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PAPERS FROM THE SYMPOSIUM ON THE CENTENARY OF THE ILO: DEMOCRACY, LABOUR LAW AND TRADE UNIONS

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FOREWORD

Caroline Kelly, Joo-Cheong Tham
and Julian Sempill

On 18 and 19 July 2019, the Symposium on the Centenary of the International Labor Organisation: Democracy, Labour Law and the Role of Trade Unions was held at the Melbourne Law School under the auspices of the Centre for Employment and Labour Relations Law.

The symposium was organised on the basis of two premises. Firstly, trade unions play a central role in Australian society. They are essential to the protection of workers from overbearing employer power. As Justice Henry Bournes Higgins vividly put it:

The power of the employer to withhold bread is a much more effective weapon than the power of the employee to refuse labour. Freedom of contract under such circumstances is surely misnamed; it should rather be called despotism in contract ... the worker is in the same position as ... a traveler, when he had to give up his money to a highway man for the privilege of life.¹

In this context, trade unions can provide a countervailing force to employer power. Effective trade unions can breathe life into a fundamental principle of the International Labour Organisation ('ILO'), the principle that labour is not a commodity.²

Trade unions, acting as representatives of working people, are also entitled to a key role in democratic government. The ILO's Declaration of Philadelphia lays down the core principle that 'the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare'.³ Hugo Sinzheimer, one of the founders of the discipline of labour law, advocated this mode of government as the 'economic constitution' of nation-states.⁴

The second premise – equally crucial – is that the societal role of trade unions is under serious challenge. Low union density and shrinking coverage of collective bargaining mean that many workplaces, especially in the private sector, are union-free and/or union-hostile zones, leaving many workers unsheltered from the power of the employing class – what Justice Higgins described extra-judicially as 'the tremendous power of giving or withholding work'.⁵ And for some governments, trade unions are not social partners but rather targets of restrictive legislation.

The resurgent attempts to delegitimise trade unions, and to neuter their effectiveness, are part of the wider neoliberal reaction against social democratic institutions. Under the guise of promoting the so-called 'market freedom of individuals' (natural and corporate), the power of employers is naturalised as an outcome of 'free' exchange; and the stranglehold of large corporations over public policy is sanitised as the 'creation of favourable conditions for investment'.

The organising efforts of trade unions, by contrast, are demonised as anti-competitive behaviour; their role in the political process is depicted as the insidious influence of special interests; and the power of unelected business bosses is obscured, whilst the elected officials of trade unions are routinely derided as 'union bosses'.

Against this backdrop, the symposium was organised to facilitate an open and honest appraisal of the prospects for the union movement. It did so while affirming these enduring truths:

- there will not be social justice, in any meaningful sense, without effective trade unions; and
- there can be no genuine democracy without vibrant trade union organisations that have a voice in decision-making at the workplace and beyond.

This last point was central to the aims of the symposium. Democracy was chosen as a key theme of the symposium for two reasons. Firstly, the democratic role of trade unions has been relatively neglected, with emphasis predominantly being given to their social justice role. Secondly, the democratic role of trade unions is central to their legitimacy and effectiveness.

Emphasis was given, in particular, to a key idea underlying democracy well captured by the Universal Declaration of Human Rights: '(t)he will of the people shall be the basis of authority of government'.⁶ This idea reminds us that there is no moral parity between natural persons and corporations. It is the welfare of people – not corporations – that is foundational. It also compels us to consider applying democratic principles to all fields of social life where some exert systematic power over the lives of others – not just a space arbitrarily marked out as 'public' or 'political'. And, importantly, it urges us to consider how trade unions can contribute to extending our understanding of what it means to have government of the people, by the people, for the people.

1 *Federated Engine Drivers' and Firemen's Association of Australasia v Broken Hill Pty Co Ltd* (1911) 5 CAR 9, 27 per Higgins J.

2 Constitution of the International Labour Organisation, opened for signature 28 June 1919, annex *Declaration Concerning the Aims and Purposes of the International Labour Organisation*, clause I(a).

3 *Ibid* clause I(d).

4 See Ruth Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford University Press, 2014) Chapter 2.

5 Henry Bournes Higgins, *New Province for Law and Order: Being a Review, by its Late President for Fourteen Years, of the Australian Court of Conciliation and Arbitration* (Dawsons of Pall Mall, 1922) 17.

6 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948), art 21(3).

This publication comprises selected papers from the symposium proceedings. In these papers, contributors tackle challenging topics related to the theme of the symposium.

Michele O’Neil, President of the Australian Council of Trade Unions, argues that the freedom of working people to organise in their common interest is under threat and explores why strong trade unions are essential to a free democracy.

Professor David Peetz explores ways in which economic democracy can be enhanced at the point of production and considers whether we should try to strengthen countervailing forces to capital, change workplace decision-making processes or change the owners altogether.

Professor Joo-Cheong Tham examines the corrosive role of money in Australian politics, and argues that trade unions should support the democratic regulation of political money in the interests of fairness and equality.

Linda White, Assistant National Secretary of the Australian Services Union, explores the representation of women in the leadership and membership of unions. She argues that affirmative action is vital in order to secure equal representation.

Tony Maher, National President of the Construction, Forestry, Maritime, Mining and Energy Union, addresses the environment, trade unions and democracy. He argues that we must respect working people and their right to a prosperous future in order to tackle climate change.

Professor Jeremy Moss also addresses climate change, the importance of achieving a just transition and the role of unions in doing so. He argues that we must put justice at the heart of Australia’s transition planning to both avoid climate change and make society more equal.

Professor Anthony Forsyth explores the challenges for trade unions in dealing with the gig economy and the problems associated with other forms of worker representation that are not independent but, rather, beholden to management.

Scott Connolly, Assistant Secretary of the Australian Council of Trade Unions, examines unions, democracy and globalisation and argues that strong trade unions are critical in a world where, increasingly, the needs of business are placed ahead of those of workers.

Dr Patricia Ranald explores the need to defend labour rights and democratic process in the context of globalised regulation and international trade agreements, which are negotiated in secret and privilege the rights of powerful multinational corporations.

We end this foreword by acknowledging the fruitful collaborations that made this symposium possible. Without its participants, the chairs and speakers, the symposium could not, of course, have proceeded. The partnership with the Australian Council of Trade Unions was absolutely vital to the symposium. The symposium was also generously supported by Gordon Legal and Maurice Blackburn Lawyers; in addition, the evening panel was supported by the Fair Work Commission. Last but not least, we would like to recognise the support of the Centre for Employment and Labour Relations Law and its members.

Caroline Kelly, Joo-Cheong Tham and Julian Sempill
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WHY STRONG TRADE UNIONS ARE ESSENTIAL TO A FREE DEMOCRACY

I'd like to acknowledge the traditional owners of the land we meet on today, the Wurundjeri people of the Kulin Nation, and pay my respects to their elders – past and present.

It always was and always will be Aboriginal land.

One hundred years ago, in a world reeling from the devastation of World War I, the ILO was formed as a unique global tripartite body representing working people, employers and governments.

The preamble to the ILO Constitution begins with the acknowledgement that lasting peace is only possible if it is based on social justice.

It explicitly states that the ILO should be 'moved by sentiments of justice and humanity as well as by the desire to secure the permanent peace of the world'.

For a century the ILO has worked towards a peace that can only be built on a foundation of freedoms for working people, like the freedom to organise in their common interest.

And though we have made enormous progress, right now that foundation is anything but solid.

Inequality is rising, both globally and locally.

The top 10 per cent of households have more than half the wealth in Australia, while the poorest 40 per cent control just 2.8 per cent of the nation's wealth between them.

The average net worth of the top 20 per cent is 93 times that of the lowest 20 per cent and those at the top have seen a 68 per cent growth in their wealth over the last 15 years.

Working people are not getting a fair share of the wealth their labour produces.

The labour share of national income has fallen in almost all OECD countries, including our own in recent decades.

Fewer working people have the freedom that secure work brings. The freedom to plan and live good lives.

Nearly half of the workers in Australia are in insecure work.⁷

We are currently experiencing the longest period of low wage growth since the end of World War II.⁸

Even the IMF has recognised that law reforms that have weakened working people's bargaining power have led to lower share of national income for workers.⁹

Half of all new jobs in our economy are second jobs, and people working two jobs in our country earn less than those working one.

And more than a million people working part-time can't get enough hours.¹⁰

Women working full-time in Australia are paid on average 14.1 per cent less than men,¹¹ and retire with around half of the superannuation balances that men do.¹²

Our rights and laws have failed to keep pace with the tactics used to exploit us. Employers are profiting from platforms that use 21st century technology to spread work with 19th century conditions.

A survey by the Transport Workers Union of more than 1000 food delivery workers in Australia found that even before fuel, insurance and maintenance costs are deducted, three in four drivers earn less than minimum wage.

Nearly half those riding bikes have been injured on the job or knew someone who had been.

Three riders working for one company alone have been killed at work in Australia.

The freedom to organise is one of the vital freedoms that underpins democracy.

And governments who are willing to undermine these freedoms represent a threat to democracy.

Last month the global peak body for working people, the International Trade Union Confederation, sounded the alarm on these freedoms.

7 Tanya Carney and Jim Stanford, The Australia Institute Centre for Future Work, 'The Dimensions of Insecure Work: A Factbook' <https://d3n8a8pro7vhmx.cloudfront.net/theausinstitute/pages/2807/attachments/original/1528337971/Insecure_Work_Factbook.pdf?1528337971>.

