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Australian Labour Law Association

ALLA NATIONAL CONFERENCE

The Regulation of Work in a 'COVID-normal' World

11-12 November 2022, Crowne Plaza, Coogee Beach

ABSTRACTS

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ALLA NATIONAL CONFERENCE

The Regulation of Work in a 'COVID-normal' World

The ALLA National Conference will be held at Crowne Plaza Coogee Beach on Friday 11 November and Saturday 12 November 2022.

The conference will run from 8.45am to 5.20pm on Friday 11 November 2022 and 9.00am to 4.00pm Saturday 12 November 2002. The conference dinner will be held at Crowne Plaza at 7.00pm on Friday 11 November 2022.

Professor Douglas Brodie from the University of Strathclyde will open the conference with a keynote address in a plenary session chaired by Professor Joellen Riley Munton (UTS).

A plenary session will consider the ongoing challenges of regulating gig workers with representatives from the Transport Workers Union, Uber and Door Dash on Friday morning.

Another plenary session on Saturday morning will focus on the Aged Care Work Value Case with representatives from the aged care industry and the Health Services Union along with Professor Emerita Sara Charlesworth.

A full program will be available in October 2022 on the conference website https://austlabourlaw.asn.au. Please read on for details about the papers you can expect to hear at this year's conference.

We look forward to seeing you at Coogee Beach in November 2022!

The 2022 ALLA Conference Committee: Professor Anthony Forsyth, Associate Professor Dominique Allen, Janine Smith, Professor Marilyn Pittard, Professor Joellen Riley Munton, Graham Smith, Emma Goodwin, Larissa Adelman and David Chin SC

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Reproducing Disadvantage? Re-thinking Labour Law's Response to Pregnancy and Work

Dominique Allen and Adriana Orifici, Monash University

Pregnancy discrimination continues to be prevalent in Australian workplaces. A 2014 report by the Australian Human Rights Commission found that 49% of new mothers experienced discrimination in the workplace on at least one occasion and of them, 55% reported experiencing discrimination more than once.

However, an extremely low number of legal claims proceed to an adjudicated outcome. This means women's experiences of pregnancy discrimination are largely invisible. Very little is understood about the discriminatory conduct that pregnant women experience at work or the barriers that women encounter to submitting legal complaints.

This paper uses doctrinal and empirical legal research methods to examine manifestations of discrimination experienced by pregnant workers and evaluate whether labour law could be strengthened to better support working women. The paper maps the framework of rights and protections currently applicable to pregnant women under the Fair Work Act 2009 (Cth) ('FW Act') and analyses court decisions relating to claims of adverse action based on discrimination on the ground pregnancy and unfair dismissal determinations of claims made in the context of pregnancy.

Recognising that these decisions comprise the 'tip of the iceberg' in terms of reflecting workers' experiences of unfair treatment during pregnancy, this analysis is supplemented by an empirical study of the experience of pregnant women working in Victoria. The paper concludes with a consideration of how the rights and protections under labour law could be strengthened to better support pregnant women who experience unlawful conduct at work.

Resetting Some Foundations of New Zealand Employment Law

Gordon Anderson, Victoria University of Wellington

The current Labour Government is currently pursuing two initiatives that, if they come into effect, will reset the foundations of current labour law. The first, currently being considered by Parliament, is the proposal to allow the negotiation/determination of Fair Pay Agreements (FPAs) at an industry or occupational level. The second is the proposal for a New Zealand Income Insurance Scheme (NZIIS). While both proposals were originally developed on a tripartite basis the reception of the proposals has demonstrated a strong division of opinion and the FPA proposal in particular has been strongly attacked by BusinessNZ, the main employer lobby group. The objects of the two proposals are somewhat different. FPAs are intended to address some of the negative effects of current wage fixing mechanisms, largely the result of the collapse in collective bargaining. The NZIIS is more future focused, and while it will remedy some contemporary problems it is more concerned with alleviating some of the consequences of the predicted disruptive character of future labour markets.

This paper will first consider the origins of the two proposals and outline the main features of each before discussing the impact of each will have on the current architecture of New Zealand's labour law, an architecture that has remained largely unchanged since the neo-liberal reforms of the Employment Contracts Act 1991. Finally, the paper will consider the future impact of each and in particular whether they will achieve the vision of their designers.

Unions and Civil Society actors as Protectors of Migrant Worker Rights

Anna Boucher, University of Sydney

An important question for regulators and for advocates is whether unions and other civil society actors can play a role alongside government in protecting migrant worker rights. How involved are these actors in pushing for such rights protection and what obstacles do they face in representing migrant workers? This presentation will highlight findings from a new Migrant Worker Rights Database that develops an innovative method to trace the nature of litigated migrant worker rights violations on the ground in Australia, England, Canada and the State of California. By coding a body of 907 legal decisions on alleged violations across the areas of employment, tort, human rights, anti-discrimination and criminal law, it presents a new evidence base for understanding migrant worker rights violations. The database codes these violations in tribunal and court cases brought over a twenty-year period (1996 to 2016) to capture the quality of violations across time and jurisdiction. A central finding is that trade unions are not heavily involved in litigation (only around 14 % of cases). Civil society actors can be involved as interveners (amici) but rarely as legal representatives. These groups also face multiple obstacles in organizing and representing migrant workers outside of legal proceedings. These challenges are outlined in the presentation.

Genuine Agreement? The Application and Implications of Section 188(2) for Employee Voice and Agreement Making under the Fair Work Act (Cth)

Renee Burns, University of Melbourne

Enterprise agreement making under the Fair Work Act ('FW Act') relies on a highly prescriptive procedural model to demonstrate the 'genuine agreement' of parties. Section 188(2) – enacted in December 2018 – affords the Fair Work Commission (FWC) discretion to conclude an enterprise agreement has been 'genuinely agreed', within the meaning of the Act, despite 'minor procedural or technical errors' in the agreement making process. This paper undertakes a survey of cases to examine how this discretionary power has been applied by the FWC and explores the implications of s 188(2) for employee voice and agreement making under the FW Act.

