobless when the firm goes into liquidation. But once again, the unions will be content with photo-ops when the gates are closed. They will blame out-sourcing, or the Government, or someone other than the AIRC.

The employer organisations have been part of the same IR Club charade for generations, and the employer ask, \$10 per hour, was in a long tradition of maintaining the unity of the system. At last, however, there is a small but growing recognition within business and employer organisations, and within corporations themselves, that the system has got to go. The first real sign that the message is getting through will occur when employer bodies go to the AIRC and put forward the evidence, which is in the public domain on the H R

Nicholls website, and in many other places, which shows that minimum wages are either so low that they have no impact on the labour market or, contrariwise, they lock out of that market those people who cannot get jobs at wages above the rate set by the tribunals. In Australia, minimum wages are 58 percent of average wages, compared with 42 percent in the UK and 36 percent in the US. That is why we have such a serious unemployment problem.

But the real villain in this theatre of the absurd is the Howard Government. Today we have, after ten years of unprecedented economic growth, an official unemployment rate of approx 6 per cent. Add the people who have found their way from the unemployment benefit onto the list of permanent disability support pensioners, and we have approximately 10 per cent. Then add the people who do not make it onto the official unemployed lists, but whom we know from the ABS surveys, would like to have a job if they could get one, and we move to a realistic estimate of unemployment and underemployment which is of the order of 13 - 15 per cent of the potential workforce. The particular group most affected by this regulatory insanity are men with few skills, no qualifications, and who are over fifty. And they have no one to speak for them. Not ACOSS, not the churches, not the unions, not the ALP and, regrettably, not the Government.

At the end of the Fraser era, the early 1980s, there was a great deal of industrial unrest, coupled with high inflation. In December 1981 the C&A Commission ratified the Metal Industry Agreement which provided for a 25 per cent in hourly labour costs which flowed through the metals industries and into the wider economy. Inflation and unemployment took off and in December 1982, Peter Reith won the Flinders by-election campaigning on the government policy of a wages freeze. This by-election defeat greatly alarmed the ALP leadership, and in the next three months, Bob Hawke replaced Bill Hayden as leader, the ALP-ACTU Accord was pulled out of the hat, and the ALP won the March 1983 election with a handsome majority, including the seat of Flinders.

These events resulted in a great deal of attention being given to our system of wage regulation and industrial arbitration and, amongst other things, Gerard

Henderson wrote an excellent account of the culture and work practices of the IR Club in his essay of that name published in *Wages Wasteland*. He gave an even better account of the Club at the inaugural conference of this Society; his paper was entitled the Fridge Dwellers. One of the major events in the history of the IR Club which was recounted at that conference is the story of the Foster pound, and since that story describes extremely well the inherent absurdity of the Higgins legacy, and its capacity to cause great harm to Australian workers, I will recount it, again, today.

During the post-war period the Chifley Government was faced with strikes which affected the entire economy, notably the coal miners' strikes in NSW. The Communist Party had captured a large number of trade unions, including the Miners Union, and was intent on fomenting industrial and political strife. At the beginning of 1949 a full bench of the Arbitration Court began hearing a basic wage case. The full bench comprised Chief Justice Sir Raymond Kelly, and Justices Dunphy and Foster. Sir Raymond Kelly, attacked subsequently by Bob Hawke as an Irish pig-farmer, was concerned about inflation. Justice Foster was a radical from Melbourne, and Justice Dunphy was somewhere in the middle. The case dragged on for over twelve months and finally in October 1950, a decision had to be made. Kelly, concerned about inflation, was adamant that he would not agree to any increase. Foster, confident that Kelly and Dunphy, both Catholics, would reach some sort of compromise of between five and ten shillings, maintained a very public position demanding an increase of a pound. (The basic wage was then 7 pounds). Dunphy thought ten shillings was desirable. On the morning of the day on which the decision was to be announced there was still no agreement. Dunphy believed that if Kelly were to have his way, (and if he and Foster could not agree, Kelly's view would prevail), a zero increase would cause much unrest. Foster, assuming that the other two would reach a compromise, insisted on a pound. Kelly would not shift. Dunphy, two days before judgement day, had told Kelly that he could not agree to a zero increase and that he would have to side with Foster if Kelly would not shift. Kelly would not agree to any compromise so Dunphy told Foster, on the morning of the decision being handed down that he would agree to his demand for a pound. Foster was dumbfounded, Kelly was furious, but it

was too late to change. And so the basic wage was increased from 7 to 8 pounds. This decision was followed not long after by the Korean wool boom and a galloping inflation, and so wage levels were driven up without any need for judicial intervention.

The Foster pound caused great consternation at the time, but the Deakin settlement was beyond question; during the fifties and sixties the IR Club grew in power and influence, and a number of trade union leaders came to believe they were above the law.