8 Andrew Stewart, Jim Stanford and Tess Hardy, *The Wages Crisis in Australia* (The Federation Press, 2019) 6.

9 Gabriele Ciminelli, Romain Duval and Davide Furceri, 'Employment Protection Deregulation and Labor Shares in Advanced Economies' (Working Paper No 18/186, International Monetary Fund, 16 August 2018).

10 Australian Bureau of Statistics, 'Characteristics of Employment, Australia, August 2018' (Release 6333.0, 29 November 2018).

11 As estimated by the Workplace Gender Equality Agency in 2018.

12 David Hetherington and Warwick Smith, Percapita in partnership with the Australian Services Union, *Not So Super For Women* (August 2017).

According to the body's 2019 Global Rights Index, countries that many would consider liberal democracies regularly violate working people's rights.

Australia, Canada, Spain and the United Kingdom are in this category, along with Russia, Liberia, Jordan, Nepal and El Salvador.

The World Economic Forum (a generally business-friendly international policy organisation) ranks Australia fifth last among OECD countries in protecting worker rights.

ILO Convention No.87, to which Australia is a party, states that 'workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes'.

Yet a top priority on the Morrison Government's legislative agenda is the so-called 'Ensuring Integrity' Bill.

This is an extreme, anti-democratic law that would allow employers and politicians to apply to have union leaders sacked from their jobs and entire unions de-registered.

The Government's attempts to paint it as being about one individual or one union are merely a smoke screen.

At its core it is an attack on ordinary workers and will if passed result in more dangerous workplaces, increased wage theft, superannuation theft, exploitation and further suppression of wages.

The work unions do everyday is literally life saving and equality building.

Hobbling our capacity to do that work is not targeting union officials – it's targeting working people.

That's a long way from the 'full freedom' that the ILO convention is supposed to protect.

And with every attack on these freedoms the foundation of our democracy is less firm, our rights as working people are less secure.

According to analysis by the International Centre of Trade Union Rights, this Bill would be incompatible with Australia's commitments under two separate ILO conventions that protect the right to organise and collectively bargain.

This is a regressive move that would further undermine the rights of working people in our country to organise and run our own organisations.

The report into these laws by an internationally respected body does not mince its words. They call this Bill what it is. They say it is 'cynically designed to encourage deeply damaging interference in trade unions' activities'.

One of the most concerning aspects of this Bill is that it allows not just government ministers the ability to apply to have a union de-registered, but any person with a sufficient interest – a category that could include employers and other parties.

Again, the international researchers are clear. They say the Bill is 'harmful to workers, undermining to trade union democracy, and of no tangible benefit to the promotion of harmonious industrial relations.'

They could not find a single industrialised democracy that had even entertained the idea of what our government is planning.

The Morrison Government's approach compares unfavourably even with the repressive measures against working people's representatives adopted by Turkey, a country whose recent record on protecting freedoms – whether of working people or the press – is not one to be envied or emulated. The only place full parallels could be found are places where the state has actively banned trade unions – either in one particular sector, or overall. The most comparable laws in a democracy exist in Brazil – but they were introduced in 1943 under the Vargas dictatorship.

'For Australia to propose an industrial law reform that would bring it closer to the example provided by Brazil's historical dictatorship than to those found in modern Western Europe illustrates just how alarming these developments are' the report says.

'The proposal is not merely "out of step" with the industrial relations systems of comparable countries', they write, 'it has no rightful place in a modern liberal democracy'.

That our elected government is willing to violate international law just to attack its political enemies is deeply, deeply concerning.

The proposed laws are fundamentally undemocratic. They are also bad for all working people.

All Australian workers benefit from the work of unions. When Governments silence and shut down working people's representatives, it is an attack on the rights of all working people, their families, their communities.

They use the vast resources and power of the state to target ordinary workers who volunteer as union officers. Teachers, nurses and postal workers who occupy offices of their union because they want to improve the rights, pay, conditions and safety of their co-workers.

The only people who would benefit from these laws are the Morrison Government and unethical employers.

There is nothing comparable to this undemocratic law in the legislation that governs the behaviour of corporate or political figures in our country.

If there were those of us in the union movement who had the right to take action in the Courts to deregister a retail company because we had discovered wage theft in two of their stores, we could have the directors disqualified and face criminal charges if they dared to even advise the business again.

If there were, there would be consequences for the likes of Christopher Pyne and Julie Bishop for personally profiting from their publicly owned knowledge and influence a few short weeks after leaving office.

There is no Ensuring Integrity Bill for banks. There is no Ensuring Integrity Bill for politicians.

It's also clear from recent events that our own Government here in Australia – despite their lip service to liberalism – feels as free to violate international conventions around press freedom as it does those around working people's rights.

Shortly after the re-election of the current government the Australian Federal Police conducted raids on two media organisations over years-old stories that they claimed had endangered national security.

They raided one reporter's home, demanded vast amounts of documents and, by the Minister's own admission, are still considering pressing charges over these stories.

Over recent weeks it has emerged that officers sought to take hand and fingerprints from the reporters concerned and demanded details of their travel movements from Qantas.

The ABC's head of Investigative Journalism, John Lyons, has written that these developments 'appear to be part of a new climate in which journalists and their sources of information, sometimes referred to as whistleblowers, are targeted'.

'With fingerprints and flight details being sought, there's a strong sense that genuine investigative journalism is being placed by the Federal Government and its agencies in the same category as criminality.'

This is chillingly familiar to us in the trade union movement, who have been subject to the weaponisation of politicised public service agencies in the course of our work representing working people.

Two years ago the offices of one of our affiliate unions, the Australian Workers' Union, was raided by the same organisation, acting at the behest of the Registered Organisations Commission – a body established by the conservative government to oversee unions.

People working at the union found out about the raids when camera crews started to show up outside their building – political staffers had tipped off the media to maximise the damage to the reputation of the union.

In 2015 a Canberra CFMMEU organiser was charged with blackmail. The charges were dropped within months.

His supposed offence? Negotiating for fair pay on behalf of the members he represented. Arrested and paraded in front of the media.

He sued for malicious prosecution and the case was settled, but the message that was sent by subjecting him to this ordeal was clear.

We are long past the point in this country where genuine union organising was placed by the Federal Government and its agencies in the same category as criminality.

It shouldn't be this way and it doesn't have to be this way.

There is a correlation between those countries with the highest living standards and those where union membership is highest.

And there is a clear correlation between inequality – which is a result of the suppression of working people's organisations – and the willingness of governments to undermine adjacent freedoms, like the free press.

Countries where unions are engaged and recognised as having a legitimate social and economic role are more equal, more free and more peaceful – something that the founders of the ILO knew a century ago.

In an economy that is increasingly focused on services, it's not just the people performing labour in a workplace who win from an organised workforce – it is the patients, the consumers, the clients of the services themselves.

The recent Aged Care Royal Commission in Australia has revealed the harrowing consequences of allowing private aged care providers to place profit before the needs of residents.

Only this week we heard the story of a woman who entered an aged care facility healthy and was dead in a month of untreated ulcers and skin conditions.

Although the facility housed 65 high-care residents, they employed only a single nurse, for seven and a half hours a day.

We've also learned that companies operating these facilities pay as little as \$7 per day to feed the residents, and sometimes even ration incontinence pads – all in the name of profit.

In January this year I lost my Mum who died in an aged care facility. My sisters and I saw up close and in the most personal of circumstances the difference that staffing levels, trained and experienced carers, hours and rosters and resources make to the quality of care.

People working in aged care homes are fighting back.

They're organising not just for their own wages, but for the safety and dignity of the people in their care.

They are demanding that aged care operators place the humanity of their residents before the profit imperative.

That good quality care can be delivered when you have good quality jobs.

When working people are organised and active, our communities and our society are better.

When working people are prevented from organising, there is no floor on how inhuman they can become.

A recent paper by the Centre for Future Work examined the regulatory and legal environments for union membership across the world.

They found a clear strong relationship between a country's protection of freedoms for workers, and the success of unions.

Countries with strong protections of people's freedom to organise are likely to have a greater proportion of union members.

And in turn, countries with a greater proportion of union members on average are more equal and have fewer working people living in poverty.

Inequality is a political choice.

It is not, as some economists would have us believe, simply a confluence of factors or the natural result of market forces interacting without human assistance.

It is a choice made by politicians, regulators and policy-makers to rig the game in favour of corporate greed and against the common interests of working people.

It's a choice they make when they put extreme, anti-worker,

anti-democratic laws to the parliament.

It's a choice they make when they raid union offices on confected grounds, and when they make sure there are cameras there to capture it.

It's a choice they make when they demonise working people's representatives, creating stereotypes that drive division and fear, in order to undermine the legitimacy of our work.

And it's a choice they make when they raid the homes of journalists, when they intimidate people who work every day exercising the freedom on which our democracy rests.

It is a choice that our government has made repeatedly, and a choice with disastrous consequences.

These consequences are not restricted to the world of work. They reverberate across our society and across our world.

Many people are losing faith – not just in particular governments, but in the institutions of society itself.

To restore that faith, we must build our unions and make our laws more fair and our country more free.

There is no time and no need to decide between workplace organising and political campaigning – the need for both is urgent and we need them both working together.

Our job is to build our movement.

Our job is to fight. To mobilise. To organise. At work, in our communities, in our homes and in our parliaments.

The only path to freedom is one that is carved and widened by the sheer number of bodies who walk it.

We must stridently, constantly and fearlessly advocate for the freedoms of working people.

The freedom to organise.

The freedom to run our own organisations.

The freedom to be represented by the people we choose.

The freedom to withdraw our labour.