It is argued that absent a framework for genuine collective bargaining – understood by reference to ILO conventions – and resulting from the decoupling of unions from the bargaining process, the procedural requirements of the FW Act are designed to ensure employees are afforded voice in the agreement making process. The discretion to overlook minor procedural or technical errors in relation to this process risks creating a class or classes of error that become automatically overlooked, undermining the protective role of procedure and threatening employee voice in agreement making.

This paper concludes that the procedural requirements for enterprise agreement making play an important role making space for employee voice and should be protected against derogation. However, this paper offers that employee voice in agreement making would be better served by the implementation of a model for collective bargaining that embraces the principles set out in ILO conventions 98 and 87.

Do You Needle Little More Help to Update Old Approaches to Risk Management to the Challenges of the Covid-normal World?

Michelle Chadburn, Thomson Geer

A business-specific, tailored approach to managing health and safety in the workplace has never been more important to help manage the new physical and psychological dimensions of the COVID-normal world.

To determine how it will keep its workers safe, productive and motivated, every business needs to assess for itself how it will manage the closer intersection of work and home and digital fatigue, the surging demands for technological access and increasing flexibility, and reduced or renewed opportunities for collaboration with colleagues and clients and what that means for career progression and workforce retention.

New or different tools have emerged (or re-emerged in new ways) to help, including social/physical distancing, quarantine/isolation, CoVax, stay at home orders, work life balance and hot-desking, and they are not without their own risks if adopted without a clear assessment on the safety to the workforce and the business in question.

With COVID-19 revealing new ways to manifest old issues, from mental health risks and isolation to bullying and sexual harassment, there is no scope for a 'one size (or jab?) fits all' approach to managing these issues. But how should business approach the risk management process in the COVID-normal world?

This paper considers how to deal with these challenges.

The Covid-19 Pandemic: Balancing Workplace Vaccination Mandates and Workers' Human Rights

Nadia Dabee, University of Auckland

This paper assesses whether New Zealand's workplace vaccination mandates, in response to the Covid-19 pandemic, were a justifiable breach of workers' right to refuse medical treatment, right to freedom of religion and conscience, and right to work. This paper first applies the 'precautionary principle' to show that the decision to use vaccines as a public health tool, even while the science was still evolving, was the right public health response. The paper then applies Derek Parfit's concept of 'group beneficence' and John Stuart Mill's 'harm principle' to workplace vaccination mandates to assess whether these mandates were a justifiable breach of workers' rights. The analysis shows that mandates only appear to have been demonstrably justifiable for workers at the borders in limited circumstances, and for those in the healthcare sector. The categories of workers on whom mandates were imposed was thus too broad to be justifiable and a more proportionate response would have been to encourage vaccination uptake along with complementary health measures. Also discussed in the paper are recent decisions in the High Court of New Zealand which appear to align with the author's views on the use of vaccinations and the scope of mandates. Next, the paper explains that only allowing exemptions based on medical grounds for mandated workers represents the 'hard compromise' that the state made between preserving human rights and the need to implement a public health measure. The application of Mill's harm principle shows that exemptions based on conscientious grounds should have also been allowed.

Labour Law and the Emerging Crisis in Worker Mental Health: Reflecting on the Lessons of the Covid-19 Pandemic in Aotearoa New Zealand

Dawn Duncan, University of Otago

In the first two years of the Covid-19 pandemic the Government of Aotearoa New Zealand pursued an elimination strategy, taking swift and decisive action to curb transmission of the virus. However, these bold public health measures had significant negative impacts on worker mental health. The combination of lock-downs, lost-earnings and economic uncertainty, redundancies, chronic understaffing, increased occupational violence, and the isolation and role-conflict associated with working from home have contributed to a growing crisis in worker mental health. This parallel “epidemic of burnout” may continue for many years, regardless of the future trajectory of the Covid-19 virus and its variants. The work health and safety regime in Aotearoa New Zealand has long prioritised safety over health, with weak or non-existent regulation of relevant working conditions, inadequate regulator attention to psychosocial hazards and unsuitable inspection and enforcement machinery. Aotearoa New Zealand also lacks workers’ compensation for stress-related illnesses, resulting in affected workers receiving less access to treatment and rehabilitation and often unable to obtain sufficient income support. Aotearoa New Zealand’s current laws have struggled to protect worker mental health or ensure adequate compensation for those suffering the mental health consequences of the pandemic. This paper reflects on the lessons of the Covid-19 pandemic, the weaknesses of the existing legal response and the urgent need for reform to ensure adequate protection and support for workers in the coming years.

Collective Bargaining in Fissured Work: Key Challenges, Novel Experiments and Possible Reforms

Anthony Forsyth, RMIT University
Tess Hardy, University of Melbourne
Shae McCrystal, Sydney University

The opportunity to improve wages and working conditions through collective bargaining is denied to many Australian workers as a result of the 'fissured' nature of business operations.

Employees of labour hire agencies are unable to negotiate with host businesses; employees of franchisees cannot bargain directly with franchisors; and putative independent contractors in the gig economy are precluded from collective bargaining by both labour and competition laws.

In this paper, we survey some of the key obstacles facing workers seeking to engage in collective bargaining, before exploring several avenues through which a broader range of workers may be able to engage in collective negotiations. These include the ACCC's exemption for independent small businesses and the Victorian Government's proposed Fair Conduct and Accountability Standards for the On-Demand Workforce.

We also examine efforts by unions to engage in informal forms of collective bargaining for gig workers, such as the Transport Workers Union's 2020 and 2022 deals with DoorDash; and its June 2022 accord struck with Uber.