Ever since the H R Nicholls Society was founded in the summer of 1985-6, there has been an ongoing debate within the membership and its supporters over what policy prescription we should advocate in our campaign to reform the Australian labour market. I'm going to conclude my remarks by arguing that the abolitionist position is the only coherent and sensible policy. In his outstanding analysis of the unemployment problem, and the welfare problem to which it is closely aligned, Peter Saunders has called for a more enlightened approach by the Arbitral Tribunals such as the AIRC. Reduce the minimum wages he suggests, and let those who are currently locked out of the labour market come inside. What I have tried to show in this paper is that it is impossible for the tribunals to do this. The foundation on which their existence is based is that the market cannot be allowed to set prices. Higgins detested what he called "the higgling of the market place." His successors cannot resile from that stance. If they did so they would be signing their resignation letters.

But what they cannot do for themselves we can do for them. The entire Higgins structure of labour market regulation has to be abolished. There is no point in trying to reform from within, through appointing to the AIRC people who understand how markets work and why they do much better than judicial interventionists. Such a person could not honestly accept appointment to the AIRC. We need, in the first instance, Commonwealth legislation which makes lawful, contracts of employment which the contracting parties themselves have agreed upon, and which are not subject to outside review. And in the second instance we need supporting state legislation, although the corporations power

could be used by the Commonwealth to legislate for freedom for a corporation, and an employee, to do what they want to do by way of an employment contract. And then we need legislation repealing the C&A Act which Higgins pushed through the federal parliament in 1904, and its succeeding legislation.

Given that the Howard Government has been dragging its heels on the reform agenda, and that the current ALP platform on the labour market is to return to the 1960s, when the arbitral tribunals were active in setting wages and conditions for a very large proportion of the Australian workforce (even former Keating adviser John Edwards has warned of the consequences of this policy,⁸) it might seem to the casual observer that public opinion is not ready for such advice.

There are a number of other indicators which point to the opposite conclusion. First, the membership of trade unions continues to fall. Despite the expenditure by the ACTU of many millions on membership promotional activities, particularly amongst the young, the trend continues down. Twelve months ago 47 per cent of public sector employees and 18 per cent of private sector employees were trade unionists. This is not down to US levels but is heading that way. The industries which have become growth industries, notably IT and communications, are characterised by contracting rather than employment relationships. When the unions do get into a new industry such as call centres, which they can pull into their orbit with virtually no membership, they often succeed in shutting them down. The transfer of call centres to India is just such a case.

The growth of contracting or self-employment as an escape route from the Higgins legacy proceeds apace and is now estimated at 28 per cent of the labour force. The unions and the State Labor governments continue to seek to legislate against this trend. They may succeed. But the economic consequences will be serious if they do succeed, and the political consequences which will follow will also be serious. The same is true of the growing importance of the casual employee. This category of legal employment offers another escape route from many of the burdens of the Higgins legacy and the proposal by the federal ALP

to wind back this affront to their sensibilities will, if enacted, produce both economic and political hardship. Economic hardship to the casual workers and political hardship to the ALP. Virtually every university student that has a part-time job (and that comprises most of them) is a casual employee.

If Mark Latham does win the next election, and does enact the present platform on industrial relations (and bear in mind that the Senate will not stop him), the next government after Latham will have a huge mandate for reform. It was Trotsky, I think, who remarked that worse is better. I would prefer to see a Howard Government push forward seriously with labour market reform, than to have Australians suffer from the sort of labour market policies which Latham is now espousing, and to rely on the recoil from that experience to produce the climate of opinion which will drive reform, willy-nilly.

Australia's position today, strategically, economically, and culturally, requires abandoning the Higgins legacy, in totality. Higgins was a sad case; a thin-skinned, unclubable, arrogant man, who deeply resented the disobedience of those workers who ignored his judicial pronouncements, and made him look ridiculous as a consequence. His son Mervyn, an only child, was killed in the charge of the Light Horsemen on Beersheba. That must have been an inconsolable tragedy. Idealism could offer no comfort in that situation.

But that is in the past and we have to look to the future and our security and prosperity as a nation. And that is why we have to realise the follies of the Higgins dream, discard them, and get on with a future which certainly offers many opportunities, but is also pregnant with unforeseen dangers.

1. John Rickards, *H.B.Higgins: The Rebel as Judge*, 1984, George Allen & Unwin, North Sydney.
2. Paul Kelly. *The End of Certainty*, 1992 Allen and Unwin, St Leonards, NSW
3. John Hyde & John Nurick (eds) *Wages Wasteland: a radical examination of the Australian wage fixing system*, 1983, Hale & Iremonger, Sydney
4. James Franklin, *Corrupting the youth, A History of Philosophy in Australia*, 2003, Macleay Press, Sydney
5. They were actually the wives of trade union officials
6. The story is told of the problem faced by the founding judges of the High Court, Griffith CJ, O'Connor and Barton JJ, when two new appointments were made to the Court by the Deakin Government in 1905, H B Higgins and Isaac Isaacs, both Victorians. The original three had been accustomed to lunching together during sitting days and discussing the cases they were dealing with, as well as other matters of common interest. The two new judges were no friends of the original three, and the prospect of expanding the daily lunch party to five was unthinkable. However, it would be seen as improper if the three continued to carry on with their customary lunches so they resigned themselves to lunching alone.
7. Colin Forster, *An Economic Consequence of Mr Justice Higgins*, Australian Economic History Review, Vol 25, No 2. Sept 1985.
8. Australian Financial Review, 3.08.04