When Governments pass regressive laws targeting working people and our unions, every one of us is made poorer, less empowered and less free.

This is a fight for the kind of country we want Australia to be. This is a fight for the kind of world we want to bring our children into.

It's up to us to lay a new foundation of freedoms, to set our democracy firm again.

Those who target working people do not know how resilient we are.

They don't know that everything that we have – and the freedom that our society rests on – is only here because we fought for it.

This is what gives us confidence. This is what gives us strength. That good, smart, strategic working people are prepared to stand together for what we believe in.

This, friends, is no time to stop fighting.

After all – if you don't fight you lose.



REFLECTIONS ON THE ILO CENTENARY

Keith Ewing

I Writing in 1992 in the inaugural issue of *International Union Rights*, I suggested that the ILO was in serious trouble. I was writing in frustration of what was then a decade of Thatcher inspired attacks on workers' rights in the United Kingdom.¹³ Although much of this agenda had been condemned by the ILO supervisory bodies, scrutiny by the United Kingdom's international peers was having little effect. Not only were the restrictions not reversed despite the criticism, but the ILO's reminder of international legal obligations did nothing to stop the avalanche of restriction, which was met with renewed ILO condemnation and renewed indifference.¹⁴

The critique drew a response from the TUC, which suggested that I had misjudged the importance of the ILO and why it continued to play an essential role. Thereafter I tried to love the Organisation and indeed engaged with it on behalf of the TUC, writing the TUC's reports to the Committee of Experts as part of the process of ongoing supervision, and a detailed complaint to the Committee on Freedom of Association in response to the Conservative governments 'authoritarian' Trade Union Bill in 2016.¹⁵ This engagement had the ulterior motive of increasing the level of criticism of the United Kingdom by ILO supervisory bodies, with a view to strengthening claims that might be presented in other legal forums – such as the European Court of Human Rights – where the British government has a duty rather than a power to comply with rulings against it.¹⁶

Looking back on that critique and the TUC's response almost 30 years later, I find it hard to be persuaded that my initial response was incorrect. It is true that I was writing at the start of the neo-liberal counter-revolution and that I cannot claim to have anticipated what was to follow. But since then three things have happened to reinforce the critique, the first being the willingness of other governments to follow the British example: imbued by the same neo-liberal orthodoxy, they too have shown equal contempt for the ILO's supervisory bodies and their obligations in relation thereto. Secondly and simultaneously, the corporations that have been unleashed and empowered by this new orthodoxy have moved to gain control of the institutions which set the standards by which it is expected they will be governed.

A move in the direction of corporate capture is to be seen most nakedly in the Employers' attack in 2012 on the right to strike, and an attack on the integrity of the supervisory bodies which have consistently taken the view that the right to strike is protected as part and parcel of the principle of freedom of association. It was an attack designed in part to contain the influence of ILO standards as courts throughout the world seemed poised to have regard to the work of international agencies in construing national constitutions and regional texts.¹⁷ But although there is now an uneasy truce, that capture will be seen as having been consolidated by the ILO Declaration on the Future of Work, which reflects values of a kind very different from those to be found in earlier ILO Declarations.

But not only is the ILO thus being ignored, and in a process of being neutralised, it is also thirdly being weaponised, paradoxically by the very governments otherwise ignoring it. This was clearly revealed by the celebrations around the ILO's centenary earlier in 2019 when the US Secretary of State issued a statement notable for many reasons. Not least was his use of the occasion to attack the governments of China, Iran, Venezuela (under the 'former' Maduro regime), and Zimbabwe.¹⁸ We return to the United States in the pages that follow, though note here that the United States has ratified fewer ILO conventions than any other developed nation, that it has ratified only two of the eight core conventions, and that it too has been found in breach of freedom of association principles by the ILO supervisory bodies.

II

Where better to start with evidence of the ILO being ignored than Australia? Here is a good illustration of a country failing to meet its international obligations, determined it seems in the year of the ILO's centenary to plunge to new depths of restriction and non-compliance. That said, Australia already has among the most restrictive laws on trade union freedom of all modern liberal democracies, and has been called out regularly by official international agencies responsible for upholding trade union freedoms.¹⁹ The Government's *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019* (hereafter, *Ensuring Integrity Bill*), promotes Australia to the vanguard globally of a deliberate slide from restrictive to authoritarian laws on trade union rights that have no place in a free society.

13 Keith D Ewing, 'Are ILO Conventions Still Relevant' (1992) 1(1) *International Union Rights* 3.

14 For full details, see Keith D Ewing, *Britain and the ILO* (Institute of Employment Rights, 2nd ed, 1994).

15 Alan Bogg, 'Beyond Neo-Liberalism: The Trade Union Act 2016 and the Authoritarian State' (2016) 45 *Industrial Law Journal* 299.

16 Though this has not been a conspicuous success either, as the Strasbourg court has refused to take the same vigorous approach on freedom of association applications from the United Kingdom as from other countries.

17 A fear of Canadian employers in particular, a fear realized in *Saskatchewan Federation of Labour v Saskatchewan* [2015] SCC 1.

18 Michael R Pompeo, 'On the Centenary of the Founding of the International Labour Organisation' (Press Statement, US Mission to International Organisations in Geneva, 21 June 2019).

19 See especially ILO Australia Country Profile, *ILO Information System on International Labour Standards* (Web Page) <<https://www.ilo.org/dyn/normlex/en>>.

The point was made powerfully in a blistering report by the International Centre for Trade Union Rights (‘ICTUR’).²⁰ The blustering response of self-serving Australian employers to the international criticism of their government was predictable. Unable to address the substance of the ICTUR’s legal criticisms, the Australian Chamber of Commerce and Industry (‘ACCI’) advised pitifully that the report was the work of a trade union based NGO, and should be dismissed with a ‘pinch of salt’.²¹ The Government’s response was equally predictable, ministers seeking to reassure the great Australian public that his Bill fully complies with international law. This is because an explanatory memorandum written by the Government says so. But this is not good enough either, as the Parliamentary Joint Committee on Human Rights established by legislation in 2011 makes very clear.

One of the treaties against which the Joint Committee is required as a matter of law to test proposed legislation is the International Covenant on Economic, Social and Cultural Rights (‘ICESCR’) ratified by Australia in 1975. That treaty expressly includes the right of trade unions to function freely, subject only to restrictions prescribed by law which are ‘necessary in a democratic society’. Where it is deemed necessary to impose legal restrictions on trade union freedoms, the ICESCR states that the restrictions must comply with the standards set by the ILO Convention on Freedom of Association (Convention 87), another international treaty that Australia has ratified. The Attorney General’s website provides helpful advice for the ACCI and others on the legal implications of ratification.

As with the ICTUR report, the Parliamentary Joint Committee’s detailed and extensive examination of an earlier version of the Bill makes sobering reading.²² It concludes that the provisions relating to the disqualification of individuals from holding trade union office were ‘likely’ to violate Australia’s ILO freedom of association obligations, as were the now largely redundant provisions dealing with trade union amalgamations.²³ So far as the other two provisions of the Bill are concerned – dealing with the State’s power to cancel a trade union registration, and its power to place trade unions in administration – the Parliamentary Joint Committee expressed concern that these too may violate ILO obligations, suggesting ways by which the risk of violation could be mitigated.²⁴ So far as I can tell the Government has not responded to these suggestions, though it was reported that the Bill had been ‘substantially rewritten’.²⁵

The doubts expressed by the Parliamentary Joint Committee in 2017 were unsurprisingly similar to the concerns raised by ICTUR in 2019. Unsurprising because the Bill creates powers that can be invoked because a union has been engaged in industrial activities that are fully protected by the international law Australia so openly flouts, *thereby compounding existing violations*. To be clear: the Bill allows interference with the internal affairs of trade unions by those whose only interest it is to weaken the power of trade unions – the Government and government officials, employers, or any other ‘interested party’ – while also failing to ensure that the powers can be exercised only when it is in the interests of the members of the union in question.²⁶

The Government claims that the Bill is necessary to restore the rule of law in industrial relations. But the rule of law is a principle that has wide application, and begins with the duty of governments to comply with their legal obligations.²⁷ By failing to comply with international law, ministers are in no position to preach to others about constitutional principles they so conspicuously fail to respect. There is no escape from the fact that the Ensuring Integrity Bill is an egregious attack on freedom of association. By failing to heed the concerns of the Parliamentary Joint Committee, the Government is revealing not only its contempt for trade union members, but also its continuing contempt for international law, as well as the procedures of the Commonwealth Parliament, by which it has been so convincingly exposed.

III

The second concern identified above relates to what looks like corporate capture of the ILO, as reflected in the changing direction and dilution of ILO principles reflected in the ILO Centenary documents. The first of these documents is the report of the ILO Global Commission on the Future of Work, which included Professor Supiot who had written so powerfully about the ILO Declaration of Philadelphia of 1944.²⁸ The latter was the child of a different epoch with different social, economic and political ambitions. It may indeed be the case that the problems facing the ILO today are a consequence of its struggle to adapt its structures and values to a new era in which these structures and values are repudiated by both governments and employers.