Finally, we consider options for reforming labour law and competition law to allow workers in a range of fissured work contexts to engage in collective bargaining, regardless of their employment status.

The Labour Relations Tradition of Emphasising Disagreement and Opposition to Centrism in Labour Legislation

Hon. Reg Hamilton, Central Queensland University

The labour relations tradition of emphasising disagreement and opposition to centrism in labour relations legislation

It is easy to find examples of serious policy differences in Australian labour relations. The test case decisions on movements in the minimum wage show employers proposing less and unions more. Senate Committee reports on proposed labour relations legislation show frequent serious differences of opinion between employers, unions and political parties. For example, the political and industrial parties sought and achieved strongly disagreed changes to the 'no disadvantage' test after 2004, consistent with their then different stated policy objectives regarding awards, and the ordinary democratic process.

However there have also been examples of agreement and cooperative endeavour between employers, employer associations, trade unions and political parties. The paper will examine some of these agreed changes to legislation and awards in the period 1983-2021, a third of the period of operation of the federal labour relations system (1904-2021). The arguable obscurity of such a list may suggest less general interest in areas of cooperation and agreement than disagreed matters.

Nevertheless, centrist reforms delivered what employers and to a lesser extent trade unions now describe as a relatively workable enterprise agreement approval system tested against awards with the 'no disadvantage' test in legislation, and a workable and less controversial unfair dismissal jurisdiction exercised by the Fair Work Commission to replace a controversial court jurisdiction.

The paper will examine the prospects for a less adversarial approach to labour legislation and the nature of past agreed changes.

Iron Fist in a Velvet Glove? A Review of Enforceable Undertakings Under the Fair Work Act 2009 (Cth)

John Howe, Tess Hardy and Sarah Spencer, University of Melbourne

This paper presents a study of all Enforceable Undertakings (EUs) entered into by the Fair Work Ombudsman (FWO) between 2009 and 2021 under the Fair Work Act 2009 (Cth) (FW Act).

Concerns have been raised about whether EUs can achieve sustainable compliance outcomes and deliver general deterrence. There has also been criticism of the way that the EU provisions are currently framed in the FW Act.

In order to properly assess the regulatory value of EUs, a baseline study of EUs made under the FW Act is a necessary first step. Our study is based on publicly available data and a review of each EU and draws on regulatory literature to inform our analysis. The paper summarises counts of EUs by factors such as: industry and size of business; counts by 'trigger' (eg. self-report, complaint or detection), contravention type and number of employees affected; duration; and analysis of content, including contrition payments. We also review several cases in which the FWO has initiated litigation action to enforce EUs. Our findings provide a comprehensive analysis of how EUs have been used to date, and will inform future research, policy and law reform concerning the appropriate nature and mix of sanctions for non-compliance with the FW Act.

The Use of the Criminal Law to Target Withholding Pay, Leave and other Employment Entitlements: Are Criminal Wage Theft Offences Justified?

Melissa Kennedy, University of Melbourne

In Australia, there is continued debate and discussion across state and federal jurisdictions as to whether the criminal law has a role in targeting certain kinds of breaches of minimum labour standards.

My research identifies theoretical justifications for criminalising certain types of conduct commonly referred to as 'wage theft' offences by focusing on the Victorian Wage Theft Act 2020 (Vic). This paper focuses on 'the full or partial withholding of employees' entitlements' offence. The record-keeping offences will not be discussed here as the justifications are different.

In order to consider whether the 'withholding' offences in Victoria are theoretically justified, I apply Stuart Green's three-part framework for assessing whether criminalised conduct has characteristics that point to a theoretical justification. Green's framework consists of an assessment of the characteristics of criminal offences by considering: (1) culpability, (2) harmfulness and (3) moral wrongfulness. Key findings in relation to the three elements will be detailed, before the paper weighs up the factors to make an overall assessment as to the extent the 'withholding offence' fits Green's framework.

The paper will also briefly draw attention to other factors that should be considered alongside a theoretical criminal justification for contemplation when enacting criminal offences.

Prospects for New Zealand-style Pay Equity Bargaining in Australia

Avalon Kent, ANMF

New Zealand has recently embarked upon the development and implementation of a unique and world-leading system of compulsory pay equity bargaining. The much-anticipated substantive amendments to the Equal Pay Act 1972 in New Zealand came into effect in November 2020. This heralded a new, but not uncontroversial, direction in pay equity, to that of a hybrid rights-bargaining framework.

Meanwhile, across the ditch here in Australia, the scourge of pay inequity between female and male workers persists and the equal remuneration mechanisms in the Fair Work Act 2009 (Cth) (FW Act) have been effectively rendered nugatory. In this landscape, the industrial parties are relying on alternative mechanisms to pursue quasi-pay equity claims.

This paper will explore the benefits and controversies of the New Zealand pay equity bargaining model and consider whether it could or should be transplanted into the Australian jurisdiction, particularly taking into account the new federal Labor Government's election promises to make gender pay equity an object of the FW Act, create statutory Equal Remuneration Principles and set up expert panels in the Fair Work Commission to strengthen the ability of the Commission to order pay rises for underpaid women workers. The analysis will inform the question whether New Zealand-style pay equity bargaining has the potential to have meaningful impact in industries where gender-based undervaluation persists in Australia.

Good Faith and Cooperation as a Framework for Consultation

Paul Lorraine, Harmers Workplace Lawyers
Giuseppe Carabetta, University of Technology Sydney

Consultation is central to good workplace relations. It has a long history, with standard consultation requirements in legislation, awards, and enterprise agreements.

But this is not just a narrow legal compliance obligation. Good leadership involves consultation and consensus building. Consultation is basic good management practice. It needs to be genuine and not perfunctory, and the Fair Work Commission offers best practice guidance.

