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WHY THE AYATOLLAHS ARE COMING

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My sermon for today is that free market ayatollahs are mounting a serious attack on the high priests of social justice because of the wrong prescriptions those priests have been doling out to the labour market; and because their sermons reveal them to be so seriously out of touch with the needs of modern society that their religion clearly needs purging. At present we are at a tilting point. We ayatollahs are not a monopoly and, like Telstra, we have sought a special broadband dispensation from Graeme Samuel to allow us collectively to press the Government to have the political courage to tilt the protective barriers so as to liberate labour market outsiders from the protection that the priests purport to provide. Our submission to Samuel draws on Paul's letter to the Romans (8) - "Let us do evil that good may come".

The Failure to Recognise Societal Change and Its Implications

Economists naturally focus on the economic implications of change. But, when they support reforms designed to produce economic benefits, they are frequently accused of taking insufficient account of potential social costs. On the other hand, those pre-occupied with social issues often focus only on the first round adverse effects of economic reform and fail to take account of favourable second and third round effects. The opponents of free trade, for example, overlooked the now demonstrable favourable effects of (largely) removing protection.

My contention is that the opponents of a freer labour market have also effectively ignored the potential for both economic and social benefits. Where the opponents have not simply been self-serving, their pleas that extensive regulation ensures a "fair go" for the workers have overlooked the unfairness of that regulation, as well as largely neglecting the implications of the structural changes in society over the past twenty or so years.

Two major structural changes have been substantially disregarded by the high priests of social justice.

One of those has been the increasing acceptance that the most appropriate form of economic organisation is a market economy and that, in such an environment, individuals are generally able to make their own employment decisions without fear of being exploited by employers. Yet, while union membership has declined to 17 per cent of private sector employees and 90 percent of businesses have no employees with union members,[1] heavy regulation continues to be prescribed supposedly to protect workers.

Second, governments have for many years now assumed direct responsibility through an extensive social security system for helping those judged unable to obtain employment or

[1] The proportion of the workforce that is union members would almost certainly fall further in a less regulated environment. The strong growth of independent contractor arrangements and the increase in Australian Workplace Agreements despite the regulatory constraints on those agreements, plus the wide range in weekly hours worked, are other indicators of greater flexibility.

otherwise disadvantaged. This system provides a protective bulwark for those at the bottom end of the social spectrum - and (too many) others as well.

Let us suppose for a brief moment that social and economic circumstances 100 years ago and for the following 80 odd years could be said to have justified the extensive prescriptions of employment conditions that applied then. The changes in the last twenty or so years, producing a market economy and a social security system, should long since have led to recognition that workers in modern societies no longer need special legal protection against employers, let alone dictation by outsiders of what employment conditions are in accord with social norms.

The Failure of the Judiciary

While the regulatory culprits include both governments and the judiciary, a major share of the blame rests with the judiciary.[2] Despite the abject failure of the Industrial Relations Commission over 100 years to fulfill its original establishment objective of preventing disputes, let alone to deliver the much-touted comparative wage justice objective, it continues along with its half-sister the Federal Court to be widely regarded as an institutional fixture that is too politically difficult to abolish. In applying the regulatory legislation, these high priests have proclaimed for themselves a role as social justice gurus but have taken precious little account of the employment-deterring effects from the twenty commandments they have imposed.

Justice Michael Kirby, now on the High Court bench, was once a member of the Australian Conciliation and Arbitration Commission and seems to have become the leading high priest of social justice, expounding at every opportunity the alleged virtues of Australia's compulsory conciliation and arbitration arrangements. Indeed, His Honour has portrayed the arbitral system as "part of Australia's culture – and it [has] played a key role in building the egalitarian features of our society that mark us off from many other countries. Economics is not everything. Looking after those who need a safety net is part of Australia's ethos".[3]

But he is not alone. Many judges and commissioners leave the clear impression that, independently of Parliament or the legislation it passes, the judiciary should play a major role in determining social policy and in ensuring what are perceived as "fair" or socially desirable outcomes.[4] Indeed, Justice Munro implied on his retirement last year as Deputy

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[2] Moore, Des, *How The Judiciary Continues to Undermine Labour Market Regulation,* HR Nicholls Society XXV Conference, 7 August 2004 (see www.hrnicholls.com.au).An edited and slightly modified version is being published in the next edition of the Australian Bulletin of Labour.