In this sense, legal instruments tell many stories. Sometimes they are important not so much for creating change as reflecting it. This is true not only of the Declaration of Philadelphia but also the ILO Centenary Declaration for the Future of Work which provides a revealing window into the impact of globalisation and the shifting balance of power in the global economy. This is an instrument drafted to embed the triumph of neo-liberalism rather than promote social democracy, eclipsing the values of citizenship, redistribution and participation which we see in the Declaration of Philadelphia and the post-war initiatives of the ILO and its constituent parts. The triumph is all the more notable for the conspicuous repudiation of the recommendations of the ILO’s Global Commission on the Future of Work.²⁹

The later had proposed the adoption of a universal labour guarantee, which would seek to ensure the universality of labour rights, an adequate living wage, the effective regulation of working time, and safe and healthy working practices. Looking at the ILO Centenary Declaration the universal labour guarantee has gone, and with it the proposal for an ‘adequate living wage’. Now we have a commitment to an ‘adequate wage’,³⁰ which is a long way short of the Declaration of Philadelphia’s commitment to ‘policies in regard to wages and earnings... calculated to ensure a just share of the fruits of progress to all, and a minimum living wage to all employed’.

20 Daniel Blackburn and Ciaran Cross, *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019* (Research Paper, ICTUR on behalf of the Australian Council of Trade Unions, July 2019).

21 For an equally powerful critique by an Australian NGO, see Australian Institute of Employment Rights, Submission to the Senate Education and Employment Legislation Committee, *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019* (29 August 2019).

22 Parliamentary Joint Committee on Human Rights, Commonwealth Parliament, *Human Rights Scrutiny Report 12 of 2017* (28 November 2017) 113-126. The conclusions of the Parliamentary Joint Committee on the revised Bill are awaited at the time of writing.

23 *Ibid* [2.82], [2.142].

24 *Ibid* [2.107], [2.126].

25 Phillip Coorey, ‘Revamped Bill to test Labor on Rogue Union Bosses’, *Australian Financial Review* (16 July 2019), a tendentious piece of subbing if ever there was one.

26 These other breaches of ILO Convention 87 were pointed out by the Parliamentary Joint Committee, above n 22, [2.68].

27 Lord Bingham, ‘The Rule of Law’ (2007) 66 *Cambridge Law Journal* 67.

28 See Alain Supiot, *The Spirit of Philadelphia* (Verso, 2012).

29 ILO Global Commission on the Future of Work, *Work for a Brighter Future* (Report, January 2019).

30 *ILO Centenary Declaration for the Future of Work* (‘ILO Centenary Declaration’), International Labour Conference 108th sess, Part III(B)(ii).

It is also a long way short of the Council of Europe's right of workers and their families to remuneration to ensure a decent standard of living.³¹ Indeed, an adequate wage could be read as no more than a subsistence wage, taking us back to the days before *Harvester*.³²

But just as important is the absence of the Global Commission's proposal to deal with the related problem of working time, with workers denied the hours necessary to earn even an adequate wage. In response to this problem, the Global Commission recommended that within the admirable context of achieving gender equality:

Urgent action is needed to ensure dignity to people who work 'on call' so that the choice for greater flexibility is a real one and that they have control over their schedules. We recommend the adoption of appropriate regulatory measures that provide workers with a guaranteed and predictable minimum number of hours. Other measures should be introduced to compensate for variable hours through premium pay for work that is not guaranteed and waiting time pay for periods when hourly workers are 'on call'.³³

This was hardly the stuff of revolution, but it was too heady for the ambitions of international bureaucrats and corporate interests.

So this too is omitted from the Centenary Declaration which is simply platitudinous in advocating 'better work-life balance' in the context of gender equality, 'by enabling workers and employers to agree on solutions, including on working time, that consider their respective needs and benefits'.³⁴ True, the working time agenda includes a renewed commitment to 'adequate protection' and 'maximum limits'.³⁵ But this simply ignores the need – acknowledged with some urgency by the ILO in the 1930s in the wake of the Great Depression – of growing numbers of workers to minimum guaranteed levels of hours to enable them to earn a decent living.³⁶ Nor is it exclusively a gender equality issue as presented by the Centenary Declaration, but currently strikes at the commodification of all workers involved.

But just as important as the dilution of ambition is the not so subtle re-positioning, reflecting the extent to which the ILO has been captured by employer interests. So although we find elsewhere a commitment to promote business respect for human rights as if corporations were nation states, for the first time in an ILO instrument we find in the Centenary Declaration a reference to the importance of free enterprise:

[The] ILO must direct its effects to supporting the role of the private sector as a principal source of economic growth and job creation by promoting an enabling environment for entrepreneurship.³⁷

Reinforcing the point is the parallel inclusion for the first time in an ILO Declaration of a reference to 'labour markets',³⁸ an

inclusion which is not just a matter of literary usage. This is a term, an idea, and a practice that confounds the core ILO principle (paradoxically reprised in the Declaration) that 'labour is not a commodity'.³⁹ But what is a 'labour market' if it is not a place where workers are bought and sold?

IV

So as the ILO celebrates its centenary, we can celebrate its institutional survival as the conscience of the international community. Now an agency of the United Nations, the ILO is one of the oldest international organisations in existence, having operated continuously since 1919. In that time, the ILO has weathered many storms, including (i) the rise of fascism in the 1930s, (ii) the second world war, (iii) decolonisation and liberation struggles, (iv) the cold war, (v) globalisation, (vi) the global financial crisis, (vii) neo-liberalism and austerity, and most recently (viii) the sustained attack by employers referred to above, challenging the Organisation's very reason for being, and the integrity of its institutions.

In weathering these storms, the ILO has shown a remarkable resilience and ability to renew itself, not least in the Declaration of Philadelphia in 1944 as the Second World War was drawing to a close. As advocated by Supiot, the Declaration of Philadelphia remains to this day as fine a statement of social values for the global economy as one is likely to find anywhere. It begins by reminding us that labour is not a commodity, all the more relevant today as workers are constantly undermined by those who fetishize markets and 'labour markets' in particular. At the heart of the Declaration of Philadelphia are two solemn obligations made by those countries that accepted it. These were first:

- (d) policies in regard to wages and earnings, hours and other conditions of work calculated to ensure a just share of the fruits of progress to all, and a minimum living wage to all employed and in need of such protection;

And secondly:

- (e) the effective recognition of the right of collective bargaining, the cooperation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures.

It is hard to believe that it would be possible to create an organisation with these and related values in today's international climate. For this reason alone, the ILO is an institution to be cherished. Still less would it be possible today to create an organisation in which trade unions play such an integral part in its governance. Although perhaps falling short of the World Parliament of Labour that many labour pioneers advocated in the 19th century,⁴⁰ the ILO remains nevertheless an extraordinarily unique institution. We should not underestimate the importance of a system of governance in which:

31 *European Social Charter*, opened for signature 18 October 1961, ETS No.35 as revised by *European Social Charter (Revised)*, opened for signature 3 May 1996, ETS No.162, art 4(1).

32 *Ex parte HV McKay* (1907) 2 CAR 1.

33 ILO Global Commission on the Future of Work, above n 29, 41.

34 ILO Centenary Declaration, above n 30, Part II(A)(viii).

35 *Ibid* Part III(B)(iii).

36 *ILO Forty-Hour Week Convention 1935 (No.47)*, opened for signature 4 June 1935 271 UNTS 199 (entered into force 23 June 1957) preamble: reduced working hours promoted because 'unemployment has become so widespread and long continued that there are at the present time many millions of workers throughout the world suffering hardship and privation for which they are not themselves responsible and from which they are justly entitled to be relieved'.

37 ILO Centenary Declaration, above n 30, Part II(A)(ix).

38 Thus, the ILO Centenary Declaration draws 'particular attention to ensuring that education and training systems are responsive to labour market needs' (Part II(A)(iii)). Apart from degrading workers as commodities, it is hard to find a clearer example in an official legal text of the subordination of workers.

39 Constitution of the International Labour Organisation, opened for signature 28 June 1919, annex *Declaration Concerning the Aims and Purposes of the International Labour Organisation*, Part I(a).

40 Ewing, above n 14.

- Workers' representatives sit as equals with employers and governments in seeking to subordinate markets;
- Workers' representatives sit as equals in making the international rules by which workers should be employed; and
- Workers' representatives sit as equals in strengthening the role of trade unions in collective bargaining.

But with the Centenary Declaration for the Future of Work we have little cause to celebrate its institutional success. A matter of real concern over the last 30 years has been the regression of standards at the national level, and the rapid decline in collective bargaining coverage in many countries, putting at risk the very principle of tripartism by which the ILO is sustained. There is an urgent need – recognized in the Centenary Declaration – to challenge neo-liberalism's counter-revolution and to restore the values at the heart of the Declaration of Philadelphia.⁴¹ Not least is the commitment to freedom of association and collective bargaining, increasingly exotic species fighting for survival in a hostile world. The ILO has created the principles, the procedures, and the instruments to enable these values to be restored, which countries like Australia now seem determined to ignore.

Which brings us back to the altogether even more sinister intervention of the United States on the occasion of the ILO Centenary, marked by the extraordinary statement by Trump's Secretary of State. Here we have a good example of America First, Pompeo reminding us that the first international labour conference was held in the USA, that the Declaration of Philadelphia was minted there, and that under US leadership the ILO won the Nobel Peace Prize in 1969.⁴² But the United States' commitment to 'advancing the rights of workers globally' rings hollow in a release that identifies concerns only with America's enemies. Perhaps it was ever thus. America's intervention was nevertheless arresting not only for its strident tone, but also its obvious lack of subtlety in the abuse of labour standards for what were self-evidently partisan political purposes.