And yet disputes and major cases continue to show the concept is not well understood, or not implemented at all, as illustrated by the recent BHP Mt Arthur case, concerning BHP's COVID vaccine policy.

The BHP case reinforced that consultation is triggered when a decision is made to implement change, while highlighting the need for genuine, meaningful consultation. But the case did little to explain what meaningful consultation would involve, or if there was any legal underpinning for the requirement, other than the existence of statutory obligations.

In anticipation of the need for continual workplace change in the "COVID-normal world" particularly, this paper examines how we can borrow from two established legal concepts – good faith and cooperation – as a framework for consultation.

Underpayments, Enforcement, and Wage Theft — Needed Reform or Much Ado About Nothing?

Matoula Makris, 3 Shell Chambers
Shane Prince SC, State Chambers

The enforcement of employee entitlements has been a topical issue for some time. In addition to existing laws, through the Fair Work Act 2009 (Cth) (FW Act), numerous States have implemented jurisdiction specific sanctions addressing underpayments. From Western Australia conducting an inquiry culminating in the Inquiry into Wage Theft in Western Australia Report June 2019 leading to legislative amendments, to Victoria becoming the first State to enact dedicated legislation, the Wage Theft Act 2020 (VIC) effective 1 July 2021, it is an issue creating debate. Employers risk gaol time (amongst other sanctions) in some Australian States if found guilty of underpaying employees. The criminalisation of underpayments brings into focus the deliberateness of an employer's actions. Not all States however have followed this lead. The Tax Administration Amendment (Combating Wage Theft) Bill 2021 (NSW) introduced into the NSW Parliament seeks to (amongst other measures) empower Revenue NSW to collect payroll tax from employers not otherwise collected in connection with wage theft. At a federal level, wage theft amendments through the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021 were not pursued. The FW Act does however provide for civil remedy penalties in connection with wages and includes provision for a 10-fold increase to such penalties for 'serious contraventions' against individuals and employers. We aim to take a look at what some States have done in this sphere against existing laws and whether there are other, innovative options that might better serve addressing underpayments outside of the criminal sphere.

Wage Theft: Criminal Offences for Underpaying Employees

Charles Martin, 35 West Chambers

This paper explores what is meant by the term “wage theft” in the sense of criminal offences for employers who underpay their employees. The paper begins with an overview of civil enforcement regimes available at federal and state levels to provide remedies and impose penalties where employers fail to comply with obligations to pay their employees. It then explores three recent reforms aimed at criminalising the underpayment of wages: the Commonwealth’s abortive attempt to introduce a criminal offence relating to underpayments into the Fair Work Act 2009 (Cth), and the Victorian and Queensland “Wage Theft Acts”.

After setting out the changes introduced by the Wage Theft Acts, the paper analyses how they might work in practice. It goes on to consider to whom various “wage theft” offences principally apply, and considers the criminal penalties which might be imposed where the offender is a corporate employer. The paper also examines how “wage theft” offences might apply to individuals, and thereby expose real human beings to the prospect of imprisonment for underpaying employees.

The paper challenges the emerging orthodox view that underpayments which occurred before the State Wage Theft Acts commenced operation cannot be the subject of criminal prosecution. While the Wage Theft Acts do not operate retrospectively, the paper argues that, in Queensland, dishonestly underpaying employees has been capable of amounting to the crime of fraud since 1 July 1997. Some underpayments predating the Wage Theft Acts could therefore be the subject of future criminal prosecutions.

The Economic Benefits of Major New Labour Law / Workplace Relations Reforms in the Post-federal Election Landscape

Margaret McKenzie, Australian Institute of Employment Rights

Major industrial relations reforms are now likely on the agenda but just how ambitious they will be remains to be seen. This paper challenges the notion that reforms aimed at increasing social and labour protections come at an economic cost, finding significant net benefits of establishing ambitious labour law/workplace relations reforms outlined in the AIER's *A New Work Architecture: The AIER model for work relations in Australia (Hardie Grant Books, 2022)*, drawing on a draft chapter of the book. It argues that reforms like lifting the restrictions on multilevel bargaining and ensuring worker protections would lift wages, employment and productivity, addressing Australia's widening international lag and its increasing inequality.

Analysing ABS and other data and literature, the paper finds under conservative assumptions a highly positive economic impact overall, with GDP expected to increase more than 6%, also wages more than 6%, labour market participation 4% and employment 6%, vastly exceeding the costs of provision. The paper offers separate and detailed estimates for the impact of providing permanent rates of pay to casual employees and 'independent contractors', improving labour force participation by providing 18 months of paid parental leave and free childcare, closing the GPG by raising female wages; and paying higher collective agreement rates of pay to workers paid by award and to 'independent contractors'.

The paper elaborates upon these results and the standard methodologies applied and argues there is no economic reason to shy away from ambitious reforms to lift working conditions in these areas.

The Work / Non-work Divide in Unfair Dismissal Law: Neglecting the Worker as a Human Being

Jacqueline Meredith, University of Melbourne

Australian unfair dismissal law draws a boundary between work and non-work when determining if a worker's off-duty conduct is sufficiently connected to their employment. In the context of the COVID-19 pandemic, this divide between work and non-work has been increasingly blurred. This paper explores the considerations that shape the drawing of the work/non-work divide in this area of the law. The focus is on the statutory employment nexus test of whether there is a 'valid reason' for dismissal, and its application in decisions involving dismissal for off-duty conduct.

It is argued that industrial tribunals rarely consider workers' rights to private life, autonomy, or dignity, when drawing the work/non-work divide. It is not unusual for worker rights and interests to be subordinated to those of the employer, with decisions reflecting a clear reluctance to erode managerial prerogatives. This is most clearly evidenced in the loosening of the required connection between employment and off-duty conduct that has occurred in recent years, with a 'valid reason' for dismissal established in relation to private conduct by workers that does not appear to directly impact the employer's business interests. The subordination of worker rights and interests in this area of the law has led to a failure to recognise and respect the worker as a human being when drawing the work/non-work divide.