[3] Kirby, Justice Michael, *Industrial Relations – Call Off the Funeral*, Address at the launch of the Australian Labour Law Association at Parliament House, Melbourne,18 July 2001.

[4] A major example is the series of widely-reported public interviews given in February 1996 during the federal election campaign by Justice Murray Wilcox in which he criticized the Coalition's plans to amend unfair dismissal laws (for further references to Wilcox J, see Forbes, John, *"Just Tidying Up": Two Decades of the Federal Court*, Proceedings of the Tenth Conference of The Samuel Griffith Society, August 1998). Again, in a paper to the XX1st Conference of the HR Nicholls Society in May 2000 (see www.hrnicholls.com.au), leading industrial barrister Stuart Wood presented an analysis of judgments by

President of the Commission that the judiciary must keep Parliament and the Government in line because "the number [of ministers] who actually know what goes on has been fairly few, and a lot of advisers know even less." By contrast, the Commission has been doing the hard yards by "getting with the parties and trying to get them to work through problems".[5]

Of course, when faced with alternative legally-open conclusions, the judiciary often needs to make choices and these will be influenced by personal beliefs on social issues. However, as Chief Justice Gleeson pointed out in his 2000 Boyer Lecture, "if the Constitution is silent on human rights and freedoms, then it is up to Parliament from time to time to deal with that subject – or not to deal with it – as it thinks fit". Moreover, "there are to be found in the Constitution very few express, or necessarily implied, civil rights".[6] By contrast, Justice Kirby asserts that where there is no law on a subject judges should prescribe it[7] and his social justice pronouncements provide a worrying indication of the serious problems caused by judicial interventionism in workplace relations.

At the opening session[8] of The Centenary Convention on Conciliation and Arbitration on 22 October 2004 His Honour offered "words of respect and praise on the centenary of industrial conciliation and arbitration in Australia" and insisted he had been flattered that I compared him with Justice Higgins[9] in a paper to the HR Nicholls XXV conference in August last year entitled "Over Mighty Judges -100 Years of Holy Grail is Enough."

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several Federal Court judges, most notably that of Justice North in the important case of Australian Paper Ltd v CEPU (1998, 81 IR 15), that clearly suggested tortuous interpretations of Section 127 of the Workplace Relations Act designed to render largely ineffective the legislative provisions directed at preventing unlawful industrial action. Wood also pointed out that, although the Industrial Relations Court had effectively been abolished, ten judges of the Federal Court (including a number of ex-union barristers) had largely operated a de facto Industrial Relations Court through the administrative mechanism of the "industrial" docket system. Justice Gray's comments on the decision by the ACCC in the Transfield/Patricia Baleen case are also relevant (see my paper to HRNicholls XXVth Conference).

[5] Munro, Justice P, Interview with Workplace Express, 26 July 2004.

[6] Meagher,RP, Civil Rights: Some Reflections, in Australian Law Journal, Vol 72

[7] A report in the Herald Sun of 26 November 2003, "Kirby Calls for Judicial Activism", included the following quotation from a lecture by Justice Kirby in England on law-making by judges: "If there is no apparent law on a subject, the judge is duty bound to create it, based on past precedents. Citizens need to know and face these realities. So do the bullies who cry judicial activism". In his Kingsley Lafferty Industrial Relations Memorial Lecture at the University of Sydney on 23 April 2002, Justice Kirby quoted approvingly a remarkable assertion by Professor Alistair Davidson that the adoption of s51 (xxxv)"effectively put the major issue of social rights on a national scale – the relations between capital and labour - into the hands of a court". Justice Kirby further indicated that "where the common law has no exact precedent, where a statute is ambiguous and, in my view, where the Constitution yields competing interpretations, universal principles of international law may be used to resolve the uncertainty". Justice Kirby went on to praise the NSW Industrial Relations Commission for its decision to "establish a new equal pay remuneration or equal pay principle intended to provide remedies for gender affected under-valuation of wage and salary rates involving workers in the State of New South Wales under the jurisdiction of the Commission" and for "founding its decision squarely on a human rights approach …I am aware of no more explicit recognition by an industrial tribunal in Australia of the significance of international human rights norms for Australian industrial relations law and practice".