41 ILO Centenary Declaration, preamble.
 42 Pompeo, above n 18.



We can speak of two types of decision-making models: the democratic model, in which everybody has a say of equal value, and the stockholder model, in which people have a say in proportion to the resources they hold. Corporations are run on the stockholder model. A union meeting is closer to the democratic model. Elections are formally based on the democratic model. They are important, but most other aspects of politics reflect the stockholder model.⁴³

The economy distributes benefits according to a stockholder model, but most people want benefits distributed more like a democratic model. Most think we need some level of inequality, to make the economy function. Those who already have resources and power seize on this idea. But it turns out, from several studies, that most people think the current distribution of income is much more unequal than what they think appropriate, and the *actual* level of inequality is much higher than the level people think exists.⁴⁴ So the actual level of inequality is much worse than what most people want. Plato once suggested that no one should accumulate more than five times the income of the lowest paid.⁴⁵ It is not a bad benchmark.

Now, trade unions are an important part of reducing that disparity. On balance, there appear to be negative correlations between union density and inequality, and as union density and hence power has declined in most industrialised countries, the impact unions have in reducing inequality has declined.⁴⁶

Capitalism is defined by the ownership of the means of production, so I want for the moment to turn to the level at which production takes place, the workplace or the enterprise.

Elizabeth Anderson, in *Private Government: How Employers Rule Our Lives (and Why We Don't Talk About It)*,⁴⁷ says that a quarter of American employees describe their workplace as being a dictatorship, and adds that most of the next 55 per cent are only one step away from finding that out the hard way. To her, the old ideals of democracy from markets based on small firms

and happy entrepreneurs, evident she says in the work of Adam Smith and the like, have been usurped by the power of modern corporations. She sees unions as *one* of the ways that this dictatorship can be battled.

That is not a bad way to see unions' role. Broadly speaking, at the workplace there are three ways to go about enhancing economic democracy at the point of production. The first approach is to leave the formal decision-making power with those who hold it – that is the owners of capital – but have some countervailing force that forces owners to take account of other interests in decision-making. The second is to try to change the formal decision-making process, that is change who makes the decisions. The third is to try to change the owners themselves.

So unions are very much in that first approach, of providing a countervailing force to capital. Straight away you realise that you cannot have more democratic workplaces unless you have more powerful unions – unless, that is, you adopt one of the other, more fundamental approaches I am referring to. As unions have become weaker, real wages have decoupled from productivity, so the gains from new technology have mainly gone to capital.⁴⁸

What we call trade unions are not the only form of worker voice. In recent years we have seen several innovative ways in which workers have sought to express their voice. These include:

- the role played by many NGOs in the global South;
- the Google WalkOut of late last year, that has partly morphed into a movement called 'End Forced Arbitration';⁴⁹
- OUR Walmart, a body established by a union that seeks to connect and mobilise workers in an organisation that had until now been un-unionisable;⁵⁰
- and the spread of 'workers' centres' providing advice, mostly without representation, to non-union workers.

43 Cameron Murray and Paul Frijters, *Game of Mates: How Favours Bleed the Nation* (Ebook, 2017).

44 See e.g. Michael Norton and Dan Ariely, 'Building a Better America—One Wealth Quintile at a Time' (2011) 6 *Perspectives on Psychological Science*, cited in George William Domhoff, 'Wealth, Income, and Power', *Who Rules America* (Article, 2011) <<https://whorulesamerica.ucsc.edu/power/wealth.html>>.

45 Glenn Morrow, *Plato's Cretan City* (Princeton University Press, 1993) 131

46 David Card, Thomas Lemieux, and W Craig Riddell, 'Unionisation and Wage Inequality: A Comparative Study of the U.S., the U.K., and Canada' (Working Paper No. 9473, *National Bureau of Economic Research*, 2003); Beverly Gage, 'Should You Care About the Fate of Unions?' 30 June 2014 *Slate*; Jonas Pontusson, 'Unionisation, Inequality and Redistribution' (2013) 51 *British Journal of Industrial Relations*; Engelbert Stockhammer, *Why Have Wage Shares Fallen? A Panel Analysis of the Determinants of Functional Income Distribution* (Conditions of Work and Employment Series No. 35, 2013); Ünal Töngür and Adem Yavuz Elveren, 'Deunionisation and Pay Inequality in OECD Countries: A Panel Granger Causality Approach' (2014) 38 *Economic Modelling* 417; Bruce Western and Jake Rosenfeld, 'Unions, Norms, and the Rise in U.S. Wage Inequality' (2011) 76 *American Sociological Review* 513; Georgina Murray and David Peetz, 'Plutonomy and the One Per Cent' in Susan Schroeder and Lynne Chester (eds), *Challenging the Orthodoxy: Reflections on Frank Stilwell's Contribution to Political Economy* (Springer, 2013) 129.

47 Elizabeth Anderson, *Private Government: How Employers Rule Our Lives (and Why We Don't Talk About It)* (Princeton University Press, 2017) 63.

48 Matt Cowgill, *A Shrinking Slice of the Pie* (Australian Council of Trade Unions Working Australia Papers No.1/2013).

49 Shirin Ghaffary and Eric Johnson, 'After 20,000 Workers Walked out, Google Said It Got the Message. The Workers Disagree' *Recode* (21 November 2018); Noam Scheiber, 'Google Workers Reject Silicon Valley Individualism in Walkout' *New York Times* (6 November 2018).

50 Andy Kroll, 'Walmart Workers Get Organized—Just Don't Say the U-Word' *Mother Jones* (online, March/April 2016) <<http://www.motherjones.com/politics/2013/02/our-walmart-black-friday-union/>>; Eduardo Munoz, 'Walmart Warns Workers Not to Use App Helping Them Understand Company's Labor Rules' *RT News* (online, 16 November 2016) <<https://www.rt.com/usa/367062-walmart-worker-app-workit/>>.

But in the end, if they are going to do something meaningful, they are going to create power for the workers; and if they do that, we may as well call them a union because that is probably what they end up being.

This is not to deny that it is sometimes strategically useful to call them something else – some body for independent representation – at least for a while, because the term trade union has been itself so heavily contested and demonised, that workers sometimes do not recognise that what they want is what we call a trade union. For example, there are American data showing that people are more likely to say they would join an independent body that represented the interests of workers, than saying they would join a trade union.⁵¹ Some observers might say, ‘that’s America’, but historically unions have had a more negative rap in public opinion here in Australia than in just about any other industrialised country.⁵² Density is so low in the USA relative to elsewhere, not because workers do not want unions, but because the institutions are lined up so effectively against them. The thing to fight over is the representation, not the word ‘union’. Now that is also not to deny that words matter, control of language is important. Labour need not give away the word to the other side, it can defend the word, but pick its fights.

The second approach I want to discuss is changing *who makes* the decisions. Here people sometimes talk about various schemes for employee participation in decision-making, ranging from quality circles, through joint consultative committees and the like. Sometimes this gets called ‘industrial democracy’. The problem is that its continued existence is at the whim of the employer. Democracy is not something that is at the whim of the king or even, one hopes, of the prime minister. So, I am not going to say anything about those schemes for employee participation in decision-making here. It is not that I do not think they are worthwhile, but they are not economic democracy. Likewise, I am not going to say anything more about financial participation schemes, like profit sharing, productivity sharing, employee share ownership schemes and the like. It is true they grant an economic entitlement, but only for as long as management lets them last, and they do not inherently promote democracy. When combined with employee participation, they do better, but they are still at the whim of the king.⁵³

However, a form of employee participation in decision-making that is worth mentioning is the system known in Germany as *Mitbestimmung*. We call it codetermination. It is a formal mechanism covered by several laws. In one, the governance of larger firms is almost jointly decided by shareholders and workers – I say almost, because in the key body, the supervisory board, which has equal representation of worker and shareholder representatives, an independent chair who, in reality, would rarely vote against management’s interests, has the balance of power.

In fact, the worker representatives themselves, having far less resources than management, rarely challenge the management agenda. For a broader perspective they are sometimes dependent on their own external board member – one of the worker representatives cannot be an employee or union official, they must be someone else external, but sympathetic to, the workers.

The choice of personnel director in larger firms must be jointly agreed between both factions in the supervisory board. There are also Works Councils, dealing with more work-specific issues like training and work allocation, that contain worker representatives. Where unions exist, their members tend to dominate employee representation on supervisory boards and works councils. In what we would call non-union firms, it is just the employees.

Mitbestimmung originated in the immediate post-war era, when philosophers, politicians and theologians wanted a system of governance that was more democratic; the British occupiers wanted to ensure the German steel cartels would not re-emerge; the unions wanted socialisation of the means of production; and the employers wanted something that they could offer the unions, who had demonstrated their power in earlier decades, without losing ownership of the means of production.

There was also a proposal at the time, coming from the Catholic church, that the interests of the *public* be covered, through some representatives chosen for that purpose by mutual consent of employees and management – but not the state. It did not end up part of the system.

Another model for changing the decision makers comes from Belgian academic Isabelle Ferreras, in her recent book *Firms as Political Entities: Saving Democracy through Economic Bicameralism*.⁵⁴ She argues for the creation of the bicameral firm. Just like our Parliament has two houses, so too the firm would have two governing bodies, one representing shareholders, one representing workers. Each would have a power of veto.

If this model came about, it would be much more effective than trade unionism, as a countervailing force, in advancing workers’ interests – though it does not follow that unions would disappear. It would greatly strengthen worker power at the workplace. The people involved would mostly be the people we now see as workplace delegates, or at least as works councillors in Germany. We would also expect that the people from the workers’ side would still want to associate with their equivalents in other forms, to form organisations. What we now see as unions outside the workplace would become those bodies, possibly still called unions. Those bodies would be a critically important force for economic democracy in society as a whole, representing the interests genuinely of all workers in a way that unions cannot claim to do at present.

That approach, like all I have mentioned, does still leave open the question as to the role for the community in governance of the corporation, and how community interests are represented. That goes to the objectives of the corporation, its license to operate, and its interaction with state regulation.⁵⁵ It is for another day.