The Covid Pandemic and Employment Mediation in Aotearoa New Zealand

Grant Morris, Victoria University of Wellington

This paper will explore the impact of the Covid-19 pandemic on employment mediation in NZ. Mediation is the primary form of employment dispute resolution in NZ (beyond negotiation). In March 2020, the government's Employment Mediation Service made up approximately half of the entire NZ mediation market. Nearly all mediations were conducted in person and the service had a significant influence on other mediation statutory regimes.

The Covid Pandemic has fundamentally altered the nature of employment mediation. The service is now primarily online and an increasing number of disputes are resolved through an early resolution conciliation process rather than through the standard mediation process. These changes have affected employees, employers, advocates, unions, and mediators. The pandemic has also introduced new substantive areas of dispute eg Covid wage subsidy disputes and vaccine mandates.

This paper will analyse the changes that have occurred over the past two and a half years and argue that employment mediation is at a crossroads. We must now decide which recent changes should be kept and which should be abandoned. These decisions cannot be made in isolation. Employment mediation occurs in the context of other forms of dispute resolution, in particular, negotiation and adjudication. The nature and success of the Employment Mediation Service is of pivotal importance to the NZ employment law and DR communities.

This analysis is based on my experience as an employment mediation researcher, teacher, and practitioner.

The Need to Regulate Social Security for Workers in Employee-like Work Arrangements: Post-pandemic Perspectives

Marius Olivier, University of Western Australia

The COVID-19 pandemic has accentuated the precarious position of workers in employee-like work arrangements, also in the social security sense. Migrant and care workers are in particular affected, considering also gendered dimensions, and reported mental health implications. Access to among other superannuation, workers' compensation, sick leave, maternity leave and unemployment protection is a significant challenge for these workers – given the statutory focus on employee status required for coverage and the operation of exemption provisions. The non-employee characterisation of their work relationships in written contracts may have serious social security implications, also in view of the positions adopted by the High Court in CCFMEU v Personnel Contracting Pty Ltd and ZG Operations Australia Pty Ltd v Jamsek. Recommended measures to address the deficient social security regime applicable to these workers are contained in the Senate Select Committee on Job Security's Job Insecurity and preceding reports, relating to the reform of state-based workers' compensation schemes, the establishment of a portable sick leave scheme and enhanced access to superannuation. The recently introduced Victorian Sick Pay Guarantee scheme may hold some promise for some of these workers, as is the case with benefits for platform workers that may flow from the recent Uber-TWU agreement. Nevertheless, these promising developments remain piecemealed and fragmented. Benefiting also from recent European Union developments, a principled approach is called for, supported by the adoption of a regulatory framework providing for the decoupling of employment status from coverage by and access to social security and an aligned collective bargaining regime.

A Fair Say All Round — Workplace Participation and Representation

Mark Perica, CPSU

In this paper, based on a draft chapter from a new book, A new work architecture: The AIER model for work relations in Australia (2022), it is argued the post-election landscape provides an opportunity for legislation that promotes worker participation and workplace democracy based on representative structures that would lead to greater civic engagement and improved efficiency, productivity, and profitability.

Since the mid-eighties, the aspiration for greater worker participation and workplace democracy has dimmed. The reasons for this include: the rise of employer driven employee involvement schemes, the decline of union membership, reduced enterprise bargaining and the rise of non-standard employment.

The Fair Work Act provides minimal support for worker participation. It adopts a State neutral posture towards trade unions. The mandatory consultation provisions are limited to major workplace change and redundancy.

A new work architecture should encourage representative structures that promote the spread workplace democracy including: education in workplace participation; minimum standards relating to workplace participation extending beyond the employment relationship; the encouragement of union membership; industry and sectoral bargaining; a mandated method of participation in ununionized workplaces and for the gig economy; work councils and mandated worker representatives on boards of large enterprises.

The paper concludes that such a project does not lack ambition. The suggested reforms could be introduced gradually or together to bring about a more socially democratic Australia.

Next Steps in Flexible Work: The Right to Work Remotely as a Labour Right

Marilyn Pittard, Monash University

The right to request flexible work, which embraces the right to request to work from home, was introduced in the Fair Work Act 2009 (Cth). Some 12 years since the operation of that Act, the law relating to flexible work has not changed significantly, apart from some minor expansion in categories of workers eligible to make the request to work from home. However, two significant developments have occurred. First, there have been enormous strides in technology facilitating remote work, Secondly, the pandemic saw a revolution in working practice, where types of work not generally conducted off-site took place at home, thereby showing that this work could be performed flexibly at home and paving the way for hybrid work (a mixture of working at the employer's premises and at home) to become more commonplace. Yet there remains no actual right to work remotely conferred on employees — it remains largely in the employer's discretion, with no right of appeal. Eligible employees must make the request to work off-site to their employer, and employers can refuse the request on reasonable business grounds.

This paper explores the case for the right to work remotely as a fundamental labour right today, and the legislative amendments needed to effect such a right. The safeguards for the sound operation of that right, such as protection against intrusive employer surveillance, and 'switching off', are also analysed.