[8] Kirby, Justice Michael, *Industrial Conciliation and Arbitration in Australia,* Melbourne, 22 October 2004.

[9] Ibid,p2.

I had then drawn attention to Justice Higgins' notoriously mistaken disparagements of the outcomes of "the higgling of the market place" and had compared them with Justice Kirby's similarly absurd statements that the national industrial system has had "big successes" in "avoiding nation-wide strikes" and in "providing rapid response by bringing disputing parties around the table". But His Honour's presentation to the Convention made it clear that Higgins is his hero, supposedly "a true liberal"[10] who purportedly understood that civil rights and basic human dignity are inextricably linked to the conciliation and arbitration of industrial disputes. According to Justice Kirby, the Higgins conception in the Harvester case of a wage that permitted the ordinary Australian to enjoy "a condition of frugal comfort [as estimated by current human standards]" was an idea that seemed right - "even for an Australian of Ulster Protestant lineage" prepared to use the exact words from Pope Leo XIII's Rerum Novarum. Moreover, it "remains in the ongoing function that Australians expect of their national tribunal for industrial conciliation and arbitration." Indeed, "Higgins' considerable intellect and sense of history helped him and his supporters create" an institution that is not "a mere agency of economics" but of "industrial equity, a 'fair go all round' or, as many would now describe it, human rights"[11].

So what is one to make of critics like myself? According to His Honour "those in the bully pulpit, who attack industrial conciliation and arbitration, who think they have the whole truth for all ages, need to be put in their place. There is no room in this nation for industrial ayatollahs".[12] Indeed, referencing to an earlier paper of mine published in Policy[13], Justice Kirby declared that those "who see no future whatever in the Australian Industrial Relations Commission", who want it "closed down, lock stock and barrel" or, "if retained, converted into a mediatory body 'with no legal powers of arbitration or intervention'… tend to live in a remote world of fantasy, inflaming themselves by their rhetoric into more and more unreal passions, usually engaged in serious dialogue only with people of like persuasion".[14] One wonders what His Honour will say at the funeral of the Commission.

It would be wrong to compare Justice Kirby with the unfortunate owner of the Gleneagles Hotel in Cornwall, who after he made the mistake of accepting a booking from the Monty Python team was described by John Cleese as "the most wonderfully rude man I have ever met". Indeed, I feel a slight sense of obligation to acknowledge how much the judiciary, including Justice Kirby himself, struggle to keep courtrooms as free as possible of passion and fantasy. Particularly appealing is the attitude of former Judge Meagher of the NSW Court of Appeal, who was reportedly so concerned to deter the exercise of passion in the courtroom that he told one counsel "I am going to sleep now and I don't want you to be here when I wake up". One has to be somewhat less admiring of the

[10] Ibid,p2.
[11] Ibid,p7
[12] Ibid,p6.
[13] Moore, Des, *Better than the Australian Industrial Relations Commission,* Policy, The Centre for Independent Studies, St Leonards NSW, Summer 1999-00.
[14] Ibid,p7.

American judge who, in attempting to avoid courtroom distractions, paid so much attention to handling his own passion that colleagues felt obliged to "persuade" him to retire!