The third approach is about changing who the owners are. Here I want to focus on worker cooperatives. Would a world of worker ownership be a world of economic democracy?

51 Richard Freeman, ‘Do Workers Still Want Unions? Yes More Than Ever!’ (Briefing paper 182, Economics Policy Institute, 2007).

52 David Peetz, ‘Sympathy for the Devil? Attitudes to Australian Unions’ (2002) 37 *Australian Journal of Political Science* 57.

53 *Employee Stock Ownership Plans: Little Evidence of Effects on Corporate Performance* (Report to the Chairman, Committee on Finance, US Senate, 1987); Bjorne Grimsrud and Torunn Kvinge, ‘Productivity Puzzles—Should Employee Participation Be an Issue?’ (2006) 32 *Nordic Journal of Political Economy* 139; Douglas Kruse, *Employee Ownership and Employee Attitudes: Two Case Studies* (Norwood Editions, 1984); Derek C Jones, ‘British Producer Co-Operatives 1948-1968: Productivity and Organisational Structure’ in Derek C Jones and Jan Svejnjar (eds), *Participatory and Self-Managed Firms* (Lexington Books, 1982); Michael Quarrey, ‘Employee Ownership and Corporate Performance’ (National Center for Employee Ownership Research Paper, 1986).

54 Isabelle Ferreras, *Firms as Political Entities. Saving Democracy through Economic Bicameralism* (Cambridge University Press, 2017).

55 For a beginning of this discussion, see Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Constable & Robertson, 2004).

Well, if each worker owned one share in their company, there was no sham contracting, and nobody else creamed off surplus value, then yes, we would – and we would not need unions at that workplace level. Workers would own the means of production. There are examples, throughout the Mondragon region of Spain, and in individual firms dotted around the world.

The studies suggest it *is* economically efficient.⁵⁶ Mondragon workers are usually keen to introduce new technology, to maintain competitiveness. A job is always found for displaced workers. The surplus generated by labour does not get wasted on jets and exclusive golf club memberships.

Not all cooperatives go well. Some are bad to begin with (if workers buy up failing companies) but on average they are at least as productive as traditional capitalist firms. Still, few have grown to dominate their industries, because they lack the capitalist urge to grow through merger and acquisition, and they lack the discipline that finance capital imposes on capitalist firms in share markets, which is to maximise short term returns, often through cost-cutting, at threat of a cut in share price that could see a well-heeled CEO out the door. The logic of capitalism prevents the dominance of non-capitalist, democratic firms.

So, too, the logic of capitalism, because of how it encourages negative externalities, threatens the planet itself. Hence in this final part I want to shift our perspective on economic democracy upwards, from the workplace level, to the planetary.

Doing so immediately throws two big things into the equation. We need to take account of the economic interests of workers in the global South. We need to take account of the sustainability of the system. I will focus on the second, without forgetting the first.

To cut to the chase, can a compromise be found between the presently envisioned interests of environmental and labour groups – between the planet and jobs? *Negative* economic growth will not work. We would not suddenly see machines closed down and replaced by labour. What we would see is major unemployment, another depression and, as a political response to it, fascism.

That is as undemocratic as it comes, and fascist governments, apart from stopping meetings like this, would also ensure that capital was able to continue producing lots of carbon emissions. Negative economic growth would also doom workers from the global south to permanent poverty and unremitting imperialism.

But we cannot keep on emitting like this. We need a very large reduction in carbon intensity (the amount of carbon emissions used in producing a unit of GDP). Recycling, enforced by regulation is a step towards that, but just a small one. Large state investments, and large changes in relative prices are central to achieving a major change in carbon intensity.

In this context, the union phrase ‘a just transition’ keeps coming up, for good reason. It is to do with things like environmental remediation; energy ‘democracy’; ‘green’ jobs; worker retraining; revitalisation or diversification of energy sources for local communities; and community agency. But the ‘just’ has another angle. If we carry on as we are, a small group of people will make a lot of money and the planet will become uninhabitable to most people.

But not to all. Never assume that the ultra-rich cannot find a way to survive comfortably – be it in a bunker in the Waikato, or a gated or better still a floating community, with its own private, heavily armed security. We are not all going to die – well, not *all* of us. And if the climate becomes that extreme then, again, there is every reason to believe that we will end up with some sort of fascist government to rule society and protect those with great wealth and power. That does not sound very democratic. Not that I am trying to stop the wealthy building their bunkers or floating cities, but the knowledge that they have a way out gives them little incentive to do anything to prevent the rest of us roasting.

There also is the big political question, about how to garner the political constituency necessary to respond to the issue. Part of it is about making use of the potential for common interests between unions, many environmental groups, and parts of industrial and finance capital. That may seem bizarre. After all, I have been saying how undemocratic money is (and by implication finance capital). But some of that money is actually workers’ money – superannuation from Australia, pension funds from Europe, even North America. Economic democracy is not just about workers’ current incomes, it is about their future incomes as well. The state of the planet will shape *how much* that future income will be; and the *use* to which workers’ capital is put will shape that planet.

This idea that economic democracy relates to funds held in trust for workers is not all that new. In some ways it harks back to the Meidner ideas of 1960s and 1970s Sweden, which planned that economic surpluses could be amassed to make investments for workers’ interests.⁵⁷ Meidner faltered, but the stakes now are much higher. There are some bodies that attempt to make workers’ capital work – such as the Committee on Workers Capital, in which representatives of many union-related funds meet once a year.

But these are not the only parts of finance capital that take a progressive line on climate matters. Others include the reinsurance companies, and a range of fund managers or asset owners linked to such entities as the International Investor Group on Climate Change. It may seem odd to talk about insurance companies as agents of change or allies in the fight for a fairer, sustainable society. But this is actually about the possibility of having a democratic future.

And if we keep emitting greenhouse gases at this rate, we will not kill the whole planet, we will not kill all the humans on earth, but we will kill democracy, and we will put in its place a system far worse than any of us have personally experienced. And there are lots of wealthy people who are only too happy to see that happen. But there are also lots of wealthy people who are very keen to avoid that. In the past, when democracy has been introduced, or saved, its often involved all sorts of odd characters acting together, but those alliances have worked.

In the end, we need economic and political democracy and we need strong unions to play a key role in enabling those to happen and to prevent a descent into fascism. We need them to do that through a more active use of workers’ pension funds to achieve democratic purposes, rather than the undemocratic logic of finance; and with recognition of the legitimate interests of workers as requiring a democratic voice in the workplace, whether as a stronger countervailing force to capital, or as facilitating an institutionalised workers’ say in the decisions that affect them. Unions are not the only way to achieve those means, but at the moment they are the best that is presently on offer.

56 Avner Ben-Ner and Saul Estrin, ‘What Happens When Unions Run Firms?’ (1991) 1 *Journal of Comparative Economics* 65; Jones, above n 53.
57 Rudolf Meidner, *Employee Investment Funds: An Approach to Collective Capital Formation* (George Allen & Unwin, 1978).

WHY THE TRADE UNION MOVEMENT SHOULD SUPPORT DEMOCRATIC REGULATION OF POLITICAL MONEY

Joo-Cheong Tham

In the lead up to the last federal election, Anthony Pratt, Australia's richest person, hosted a fund-raiser for the Liberal Party at his Kew mansion, Raheen, where selected guests for thousands of dollars could rub shoulders with the Prime Minister Scott Morrison and his ministry. Pratt was, however, even-handed to the Australian Labor Party for days later, he hosted a similar fund-raiser for the Opposition Leader, Bill Shorten, and his shadow ministry.⁵⁸

For years, party officials in both the Australian Labor Party and Liberal Party have cultivated wealthy business interests with strong links with the Chinese Communist Party government, persons some party insiders have described as 'whales'. The two most notable donors, Huang Xiang Mo and Chau Chak Wing, secured access to the highest levels of political office, including meetings with Prime Ministers Rudd, Gillard, Abbott and Turnbull, after contributing millions of dollars to their parties.⁵⁹ And despite being warned by the Australian Security Intelligence Organisation of the risks that Huang and Chau posed to national security, these parties continued to take their money.⁶⁰

These two examples highlight the corrosive role of money in Australian politics. Other examples show how the problems are as acute with political spending as with political contributions. Adani, the mining company, has undertaken a significant campaign promoting its business interests including through letter-boxing and bill-boards during the federal election campaign period.⁶¹ And there is, of course, the spending of another mining interest: Clive Palmer who spent around \$60 million into the federal election, potentially outspending the Liberal Party and also the Australian Labor Party.⁶² While Palmer's United Australia Party did not win a single seat, there is little doubt that the support it received and the way it flowed its preferences were instrumental to the Coalition's victory.

These examples illustrate how political money poses two serious problems for the integrity of Australia's democracy. First, corruption, including systemic corruption of the political process by moneyed interests. Second, unfairness both in relation to channels of political influence and elections.

The problems present a compelling case for regulation. Elsewhere, I have proposed two 10-point plans, one on the funding of election campaigns and the other on political lobbying, as a blueprint for democratic regulation of money in Australian politics.⁶³

This paper focuses on two measures proposed in the 10-point plan for the democratic regulation of funding of federal election campaigns, caps on political spending and caps on political donations, to draw out and assess the main stances Australian unions have taken in relation to the regulation of money in politics. Its key argument is that the trade union movement should support democratic regulation of political money.

At one level, we would expect Australian unions to be supportive of the regulation of money in politics. After all, fairness and equality, animating concerns of such regulation, are also core principles of the Australian union movement. Moreover, trade unions are amongst the most significant organisations standing against the marketisation of society, including the marketisation of politics and government.