An Evaluation of Government Proposals to Regulate 'Gig' Work: Prospects and Issues for Road Transport Workers and Businesses

Michael Rawling and Joellen Riley Munton, University of Technology Sydney

Studies have indicated that minimum work standards for on-demand road transport gig workers who are purportedly engaged as contractors are necessary to address the low pay and poor safety they experience at work. Labor's Secure Australian Jobs Plan pledges that Labor will extend the powers of the Fair Work Commission to allow it to make orders for minimum standards for new forms of work, such as gig work. This paper will consider the extent to which this plan, if legislated, will adequately protect on-demand 'gig' workers and other contractor workers in the Australian road transport industry. It will also assess whether the plan will create industry standards to allow road road transport businesses to compete on a level playing field. The paper will compare and contrast the Albanese Labor government's plan with other legislative techniques that could be used to implement minimum standards for workers engaged as contractors in the road transport industry. Legislative regulation of road transport gig work should focus on the substance of the work performed rather than the method of engaging workers. Thus, we consider the extent to which State Parliaments and/or the federal Parliament should establish minimum pay and safety standards for all road transport workers regardless of their work status and the manner in which the workers are engaged.

Wage Stagnation and the Contraction of Enterprise Bargaining — A Sectoral Bargaining Model

Ben Redford, United Workers Union

Has enterprise bargaining — the ‘big idea’ of 1980’s workplace relations reform — failed to deliver on its key objectives? Legislatively approved, locally negotiated enterprise agreements promised to deliver better productivity, higher wages and a range of macro-economic benefits. Instead, productivity growth is poor, wages have stagnated, and the number of enterprise agreements being made and the number of employees covered have declined significantly.

The Fair Work Act re-introduced a good faith bargaining concept and provided special limited arrangements for making agreements for low paid workers and multi-employer bargains. But it retained constraints in favour of collective bargaining at the micro – enterprise level. Have these measures been successful?

This paper draws on a draft chapter for the AIER edited volume proposing a new work relations architecture and examines the experience and results of enterprise bargaining over the last 30 years.

Finding that the outcomes have been uneven at best and a complete failure in key respects — the paper looks at international trends and policy proposals and argues that the scope of bargaining must be broadened to allow for multi-employer and sectoral level bargaining to occur to provide optimal outcomes, details how this could work and the tribunal’s role.

Workers' Rights to "Privacy" and to "a Private Life": Is There a Distinction and Does it Matter?

Amanda Reilly, Victoria University of Wellington

The terms "privacy" and "private life" are often conflated in labour law academic writing as well as in case law. This conflation is (it is suggested) symptomatic of the fact that privacy is under theorised in the sphere of labour law; moreover, the meaning of privacy itself is contested and contestable.

This paper will attempt to answer the question of whether the right to privacy and the right to a private life are two separate concepts and whether this distinction matters. It will tentatively conclude that, on the one hand, given that we find ourselves in the COVID normal environment where emergent technologies have hugely increased the possibilities of employer surveillance and intrusion into workers' private lives, conceptual clarity is important. However, on the other hand, adopting Fairfield's argument that privacy is best treated as a word that acquires meaning within different contexts, insisting on a distinction between the two concepts may be unnecessary. What is important is that in creating an understanding of privacy in the context of work and crafting regulatory responses to protect it, law makers should not be limited by understandings and definitions of privacy lifted from other contexts.

Classifying and Comparing National Labour Dispute Settlement Laws: A Systematic Approach Towards Developing a Taxonomy of Labour Rules

Jonathan Sale, University of South Australia

There are many differences in dispute forms and dispute settlement mechanisms across countries. Classifying and comparing national labour dispute settlement laws initially require the description of those laws in each of those countries and then a systematic comparison. The broad definitions of ‘labour law and regulation’ and ‘labour dispute’ used in this study indicate the potential complexity of even this bounded exercise. In the face of this complexity, the descriptive and comparative analyses will benefit from theorisation and simplification. This is provided in two steps, each addressed and summarised via two diagrams: one focusing on the types of labour disputes that can be the subject of legal regulation; another concentrating on modes or mechanisms by which labour disputes can be settled. Differences across various labour law regimes can be captured using the typologies depicted in the diagrams. The typologies can then contribute to a better understanding of the broader features of these regimes in terms of the subject matter (rule-application and/or rulemaking) and parties (relationships) involved in labour disputes, as well as the obligatoriness (publicness) of and locus of decision making (power) in labour dispute handling mechanisms, permitting their comparison to reveal similarities between them. Overall, the typologies depicted in the diagrams are valuable because they provide ways of comparing laws regulating different types of disputes and settlement mechanisms at different times in the same country (dynamic or historical) or across countries at the same point of time (static or cross-sectional). Particularly important are situations where the types of disputes and settlement mechanisms regulated by law change over time in a country or where laws in different countries regulate different types of disputes and settlement mechanisms.

Green Bargaining in Australia: Legal Impediments and Possibilities

Eugene Schofield-Georgeson, University of Technology Sydney

Human toil within workplaces contributes to around 80% of Australian greenhouse gas emissions. Capital and employers, meanwhile, enjoy significant gains from this productivity and its resulting emissions. Meanwhile, national climate regulation is weak and only marginally improved by a new Labor Government. Emissions reductions are set to fail the Paris Agreement 2030 target by roughly one-third.

Like a great deal of social reform over the past 200 years, there is much that the labour movement can contribute to the struggle for human survival against climate change. Foremost, is the possibility of 'environmental bargaining' within workplaces and the use of health and safety committees to reduce emissions and make other environmental contributions within the workplace. Such change is recommended by the United Nations Environmental Program and is currently on-foot in European and North American workplaces. But in Australia, meaningful enterprise bargaining over environmental issues with binding obligations on employers, are mostly prohibited by the Fair Work Act 2009 and its common law interpretation. Additionally, overstretched health and safety regulators in the states cannot be expected to enforce a resulting 'workaround' to federal legislation afforded through health and safety committees.

Accordingly, this paper engages with the emergent discourse of environmental labour studies to update and clarify existing Australian law regarding possibilities for environmental or green bargaining. It proposes legal strategies to permit and encourage comprehensive environmental bargaining in mainstream Australian enterprise agreements.