It is worth reminding ourselves here that s.51 xxxv of the Constitution says nought about safety nets or human rights. The subjecting of employment arrangements to specific legal conditions, both legislative and judicial, has developed over time largely from judicial decision-making based on the notion that it is a necessary part of the dispute-settling process inherent in the placitum. That is why, presumably, the IRC has seen fit to require employers to include in employment agreements such important human rights as jury duty, parental leave, compassionate leave, RDOs and other matters that would (seemingly) otherwise be non-negotiable. Justice Higgins' denigration of bargaining between employers and employees as the mere "higgling of the market place" set the pattern for this judicial interventionism and for the belief that it is essential to have an independent umpire with the capacity to impose "fair" conditions on the negotiating parties.[15]

Nobody disputes the principle that the judiciary should be independent and free from political influence. But a serious problem exists when we have such a wide range of Justice Kirby types who apply workplace relations laws according to their own views of what constitutes social justice, with limited consideration of the economic, or for that matter, the social implications, and with little regard even to black letter law. Indeed, we have a quasi-judicial monopoly of regulation that makes it highly unlikely that this problem could be overcome simply by allowing competition between Federal and State regimes of regulatory laws.

The Case for Major Reform – Aspects That Have Been Overlooked

But can a move to legislate to eliminate or greatly reduce regulation be justified when employers are perceived as being much more powerful and able to force workers to accept onerous conditions?

The reality is that in our relatively modern competitive economy there are over 1.1 million Australian businesses *and* there is virtually no scope for them to exercise monopsony powers. Those businesses actively compete amongst each other for the services of a workforce of around 10 million and that workforce has as a backstop a generous social security system. In such circumstances no valid argument can be mounted that, without prescriptive regulations, employers as a group would force wages down or impose "unfair" conditions on their employees. When working conditions are unacceptable to either party, each side has alternatives that, while not necessarily the first best option for either, prevent businesses as a group from being imposers and workers as a group from being slackers. Surveys show that Australia's labour force exhibits a high

[15] Historically, however, Australia has experienced a high rate of industrial disputation and one well above the average in most overseas conutries – see my *The Case for Further Deregulation of the Labour Market*, Commonwealth of Australia, November 1998.

degree of job satisfaction and is able in most cases voluntarily to change jobs without penalty.

Accordingly, with no general imbalance of bargaining power between employers and employees,[16] freedom of contract can be introduced into employment in the mutual interests of both workers and employers. Yet this imbalance argument is widely (almost desperately) touted by so-called experts and it underlies the position taken by unions and by many involved in the judicial decision-making process.

Nor is there a need to continue having judicial "outsiders" passing judgments on whether employment contracts are "working". The satisfactory operation of such contracts depends primarily on relationships that can only be assessed within a business, particularly as to whether self-enforcing and in-built incentives work out in practice.[17] This is not mere assertion. The existence of a generic problem with judicial "outsiders" who exercise excessive interpretive power has increasingly been acknowledged, including by the present Chief Justice when he was Chief Justice of NSW in 1995. In an article entitled *Individualised Justice – The Holy Grail,*[18] His Honour then noted the potential for "individualised" judicial decisions to have serious adverse implications, including for "the willingness of people to engage in commercial transactions".[19]

This problem suggests that regulatory legislation should leave minimal scope for judicial interpretation and that action should also be taken to strengthen the Acts Interpretation Acts. Far too few of the judiciary (and commentators on judicial decisions) pay regard to the requirements of these acts that the purpose or object underlying an act should be promoted.[20] These legislative requirements ought to have been highly relevant to judicial interpretations of the Workplace Relations Act 1996, whose principal objects include "ensuring that the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace or enterprise level".[21]

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[16] For further consideration of this issue, see Hogbin, G on www.hrnicholls.com.au

[17] For further discussion of this point, see Moore, D.(2001), *Judicial Intervention The Old Province of Law and Order*, Proceedings of the Thirteenth Conference of the Samuel Grifith Society, Vol 13, September, Sydney, 152-158.

[18] Gleeson, Murray, *Individualised Justice – The Holy Grail,* in The Australian Law Journal, Vol.8,June, 1995.

[19] Even the President of the Australian Industrial Relations Commission, Mr Justice Guidice, has complained that there is a potential for unfairness because "the uncertainty generated by the mixture of laws which impact on employment relationships in this country constitutes an erosion of freedom and impacts on the quality of our society." See his Keynote Address to Industrial and Employment Law Conference, Bar Association of Queensland, www.airc.gov.au, 20 April 2001.