And here, there should be little doubt that the undemocratic effects of money in politics stem from the deep structures of capitalism. Albert Einstein, an avowed socialist, captured this well decades ago. Under capitalism, what Einstein considered 'the predatory phase of human development',⁶⁴ 'the members of the legislative bodies are selected by political parties, largely financed or otherwise influenced by private capitalists who, for all practical purpose, separate the electorate from the legislature'.⁶⁵

And indeed, as we would expect, there have been strong views expressed within the labour movement supportive of regulating money in politics. In her book, *On Fairness*, Australian Council of Trade Unions ('ACTU') Secretary Sally McManus said that:

A powerful incentive to corruption, hard and soft, exists in the dynamics of . . . economic and political relationships. Big corporations have a direct interest in politics and the political system; their political donations reward those who promise them favourable conditions, and neither the community benefit nor the national interest comes into it.⁶⁶

After the last federal election, Sally McManus has also called for serious consideration of controls on election spending.⁶⁷

58 Will Glasgow and Christine Lacy, 'ALP's equal billing at Pratt's Place', *The Australian* (27 February 2019) 19.

59 Clive Hamilton, *Silent Invasion: China's Influence in Australia* (Hardie Grant Books, 2018) Chapter 4.

60 Nick McKenzie and Chris Uhlmann, 'ASIO warned politicians about taking cash from Huang Xiang Mo, Chau Chak Wing', *Australian Financial Review*, (online, 5 June 2017) <<https://www.afr.com/news/politics/asio-warned-politicians-about-taking-cash-from-huang-xiangmo-chau-chak-wing-20170605-gwktc9>>.

61 'Adani to letterbox homes in Queensland's north', *SBS News* (online, 10 April 2019) <<https://www.sbs.com.au/news/adani-to-letterbox-homes-in-queensland-s-north>>

62 Melinda Howells, 'Clive Palmer says big election spend "more effective" than charity donations', *ABC News* (online, 21 May 2019) <<https://www.abc.net.au/news/2019-05-21/clive-palmer-55m-federal-election-ad-spend/11135636>>.

63 Joo-Cheong Tham, 'Democracy before Dollars: The problems with money in Australian politics and how to fix them' (2019) 90(2) *Australian Quarterly* 20-33.

64 Albert Einstein, 'Why Socialism' (May 1949) *Monthly Review* reprinted in *Monthly Review* (May 1998).

65 Ibid.

66 Sally McManus, *On Fairness* (Melbourne University Publishing, 2019) 69-70

67 David Crowe, 'We'll be the resistance: Unions defend their campaign, vow to take on Morrison', *Sydney Morning Herald* (online, 22 May 2019) <<https://www.smh.com.au/federal-election-2019/we-ll-be-the-resistance-unions-defend-their-campaign-vow-to-take-on-morrison-20190522-p51q7i.html>>.

In 2009, the Liquor, Hospitality and Miscellaneous Union (now United Voice, which incidentally is among the top five unions in terms of contributions to ALP) also published an important report, *Democracy Pty Ltd: The case for election campaign and political party finance reform*, calling for wide-ranging reform. More recently, in 2017, the Victorian State Labor Conference adopted a reform agenda on political funding that included caps on political contributions.⁶⁸ The 2018 ALP National Platform also commits to ‘(seeking) to limit the level of federal campaign expenditure, through the introduction of spending caps’.⁶⁹

Competing, however, with these views is a strand of union opinion that is hostile to the regulation of money in politics. For this strand, the animating principles are less fairness and equality but rather freedom and liberty.

Arguably, the best illustrations of this strand of opinion are the constitutional challenges brought by Unions NSW in 2013 and 2018 to provisions of NSW election funding laws, particularly the challenge in *Unions NSW (No 1)*.

In both cases, Unions NSW argued that the challenged provisions breached the freedom of political communication implied under the Commonwealth Constitution:

- In *Unions NSW (No 1)*, the challenge was to two provisions, one restricting the ability to donate to those on the electoral rolls (thereby, prohibiting donations from legal entities such as trade unions) and the other, a provision that aggregated the spending of organisations affiliated to a political party to the cap applying to the party;
- In *Unions NSW (No 2)*, the challenge was to the reduction of the spending caps that applied to third parties (organisations and individuals that engaged in election campaign spending that are not political parties or candidates) from \$1.05 million to \$0.5 million and a provision that aggregated spending when organisations were said to ‘act in concert’.

The table below summarises the provisions challenged and the outcome of the decisions of the High Court.

Case	Challenged provisions	Outcome
<i>Unions NSW v New South Wales</i> (2013) 252 CLR 530 (<i>Unions NSW (No 1)</i>)	Section 96D of the <i>Election Funding, Expenditure and Disclosures Act 1981</i> (NSW) which restricted the ability to donate to those on the electoral rolls	Invalid
	Section 96G(6) of the <i>Election Funding, Expenditure and Disclosures Act 1981</i> (NSW) which aggregated spending of organisations affiliated to a political party to that of political party	Invalid
<i>Unions NSW v New South Wales</i> (2019) 93 ALJR 166 (<i>Unions NSW (No 2)</i>)	Section 29(10) of <i>Election Funding Act 2018</i> (NSW) which reduced third party spending limits from \$1.05 million to \$0.5 million	Invalid
	Section 35 of <i>Election Funding Act 2018</i> (NSW) which aggregated spending of third parties when ‘acting in concert’	Unnecessary to decide

To be sure, these provisions, particularly, those challenged in 2013, were problematic. Before the High Court handed down its decision in *Unions NSW (No 1)*, I wrote an opinion piece published in *The Guardian* that said the following:

[the challenged laws] constitute one of the most serious attacks on Australia’s democratic process in recent times. In all likelihood, they will render the historic structure of ALP unviable by prohibiting affiliation fees, and by strongly discouraging affiliation through the aggregation of spending. Amounting to a de facto ban of the ALP’s party structure, they are an egregious breach of freedom of association. They are also grossly unfair as they have a selective – and dramatic – impact on the ALP.⁷⁰

At the same time, I said:

[there are] risks of victory, even if less apparent. Should the laws be struck down through endorsement of US supreme court jurisprudence – especially *Buckley v Valeo*, which rejected equality and fairness as legitimate grounds for restricting ‘free’ speech – attempts to regulate the electoral process to ensure its democratic integrity may be imperiled through constitutional obstacles.⁷¹

This was said in the context where the submissions of Unions NSW dripped with references to the US First Amendment jurisprudence, particularly, to *Buckley v Valeo*⁷² and *Citizens United*.⁷³

Such reliance on US First Amendment jurisprudence brings us into the treacherous terrain of a liberal-democratic approach to regulating money in politics – or what the Canadian Supreme Court has characterized as the libertarian model.⁷⁴

In this model:

- The pre-eminent democratic value is liberty or freedom;
- Freedom is, however, understood in a particular way – as ‘freedom from’ State regulation; and
- The reason for this understanding of freedom is not difficult to find: as the US Supreme Court in *Citizens United* emphasised in relation to the First Amendment, it was ‘(p)remised on mistrust of governmental power’.⁷⁵

Hence, this model is founded upon hostility to State regulation.

68 ‘Victorian Branch Australian Labor Party Platform 2018’, *Victorian Labor*, 90 (Policy Document, 2018) <<https://www.viclabor.com.au/wp-content/uploads/2018/07/Platform-2018-Web.pdf>>.

69 ‘A Fair Go for Australia: National Platform’, *Australian Labor Party* (Policy Document, 2018) [73] <https://www.alp.org.au/media/1539/2018_alp_national_platform_constitution.pdf>.

70 Joo-Cheong Tham, ‘NSW election funding laws are a serious attack on freedom of association’, *The Guardian*, (online, 7 November 2013) <<https://www.theguardian.com/commentisfree/2013/nov/07/nsw-election-funding-laws-are-a-serious-attack-on-freedom-of-association>>.

71 *Ibid.*

72 *Unions NSW*, Submission in *Unions NSW v New South Wales* S204/2018 [15], [21], [33], [42].

73 *Ibid* [31], [33], [40], [57]-[59].

74 *Attorney-General of Canada v Harper* [2004] 1 SCR 827, 868.

75 *Citizens United v Federal Election Commission* 558 US 310, 340 (2010).

At the same time, it is sanguine about the exercise of private power – private regulation – for three reasons:

- First, it almost exclusively focuses on the dangers of State regulation;
- Second, it rejects equality as a rationale for regulation. The most striking statement here is from *Buckley v Valeo* where it was said that ‘the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment’;⁷⁶
- Third, it sanctifies the use of money in politics as democratic by characterizing money as speech – the use of money for political expression is, according to this approach, fundamentally an exercise of democratic freedom.⁷⁷

The appeal of the libertarian approach lies not only in its powerful rhetoric of freedom but its elevation by the US Supreme Court.

In the context where the strong arm of the State has been used to curb the effectiveness of trade unions, it is not difficult to see the attractiveness of a position that holds it at bay. Most significantly perhaps, the libertarian approach would seem to provide a way of addressing two legitimate concerns that some unions have in relation to the regulation of money in politics:

- First, that contribution caps will prohibit trade union affiliation fees to the Australian Labor Party – this was the underlying concern of the challenge in *Unions NSW (No 1)*;
- Second, that spending caps will prevent trade unions from mounting effective election campaigns – this was the key concern in *Unions NSW (No 2)*.