The Pitfalls in the Regulation of Paid Parental Leave in Australia for Gender Equal Parenting

Amanda Selvarajah, Monash University

In 2010, the Paid Parental Leave Act 2010 (Cth) (Act) established government-funded minimum wage payments for eligible carers. These payments have since been criticised for entrenching gendered parenting. However, the Act's objectives state that these payments are to merely 'complement and supplement' other parental leave entitlements. This paper thus explores how employer-funded parental leave complements the Act and how these policies encourage gender equal parenting. Workplace Gender Equality Agency data and interviews with human resource professionals demonstrate that employer-funded parental leave is rare and where employer-funded parental leave is offered, employer policies are often heavily influenced by the Act and thus mirrors many of the Act's features that fail to encourage gender equal parenting. These results highlight the need for a fundamental reimagining of paid parental leave regulation in Australia to encourage gender equal parenting.

Employment Discrimination by Algorithm: Can Anyone be Held Accountable?

Natalie Sheard, La Trobe University

The use by employers of algorithmic systems to automate or assist with recruitment decisions (Algorithmic Hiring Systems ('AHSs')) is on the rise internationally and in Australia. While promising to remove subjectivity and human bias from the recruitment process, AHSs may in fact lock members of protected groups out of the job market by perpetuating historical and systematic discrimination.

In Australia, AHSs are being developed and deployed by employers without effective legal oversight. Regulators are yet to undertake a thorough analysis of the legal issues and challenges posed by their use. Academic literature examining the ability of Australia's anti-discrimination framework to protect against discrimination by an employer using an AHS is limited. Judicial guidance is not available as cases involving discriminatory algorithms have not come before the courts.

This paper will provide a broad overview of whether the direct and indirect discrimination provisions of Australian anti-discrimination laws regulate the use by employers of discriminatory algorithms in the recruitment and hiring process. It critically evaluates: (i) who, if anyone, is liable for automated discrimination, that is, where the discriminatory decision is made by an algorithmic model in an AHS and not a natural person; (ii) the law's ability to regulate 'proxy discrimination', that is, discrimination on the basis of a personal feature, such as a person's postcode, which may be highly correlated with, but not itself a protected attribute; and (iii) whether indirect discrimination provisions can provide redress for the disparate impact of an AHS.

Formal and Informal Regulation of Holiday Bonuses in Southeast Asia

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Trang Tran, Monash University
Ingrid Landau, Monash University
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The payment of holiday bonuses to workers is a common practice in Southeast Asia. These bonuses have emerged through custom and practice to support festivities associated with annual holidays, such as Christmas, Lunar New Year (Tet) and Eid. Regulated to various degrees by law and custom, these bonuses are a significant source of collective conflict in the workplace. In Vietnam, for example, the advent of the Lunar New Year is often accompanied by an increase in wildcat strikes as workers express their dissatisfaction with employer pronouncements concerning the annual Tet bonus.

This paper explores the formal and informal regulation of holiday bonuses in Indonesia, the Philippines and Vietnam. It examines the extent to which, and how, these employer payments have come to be regulated by law and the continuing influence of informal norms in determining payment of these bonuses and the resolution of related disputes. This research forms part of a broader project investigating the formal and informal regulation of collective labour disputes in Southeast Asia.

Far From a Class Act: Federal Class Actions as a Suboptimal Collective Regulatory Mechanism in a Covid-normal World of Work

Daniel Tracey, University of Sydney

The COVID-19 pandemic has, in many ways, brought us together and kept us apart. On the latter, prohibitions on co-location (for example) have arguably hindered workers' capacity to gather and act collectively to regulate labour standards and address wage theft.

Historically, collective and union-driven initiatives underpinned Australian labour regulation. However, recent legislative changes have diminished collective approaches to labour regulation by individualising employee voice at work, stripping unions of their regulatory authority, and prioritising an underfunded and understaffed inspectorate as a primary labour regulator.

Today, despite the individualised nature of labour regulation, one of the few ways workers can collectively enforce labour standards – in the absence of intervention and assistance from traditional regulators – is through class action litigation. Against the backdrop of Australia acclimatising to a COVID-normal world of work, it seems opportune to consider the regulatory efficacy of federal class actions, as a collective mechanism with which workers might seek to remedy wage theft for themselves.

In this paper, I consider the legal and administrative complexities inherent to federal class actions. Specifically, I assess their adverse impacts on workers' ability to take timely and inexpensive regulatory action to address wage theft – including those impacts stemming from the treatment of solicitor-client costs, and involvement of litigation funders, under the class action regime and the Fair Work Act 2009 (Cth) (considered together). From this, I conclude that class actions are a suboptimal regulatory mechanism for worker groups, in need of reform or replacement to better serve the modern workforce.

Social Networks and Workers' Collective Action in an Authoritarian Regime: The Case of Vietnam

Trang Tran, Monash University

The interrelation between social movements and social networks has drawn the attention of scholars, particularly in shaping the political changes in different countries. However, with a few exceptions, there is little knowledge on how social networks influence the labour movement in an authoritarian setting. This paper applies McAdam et al's framework on social movements' emergence, development and outcomes to explain the workers' collective action in Vietnam, and how workers' online activisms can be translated to offline actions and vice versa. The paper argues that social networks only contribute to workers' solidarity temporarily. It was the government's tolerance of workers' collective actions that sustained the ongoing wave of wildcat strikes in Vietnam. Two case studies of workers' collective actions, one by platform workers, and the other by manufacturing workers shall be used to illustrate.

Criminalisation of Wage Theft: An Effective Deterrent?

Kate Walawski, Focused Legal

On 30 March 2022, the Senate Economics References Committee tabled its report, defiantly titled ‘Systemic, sustained and shameful: unlawful underpayment of employees' remuneration’. The Report details the Committee’s work since November 2019 and examines the causes, scope, and consequences of unlawful non-payment or underpayment of employees’ remuneration by employers in Australia. The Report also advances a number of recommendations that, if implemented, could ensure compliance by employers with workplace laws.