[20] The Acts Interpretation Act of 1901 and the 1981 addition of s 15AA provided that "in the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object". Also relevant is the 1984 addition of s15AB, which provided that extrinsic materials such as Hansards (and hence Second Reading Speeches) and explanatory memoranda should be used in interpreting legislation.

[21]Further, the Second Reading Speech presented that legislation as "a break with a system of industrial relations that has been based on a view that conflict between employer and employees is fundamental to the relationship and that an adversarial process of resolving disputes is appropriate and inevitable"; as

In brief, my contention, is that, particularly since the late 1980s, the judiciary's application of workplace relations regulatory legislation has been out of kilter with the structural changes in society and with the intent of legislative changes. Action needs to be taken to reduce on various fronts the risk averseness of employers and its adverse effects on employment, which have probably been under-estimated. Partly because of the too ready acceptance of the independent umpire syndrome, the high priests of social justice have so far avoided having to face economic and social realities. The time has surely come to draw stumps.

The Case for Major Reform – Some Relevant Data

The performance of the labour market under the workplace relations regulatory legislation and its judicial interpretation has been affected by a range of other influences, including the deterrent effects on employment arising from the increased access to benefits available through the social security system.[22] Even so, with a greatly improved rate of economic growth since the early 1990s, it is surprising that the labour market has not performed better.

First, although the attached graphs show an increase in the proportion of the working age population employed since the early 1990s, that proportion has only recently attained the peak reached in the late 1980s if one adopts the ABS definition of the working age as being all those over 15 years. Moreover, using the OECD definition of 15-64 years, Australia still has proportions employed significantly lower than in countries with economic, welfare and political systems that are broadly similar to ours. Data in the OECD's Employment Outlook published in June 2004 (for 15-64 year olds) show that in 2003 Australia had 69.3 per cent of the working age population employed compared with the US (71.2 percent), the UK (72.9 percent and New Zealand (72.5 percent). These higher proportions were not one-offs but have existed for many years. If in 2003 Australia had had similar proportions employed as in the UK, for example, our employment would have been around 400,000 higher ie equivalent to about two thirds of those officially unemployed. But such comparisons understate our employment potential:

"rejecting the highly paternalistic presumption that has underpinned the industrial relations system in this country for too long – that employees are not only incapable of protecting their own interest, but even of understanding them, without the compulsory involvement of unions and industrial tribunals"; as giving "priority to freedom of association"; and "above all… to empower employees and employers to make decisions about relationships at work, including over wages and conditions, based on their appreciation of their own interest". It was also clearly the intent of the Act to prevent arbitration on bargaining issues during bargaining periods, and to strengthen the compliance provisions to deal with unlawful industrial action. Of course, like all pieces of legislation involving political compromises, the 1996 Act gave scope for the AIRC to pursue regulatory paths, including to determine a "fair and enforceable" safety net of minimum wages and conditions of employment. However, while leaving scope for the exercise of judicial discretion, my contention is that, particularly having regard to the major changes in economic and political circumstances already mentioned, the legislation and the Second Reading Speech do not provide any justification for the tribunals and courts to pursue the regulatory and discretionary paths to the extent they have been.

[22] Moore,D.(1997), *The Effects of the Social Welfare System on Unemployment,* Australian Bulletin of Labour 23, December, 275-94

with our higher rates of literacy and numeracy than these countries, Australia should have higher not lower proportions of working age employed than they have.

Second, in interpreting Australia's employment/population rates account needs to be taken of our very high proportion of part-timers, over a quarter of which say they would like to work more hours. In 2003 we had 28 percent employed part-time compared with 13 percent in the US, 23 percent in the UK and 22 percent in New Zealand. The increasing proportion of part-timers (up from 22 percent in 1990) is reflected in the reduction in average annual hours worked by Australians (now down to 34.6 hours per week compared with 35.7 in 1997).[23]

