

Justice Giudice, the AIRC and the minimum wage

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There may be argument as to whether a minimum wage should be set at all. But if there is to be a minimum wage, as is the government's policy, the President of the Australian Industrial Relations Commission has now usefully shown that it should not be set in the same way as his commission presently fixes the minimum.

In his speech on 2 September 2005 on a decade of minimum wage fixation, Justice Giudice said that his commission has been faithful and impartial to its statutory role¹. However the picture he gives of the present system raises many questions about the commission's worth in this field.

1. AIRC's irrelevance. The President says that in the early 90s the AIRC's national wage decisions affected 67% of the workforce, but now only 20% of the workforce have their pay set by awards of the AIRC². One of the IR club newsletters barely reported the last national wage decision³. Why should a body of such declining influence for the workforce set the minimum wage?

2. AIRC in the dark. The President says the AIRC does not know how many employees are employed at the level of the minimum wage⁴. But you need to know who you are protecting and how many. This admission of ignorance, after almost a decade of setting the minimum wage shows it's time for change.

A different approach would help get the evidence. In its most recent minimum wage decision, in June, the AIRC, relying on four-year-old data, said the minimum rates workforce were likely to be female, non-English, live in a regional area and/or work in a low skilled occupation⁵. This obvious starting point for investigation was not pursued by either the parties or the commission in that case. Yet it is easy to drive to Bendigo and find out about wage payments there, and in similar ways to put together a picture of each category of worker thought to be low paid. The huge contingent working on the last minimum wage - 26 people who appeared before the commission, seven commission members, seven associates, and all their back offices – could easily have been organised to get this basic evidence.

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¹ "Minimum Wage Fixation 1995 – 2005", a paper given to the Industrial Relations Society of the Northern Territory, para 32.

² "Minimum Wage Fixation 1995 – 2005", para 11.

³ CCH Industrial Law News, 23 June 2005, p 6. A discussion at pp 8-9 of a worker's entitlement after being sacked for refusing a drug test got four times more coverage.

⁴ Para 14.

⁵ Safety Net Review Wages, decision of the AIRC, 7 June 2005, para 290.

3. AIRC hears the wrong parties. The President says that each year it is the trade unions that apply for a review of the minimum wage⁶. Yet most union members are above the minimum wage and would not be concerned in its adjustment. Public servants, who have stayed loyal to unions, are not directly concerned in minimum wage adjustments as, according to the last minimum wage decision, award reliant public servants do not receive safety net adjustments⁷. If workers in retail, hospitality, health and community services (where you might expect poorer workers) cease to be award reliant, as the commission has found⁸, why have the unions speak for them? In any event others in much greater numbers have a direct interest in the level of the minimum wage, namely those looking for a job and those in the 80% of the workforce who are outside awards, and who are not union members, but whose agreements can be tested against the award safety net. The impracticality of the unemployed applying to the AIRC, or those applying who have said goodbye to awards, shows that the adversarial system for minimum wage setting has had its day.

The state and territory governments, all parties to the last minimum wage case, would be familiar with the plight of their regions, their pockets of unemployed or special conditions in the state, yet these were not matters they put to the commission. Instead they put a joint case of general economic arguments. They have not proven their worth.

4. AIRC does not lead by example. The President says it is difficult to calculate the employment effects of the minimum wage or to identify the needs of the low paid and he calls for useful and robust research⁹. This is not a new call. In the 2003 minimum wage decision the commission wanted the parties to jointly conduct a survey to provide ‘contemporary information relevant to the Commission’s task’¹⁰. It has criticised the Australian government for presenting research not agreed with the other parties¹¹. For this year’s case it wanted “other groups in the community” to meet with it at hearings in the state capitals, but none came forward, and it lamented that the ACTU’s opponents – of all people - did not join with it in high quality research¹². Most of the research presented to this year’s case by the parties was described as irrelevant, flawed or of limited use¹³.

The resulting yawning gaps in evidence are always someone else’s fault but never the commission’s. Yet the commission can gather its own evidence and it is not bound by the rules of evidence. The commission could have commissioned research or used its own staff or used a counsel assisting, - as in a royal commission – if only to show others the way. It has not done this. After all these years its time for action, and to avoid next year’s minimum wage case bringing the same laments from the commission.