The publication of the Report is particularly apt with the growing emergence of high-profile wage underpayment scandals in Australia. Household brands have been brought into media prominence revealing systemic levels of corporate non-compliance with workplace laws, which in turn, has strengthened calls for the imposition of criminal sanctions. However, with Queensland and Victoria having now criminalised wage theft, the role of criminalisation in achieving compliance with workplace laws is a highly contentious issue.

This paper examines the recommendations as detailed in the Report, including the recommendation to criminalise wage theft. The paper also seeks to examine the recent introduction of legislation in Australia targeting wage theft; specifically, the paper compares Queensland and Victoria’s respective approaches to the criminalisation of wage theft. The paper also seeks to address whether criminalising wage theft will be an effective deterrent or whether in failing to deter the recalcitrant, criminalisation may prove equally antithetical to compliance with workplace laws. It contends that the imposition of criminal penalties will only be as effective as the regulator's ability, willingness and efficiency to pursue them.

Day of the Dead: The End of "Zombie" Agreements

Kate Walawski, Focused Legal

A controversial aspect of Australia's industrial relations system perseveres - the continuation and preservation in law of zombie agreements. These agreements, approved under the Workplace Relations Act, continue to operate beyond their nominal expiry date and until they are replaced or terminated. As time passes, the terms and conditions of these agreements deteriorate and decay against the minimum guarantees of progressing modern awards. The Fair Work Act fails to ensure a guaranteed safety net of fair, relevant and enforceable minimum conditions; specifically, by virtue of the loophole created by section 206, workers are permitted to be paid substantially less than they would otherwise under a modern award. The endemic use of zombie agreements as a vehicle for lawfully underpaying workers is pernicious; a fundamental object of the Act is not being met and we are witnessing the gradual erosion of minimum conditions. This paper explores the structural failures experienced by workers and analyses the current mechanisms of avoiding the minimum conditions of the NES and the awards. Further, it reports on the estimated loss experienced by workers under the imposition of zombie agreements. These agreements are not long for this world. Mindful of the Ombudsman's renewed focus on wage theft, this paper calls for the abolishment of zombie agreements and functions as a wakeup call for businesses operating with zombie agreements. It is time to heed the dire warning of Commissioner Hunt; the clock is ticking for employers who retain zombie agreements and they do so at their own peril.

Job Security Provisions in the NES

Virginia Wills, University of Melbourne

Job insecurity, and its health and wellbeing impacts, present a problem in Australia, exacerbated and exposed during Covid pandemic, as reiterated in the 2022 Senate Committee job insecurity report and as a federal election issue.

Reforms around the growth of insecure work, inappropriate casualisation of work, Uberisation, misclassification of workers as ‘self-employed” or independent contractors and misuse of labour-hire, have already been announced as government policies to address this problem and promote employment security.

Once employees are covered by the National Employment Standards (“the NES”) and unfair dismissal protections, a further element of job insecurity is the protections themselves: are notice of termination and redundancy and unfair dismissal compensation adequate to deliver job security? The award test cases establishing the notice and redundancy minimum entitlements were bargained for and decided approximately two generations ago and have not been increased since.

In the case law it is unusual to find separate analysis of the job security provisions of the NES (notice and redundancy) from analysis of unfair dismissal, so compensation for unfair dismissal will be included in the paper.

The methodology used is comparative legal research using a functional approach (comparing the solution to a universal problem, rather than comparing how the solution is arrived at). The countries being compared with Australia are New Zealand, United Kingdom, Canada, France, and Germany.

The conclusions propose the current job security protections for employees, the number of weeks’ notice and weeks’ redundancy and compensation cap for unfair dismissal should all be increased in Australia.

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Professor John Howe is Director of the Melbourne School of Government and Co-Director of the Centre for Employment and Labour Relations Law at the University of Melbourne. John's research interests include labour market policy and regulation, regulatory design, and social and sustainable procurement. He has written extensively on the role of the state in regulating employment and labour markets, and on the intersection between state-based regulation and corporate governance. John is presently engaged in research concerning regulatory enforcement of minimum employment standards and labour dispute resolution in Australia and the Asia-Pacific region, and also on procurement as an instrument of labour market policy. Prior to commencing an academic career, John worked in private legal practice, and also as a researcher for public policy and advocacy organisations in Washington DC. John was Secretary of the Australian Labour Law Association between 2005 and 2009, and Chair of the Labour Law Research Network from 2015-2019. He was Deputy Dean of the Melbourne Law School from 2013-2016.

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Dan Tracey is a PhD Candidate at the University of Sydney Law School. Dan’s research is focussed on the efficacy of class disputes to regulate wage and industrial laws, and how behavioural economic techniques – like nudges – could be used to improve labour standards compliance. Dan is based in Canberra, and beyond his research he is an industrial and workplace relations Director with the Australian Government.

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Trang Tran has been working as a lecturer at Hanoi Law University since 2015. In 2019, she started her PhD at Business Law and Taxation, Monash School of Business, Monash University. She also has experience in providing consultancy services for the International Labour Organization (ILO) Vietnam, Ergon Associates UK/EU and several non-government organizations. Her researches focus on labour disputes settlement mechanisms, workers representative organizations, collective bargaining, collective action, rights of people with disabilities, social security and human rights.

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Kate is a Partner in Workplace Relations and Employment Law and has practiced almost exclusively in the area of workplace relations and employment law since leaving a previous career in education and forging a new career in law. She has extensive experience in helping businesses traverse the ever-changing Australian employment law landscape and assisting them to minimise their legal risk and exposure. She assists clients in managing work force challenges and achieving compliance with workplace laws including health and safety laws. As a passionate educator she is frequently called on to present at seminars and conferences and often conducts workshops and training on workplace and safety issues and employment law best practice.