Third, although there has been a major fall in the so-called official unemployment rate compiled on an internationally comparable basis, the effective unemployment rate is much higher. In September 2003 the then unemployment rate of 5.9 percent compared with the labour under-utilisation rate of 12.5 percent published by the ABS in June 2004. While this was a not insignificant improvement on the 15.2 percent rate in September 1996, it still left 1.2 million "under-utilised" (covering those who were working but would like to work more and those who were either actively looking for work - but not available in the survey week- or discouraged job seekers). Moreover, the ABS survey of Persons Not in the Labour Force in September 2004 (published in March 2005) showed that, on top of the 562,000 then formally unemployed, there was an additional 790,000 who were not actively looking for work but who said they would be available to start work within four weeks if jobs became available. As one leading economist has pointed out, this means that "as many as 2 million people, or 20 percent of the numbers now employed, would like employment or an increase in their hours of work", indicating that "the magnitude of the underutilised workforce suggests there are considerable opportunities to expand employment."[24]

Fourth, the ABS Household Expenditure Survey for 1998-99 shows the relatively small role played by wages in households on low incomes. Households with incomes in the bottom quintile then received nearly 70 per cent of gross incomes from government pensions and allowances but only about 8 per cent from wages and salaries. The 2001 survey shows that wages are only 15 percent of the income of the bottom third. Moreover, more than half of minimum wage recipients are in the top half of household incomes. Together, these two factors make nonsense of the case for using the regulation of wages as a vehicle for assisting those on low incomes.

Fifth, while a proportion of the work force (perhaps 15 per cent) effectively operates outside the regulatory system, only an estimated 3 per cent (about 250,000) are formally on individual agreements or AWAs. Moreover, when the Employment Advocate has

[23] According to the Workplace Editor of The Age (28 July, 2004), a "series of studies", including by the ACTU, suggest that most so-called casual employees, said to now constitute 29 per cent of employment, would prefer to be permanently employed. However, the definition of "casual" used appears to be the same as that used by the ABS, which counts as casual only those who do not have leave entitlements. Some 13 per cent of these are in fact permanently employed.

[24] Freebairn,J. (2004), Inflation Risks Don't Measure Up?, Australian Financial Review, 19 April, Sydney.

doubts about whether an AWA proposal meets the "no-disadvantage" test, he is required to submit them to the AIRC to assess whether it meets that test.[25]

Sixth, although published industrial disputes statistics of working days lost have in recent years generally been at a relatively low level, this has been an international-wide phenomenon. Moreover, it cannot necessarily be taken as indicating that employers are relatively free from disruptive union attempts to obtain "concessions". "Disputes" and workplace "disruptions" can (and do) occur without the loss of the ten working days required to qualify as a statistical dispute.

The Case for Major Reform – Some Economic and Social Benefits

This brief outline of the judicial, legislative, economic and social situations suggests that, if much greater freedom to contract is allowed, that will produce a positive labour demand response by businesses as a result of the reduction in regulatory risk and in the employment conditions currently required to be met. Job protection type responses either from unions or from decisions under judicial processes would also be less. That would, in turn, reduce the existing inhibition to implementing structural changes and productivity improvements, thereby providing Australian businesses with increased ability to maintain internationally competitive cost structures. Further, given a reasonable response in labour supply, the resultant increase in the employment/population ratio (EPR) would help overcome the ageing population problems identified in the Intergenerational Report of 2002-03.

However, as unskilled labour makes up a relatively large proportion of the unemployed and the 800,000 odd outside the labour force looking for a job, the extent to which the EPR increases will depend on two important *specific* policy reforms.

First, the existence of such a large group of *potential* employees with relatively low productivity provides a strong economic case for having no minimum wage or, at the very least, allowing it to fall to levels comparable with the lower levels of minima existing in some OECD countries. Indeed, with Australia's minimum of 58 per cent of the median wage currently the second highest amongst OECD countries, even a lowering of the minimum to around 33 percent of the median ($7 per hour compared with the