⁶ “Minimum Wage Fixation 1995 – 2005”, para 12.

⁷ 2005 Safety Net Review (June 2005 decision), para 378.

⁸ At para 417

⁹ Paras 14 and 16.

¹⁰ May 2003 decision paras 176-7

¹¹ June 2005 decision, para 173

¹² June 2005 decision, paras 173 and 176

¹³ June 2005 decision, para 164 and following.

5. AIRC did not give the basis for its increase in the minimum wage. The President says that the commission “may not give effect to whatever rates it thinks fit” and it must have regard to criteria including maintaining high employment, the needs of the low paid and prevailing living standards¹⁴.

The last minimum wage decision simply says, after reciting, over 100 pages, submissions on these economic criteria that “(i)n all the circumstances we consider that an adjustment to the safety net of \$17 per week is appropriate”¹⁵. What were these circumstances? Figures showing an eight-year decline in the minimum wage compared to the median wage are discussed under prevailing living standards. But there is no mention of the decline of the living standards of those on the minimum, as you would expect when calculating any increase to ‘maintain’ the minimum. As to the employment effects of any increase, the commission rejected studies on the elasticity of demand submitted by the Australian government, the only evidence the commission had. The commission balanced unspecified ‘negative employment effects’ against a heartening wage increase for 1.6m award reliant employees¹⁶. It said nothing about the losers - these who could become unemployable as a result of an increase or others who would not get jobs - to know in human terms the real ‘negative effects’.

As to the needs of the low paid, the commission’s lack of information – it said there should be more research – did not prevent it saying “research tends to indicate that the safety net is, by and large, an effective one so far as the low paid are concerned”¹⁷.

The circumstances relied on by the commission for the increase have been of a very general kind. They include no finding of a decline or change which when measured says 3.6% or \$17. However this increase was \$6 more than what the Australian government would have conceded and \$9.20 less than what the unions wanted. Giving each disputant something out of a decision is a type of justice we might all instinctively agree with. But in this case the disputants are the wrong parties, and the Workplace Relations Act requires quite specific economic impacts to be considered. The plight of the right parties – women, migrants, those in the regions and the low skilled – has not been considered. No one could be comfortable about this result.

6. AIRC’s procedures not very transparent. Justice Giudice says that there are important questions about the new minimum wage fixing body including the “transparency of its procedure”¹⁸. He is right but he should not imply that the commission’s procedure should be followed. In the last minimum wage decision the commission set out large slabs of parties’ submissions and followed them by observations such as “it would be unwise to place any reliance on ...” or “we encourage further research” or it both criticised the submissions and said “they add some weight to” a party’s case or it said an expert paper “is of limited relevance”¹⁹. Such fence-sitting observations are not findings on matters in dispute, which the commission is obliged to give. They don’t guide the disputants. Nor is it transparent

¹⁴ June 2005 decision, paras 12 and 13.

¹⁵ June decision, para 424.

¹⁶ June decision, paras 09 and 410.

¹⁷ June decision, para 410

¹⁸ “Minimum Wage Fixation 1995 – 2005”, para 32.

¹⁹ At paras 199, 220, 244 and 245.

for the employment effect of wage increases, in which the commission, of all economic regulators, has pre-eminent experience, to be expressed indirectly, in terms of what economists say.

7. Government-dependence. Justice Giudice questions the new minimum wage fixing body's "independence from government"²⁰ However if the government has a particular conception of the minimum wage, if the data and expertise for the job are placed in government and if the parties affected - women, migrants, the low skilled, etc - don't have natural advocates, why should the new body be anywhere else but the government? Even in Justice Giudice's commission most of the evidence used for the minimum wage is evidence from the ABS, Treasury and other Australian government sources, and not evidence of the parties' experience.

Justice Giudice's final defence of the present system of minimum wage setting is that the AIRC has relieved politicians from blame for unpopular decisions. Blame or responsibility, whether it rests with the AIRC, a fair pay body or the government, is not the real issue because it is always someone else who pays, whether the employer made uncompetitive or the worker who can't get a job. The real issue is that if there is to be a minimum wage it be set in a more rational way than it has been by the Australian Industrial Relations Commission in recent times.

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²⁰ "Minimum Wage Fixation 1995 – 2005", para 32.