[25] While this means that such proposals come before the Commission in only a minority of cases, in practice it exercises a not insubstantial influence on the approval process and hence the capacity of employers to conclude AWAs. Thus, in deciding whether a proposal would pass the no disadvantage test, the Employment Advocate has to take account of fact that, as it is a non-union agreement, the Commission will be more deliberative in any assessment that it is asked to make than it would if a union agreement is involved. It is relevant in this context that, under the AIRC's interpretation of its general jurisdiction to conciliate and arbitrate industrial matters, a union can notify a dispute to the Commission when an employer is offering or planning to offer AWAs and the Commission can then make recommendations, and even arbitrate, to order that the employer desist from offering AWAs. In a recent claim brought by a union the Commission did in fact intervene to recommend that the employer desist from its current offer, talk to the union and then ballot employees whether they collectively wanted AWAs to be offered or a union agreement. In short, the agreement making system introduced in 1993 (union) and 1996 (non union) is a regulated system of agreement making and this system is linked to the regulated award system via the no disadvantage test.

current $12 plus per hour) would offer enormous potential for increasing their employment. Such a rate would be about the same as in Spain (30 per cent), Japan (32 per cent) and the US (34 per cent).

Further, although some analyses by academic economists suggest only small employment responses to changes in the minimum wage, there are grounds for thinking that these analyses may involve a not insignificant under-estimation of responses in employment.[26] Such employment would, in turn, provide the on-the-job training that offers the potential for higher wages to be earned down the track.

There is also a strong social case for having no minimum wage or at least a much lower one. It is obviously grossly unfair to have a regulation that inhibits or prevents the legal employment of many at the bottom of the social spectrum. The fact that no wage is allowed to be paid between the minimum of around $24,000 a year and the unemployment benefit of about $10,000 (for a single adult) illustrates the extent of the unfairness. As noted, it is also difficult to see that social fairness is improved by helping the more than half of low wage earners who are in the top half of household incomes and who now receive a minimum wage. And, with wages constituting only a very small element of low income households' incomes, the abolition or major reduction of the minimum wage could not be seen as taking away any important component of the social security safety net. It is patently obvious that assistance to those on low incomes should be the function of social welfare policy, not a responsibility of industrial tribunals that have no capacity to assess the widely different needs of individuals on such incomes.

The potential for significant additions to the employment of the lesser skilled would open up the possibility of a major improvement in the social situation. The argument sometimes used against a major freeing up of employer/employee relations – that it would be unfair to workers – can thus be turned around, viz it is more the existing arrangements that are unfair because they protect the insiders but exclude from employment those at the bottom end who are unable to penetrate the regulatory constraints. The existence of over 1 million jobless couples, many with children, highlights the problem and the need to introduce reforms (in both workplace relations and social policy) likely to reduce it.

Some will argue that, if employers are allowed to offer a wage below the current minimum, those currently on the minimum will either lose their job or experience a reduction in wages and hence in living standards. However, unless those presently employed on the minimum have an inadequate productivity performance, their wages and/or jobs should not be adversely affected.[27] The main outcome of any lowering of the minimum would not be job replacement but additions to employment. Those on the minimum who claimed that lower paid workers had "forced" their wages down or caused

[26] Moore, Des (2002). *Minimum Wages: Employment and Welfare Effects or Why Card and Krueger Were Wrong,* Australian Bulletin of Labour, Adelaide, September.

[27] Estimates from official sources are that, while the minimum award by the AIRC extends to about 1.5 million employees, only about 150,000 are actually on the minimum. This suggests that, with no minimum, the potential for wages of existing employees to fall below the current minimum is very limited.

them to lose their job could scarcely claim to be hard done by; and they would, of course, be eligible for the unemployment benefit if they could not find work at a wage lower than their previous one.

In short, the living standards of lower productivity workers should be protected by maximising their opportunities for employment or, failing that, through the social security system.

Second, major changes also need to be effected in welfare and tax arrangements to help reverse the upward trend in the proportion of the working age population on social benefits. Between 1969 and 1999, income support payees increased from 1.1 million to 4.7 million and the proportion of the working age population receiving such support increased from 4 percent to 21 percent. The considerable deterrent to potential employees to make themselves available for employment was highlighted in a recent analysis by the Secretary General of the OECD, who pointed out that "disincentives embedded in public policies" are a major reason for Australia having only an average (amongst OECD countries) employment rate for those aged 55 or over.[28] Much analysis has already been published of the consequences of high effective marginal tax rates, and what more might be done to reduce the disincentives, and it is not proposed to pursue that issue further here. However, a tightening in the eligibility for health and welfare benefits, particularly in regard to middle and higher income groups, and/or some flattening in tax rates would obviously be important in encouraging people to offer themselves for employment in circumstances where greater freedom to contract applies.

What the Reforms should Comprise

There are alternative ways of implementing workplace relations reform. Some will argue that it should be effected through amendments to the existing workplace relations legislation. However, I favour making a completely new start by repealing the existing legislation and passing new Federal Employment Contracts legislation that would allow employers and employees the maximum freedom to negotiate and contract their own terms and conditions of employment and provide minimal opportunity for tribunals or courts to make decisions that apply non-legislated employment conditions.

The parties to employment contracts would not of course be able to avoid the normal criminal law applying to actual or attempted exercises of violence and duress and the legislation requiring no racial, sexual or disability discrimination would also continue to apply. It would also seem desirable to include in the legislation requirements that employers provide safe working places but such requirements should be less onerous than those included in some State acts.

As to other conditions, the basic approach should be that these would be determined in negotiations between employers and employees. If it is decided to retain a minimum

[28] Cotis,Jean-Philippe (2005), *Deep Benchmarking will unlock growth,* Australian Financial Review, 2 March. Cotis also noted that low employment rates for the low-skilled as well as for older workers have contributed to Australia's "still sizable income gap with leading countries."

wage (at any rate for the present), then at the very least it should be substantially reduced to (say) the equivalent (relative to the median wage) that exists in some other countries. In order to give early application to such a change, such action would presumably require a legislative provision to negate the extant decisions of the AIRC.

Given the retention of a minimum wage, there would be a question as to how it should be determined in future. An AIRC that appears to take little account of the potential adverse employment effects of the minimum, and believes it needs to deliver increases because 'not all employees are capable of bargaining and bargaining is not a practical possibility for those employees who lack bargaining power', is obviously not the appropriate body. Perhaps the best approach would be to legislate a Charter of Employment Honesty requiring the Treasury and the Department of Employment to publish a report each year on the employment effects of the existing minimum wage and the likely effects of changing it either way. Such an official published report would reduce the risk that governments' determinations of minimum wages would be excessively influenced by political considerations.

A federal Employment Contracts Act along the lines indicated would rely for constitutional authority on the Federal corporations power and, in the case of corporations, would thus over-ride State laws to the extent they are inconsistent. While this would not cover unincorporated businesses, which States would continue to be able to regulate, it appears that it would potentially cover around 85 percent of total employees. If such a substantial proportion of such employees was to work under contract arrangements, that would represent a major reform. It is envisaged that large corporations would effectively be able to continue to undertake enterprise bargaining by concluding identical contracts with sections of, or even their entire, workforces. If States chose to continue to regulate unincorporated businesses the extent of incorporation could well increase to the point where it would cease to be worth their continuing the regulatory apparatus.

As to the AIRC itself, the passage of Federal Employment Contracts legislation with minimal conditions, and the removal of any responsibility of that body for determining a minimum wage (and other existing "allowable matters"), would effectively mean a greatly reduced role for the high priests of social justice. If the government judged it necessary to retain an AIRC with some alternative responsibilities in workplace relations, one possible approach would be to convert it into a mediatory/conciliatory body with no legal powers of arbitration or intervention. The Advisory Conciliation and Arbitration Service (ACAS) in the UK is such a (widely used) body that, in the voluntary mediations/conciliations it chairs, has established itself as impartial as between employers and employees. It provides extensive advisory services to both employers and employees at a low cost.

The existence of such an advisory body here could be particularly helpful in adjusting to legislation providing for a Federal Contract of Employment. Instead, of prescribing the law from on high, our high priests could then perform the duties of shepherds watching

their flocks by night while seated on the ground. With luck, glory might even shine around, at least for those previously kept out of a job!