These are clearly salient concerns given the significance of trade union political spending, both in the form of contributions to the Australian Labor Party and also in the form of independent third party spending.

In the period from 1998/1999 to 2015/2016, trade union contributions accounted for nearly 30 per cent of all contributions to the Australian Labor Party. Such contributions are particularly significant for a few unions. The top five unions (Shop, Distributive and Allied Employees Association; Construction Forestry Maritime Mining Energy Union; United Voice; Australian Manufacturing Workers’ Union; and the Australian Workers’ Union) accounted for 60 per cent of total trade union funding to the Australian Labor Party for this period.

And in terms of spending, trade union spending accounted for 45.2 per cent of third party expenditure over the four elections (2007, 2010, 2013, 2016). The top five union organisations in terms of spending (Australian Council of Trade Unions; Australian Education Union; United Voice; NSW Nurses Association; and Community and Public Sector Union) accounted for more than two thirds of total trade union spending and more than a third of total third party expenditure (33.5 per cent).

Through its trenchant opposition to regulation, a libertarian approach would allow all these contribution and spending practices to proceed apace.

In the same breath, it addresses the concerns regarding trade union affiliation fees and election campaigns. A full-blooded libertarian approach, such as that adopted by US Supreme Court Justice Clarence Thomas which was cited in the submissions of Unions NSW in *Unions NSW (No 1)*,⁷⁸ would consider both caps on contributions and spending as constitutionally illegitimate. And if there were no such caps, the concerns regarding trade union affiliation fees and election campaigns would naturally disappear.

However appealing the libertarian approach is, it is deeply flawed for three reasons:

- The first should be obvious by now – it contradicts the core values of the Australian trade union movement, equality and fairness;
- The second is that it is unnecessary: there is a more compelling approach that addresses the concerns regarding trade union affiliation fees and election campaigns;
- The third, which I will come back to in my conclusion, it is short-sighted: it trades immediate gains to particular sections of the union movement for gradual undermining of the strength of the movement as a whole.

As to the second reason, there is an alternative, more compelling, way of viewing the regulation of money in politics that at the same time addresses the two concerns mentioned earlier.

That is the social democratic approach – what the Canadian Supreme Court has dubbed the egalitarian model.⁷⁹

In this model:

- The pre-eminent democratic value is political equality⁸⁰ – the notion that each member of the community has equal political status and correspondingly that wealth and resources should not determine the extent of political influence. As Robert Dahl, arguably the key theorist of democracy, said, ‘[i]f income, wealth, and economic position are . . . political resources, and if they are distributed unequally, then how can citizens be political equals? And if citizens cannot be political equals, how is democracy to exist?’;⁸¹ and
- Freedom is understood as both ‘freedom from’ and ‘freedom to’. As John Rawls puts it, it is not just the formal conferral of freedoms that matters but also their fair value.⁸²

In understanding freedom in this more subtle way, there is also a connection to what is universally accepted – except by the US Supreme Court – as the benchmark for democratic elections: that they be free *and* fair. Under the egalitarian model, there is suspicion of State regulation, particularly, abuse of power by the governing parties, but also embrace of State regulation in order to give effect to the principles of political equality and fairness in the context of inequalities of wealth and resources. As the High Court in *McCloy* put it, ‘[t]he risk to equal participation posed by the uncontrolled use of wealth may warrant legislative action to ensure, or even enhance, the practical enjoyment of popular sovereignty’.⁸³

76 *Buckley v Valeo* 424 US 1, 48 (1976).

77 *Buckley v Valeo* 424 US 1 (1976), 19, cited in Unions NSW, Submission in *Unions NSW v New South Wales* S204/2018 [42].

78 Unions NSW, Submission in *Unions NSW v New South Wales* S204/2018 [16], [22].

79 *Attorney-General of Canada v Harper* [2004] 1 SCR 827, 868.

80 Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy: Volume 1* (1991) 321.

81 Robert Dahl, *Democracy and its Critics* (Yale University Press, 1989) 326.

82 For this distinction, see John Rawls *A Theory of Justice*, (Oxford University Press, 1999) 225; John Rawls, *Justice as Fairness: A Restatement* (Harvard University Press, 2001) 149.

83 *McCloy v New South Wales* (2015) 257 CLR 178, 207 [45].

Under the egalitarian model, caps on contributions which were upheld by the High Court in *McCloy* seek to address corruption broadly understood: not just quid pro quo corruption as accepted by the US Supreme Court but also:

- Clientelism, which according to the High Court ‘arises from an office-holder’s dependence on the financial support of a wealthy patron to a degree that is apt to compromise the expectation, fundamental to representative democracy, that public power be exercised in the public interest’;⁸⁴ and
- ‘War-chest’ corruption, which arises when ‘the power of money . . . pose[s] a threat to the electoral process itself’.⁸⁵

Under this model, we can make a principled distinction between political donations and membership fees on the basis that membership fees have much less risk of corruption due to an open declaration of support for aims of a political party and is, moreover, integral to a vital form of political participation: participation within political parties.

This distinction supports an exemption for genuine membership fees from caps on contributions. This exemption, in turn, should extend to organisational members such as trade unions affiliated to the ALP. There is no reason to view membership solely in individualistic terms.

Further, a failure to extend an exemption to organisational membership will mean banning of particular party structures, specifically indirect parties comprised only of organisational members and parties with mixed structures comprised of individual and organisational members. These party structures are not unique to parties of the ‘left’. For instance, the predecessor of the National Party, the Country Party, had farmers’ organisations as members; similarly, the New South Wales Shooters and Fishers Party has had shooting and fishing clubs as members.⁸⁶

It might, however, be said that in the world of realpolitik, there is no way the Liberal Party and the National Party will agree to caps with an exemption for organisation membership fees. On the contrary, this is precisely what occurred with the New South Wales Legislative Council Select Committee on Electoral and Political Party Funding where I put similar arguments. The six-member committee, which had only two ALP members and had as its Chair, Reverend Fred Nile, and as its Deputy Chair, Don Harwin who is the current Industrial Relations Minister for New South Wales said this:

The Committee considers that membership fees should not be encompassed by the Committee’s proposed ban on all but small individual donations ... Similarly, the Committee believes that trade union affiliation fees should be permissible, despite the proposed ban on union donations. To ban union affiliation fees would be to place unreasonable restrictions on party structures.⁸⁷

These views explain the exemption in section 26 of the *Election Funding Act 2018* (NSW) for organisational membership fees, including trade union affiliation fees.

As to spending limits, there are two reasons for such regulation under the egalitarian approach: it levels the playing field by preventing excessive spending to dominate electoral contests; and it reduces the risk of corruption by staunching the demand for campaign funds.

Once spending limits are placed on contestants in elections, parties and candidates, it is imperative that controls are also placed on what are called third parties (individuals and organisations that participate in election campaigns that are not parties and candidates).

The need for this was well explained by the Canadian Supreme Court in *Harper v Canada*. Drawing upon the 1991 Canadian Lortie Royal Commission Report, the Court explained that third party spending limits were needed on the following grounds:

- It prevents the dominance of the political discourse by the wealthy;
- It prevents parties and candidates from circumventing the limits that apply to them by creating front organisations; and
- It reduces the risk of third party spending having an unfair effect on the outcome of an election.⁸⁸

What then about the concern that spending limits will prevent effective election campaigns by trade unions? The short answer is that this does not necessarily result from third party spending limits. The experience of New South Wales unions in the first two State elections where spending limits applied (2011 and 2015 NSW State Election) supports this point.

Whether spending limits will prevent effective election campaigns by trade unions very much depends on the level at which the limits are set. Indeed, it is well accepted that third party spending limits should, as the High Court made clear in *Unions NSW (No 2)*, be high enough to allow third parties to reasonably present their case. Equally, the limits should not be so high that it allows the wealthy to dominate political discourse and elections through third party spending.

We are inevitably in Goldilocks territory where third party spending limits should not be too low nor too high. And that is why the process of setting the level of the limits should be robust. For my part, I have suggested the initial levels be set through a Royal Commission process and changed subsequently by the Australian Electoral Commission.⁸⁹

There are two other noteworthy principles in the setting the level of third party spending limits, one may be palatable to those involved in union election campaigns and the other perhaps less so.

First, from a democratic perspective, mass mobilisation should be encouraged in the design of spending limits. This can be done by exempting volunteer labour from spending. It may also be desirable to provide for an increase in third party spending limits according to the number of members of a third party when there is an authorisation from its members for such spending.

84 Ibid 204 [36].

85 Ibid 205 [38].

86 Joo-Cheong Tham, *Establishing A Sustainable Framework for Election Funding Laws in New South Wales: A Report for the New South Wales Electoral Commission* (2012) 148-51.

87 *Electoral and Political Party Funding in New South Wales* (Final Report of the Legislative Council Select Committee on Electoral and Political Party Funding, June 2008) 131.

88 *Attorney-General of Canada v Harper* [2004] 1 SCR 827, 875.

89 Joo-Cheong Tham, ‘The Crisis of Political Money; or, What the Rest of Australia can Learn from New South Wales’ (2015) 74(3) *Meanjin* 69-77.

Second, third party spending limits should be set at a level lower than that which applies to political parties, as is the case with Canadian and UK spending limits. This is due to two reasons. First, as the Canadian Supreme Court in *Libman* said 'owing to their numbers, the impact of (third party) spending on one of the candidates or political parties to the detriment of the others would be disproportionate'.⁹⁰

Second, as Gageler J rightly recognised in *Unions NSW (No 2)*, there is a 'functional distinction' between political parties and third parties: 'during a period leading up to an election, a political party which aims to form government must be in a position to communicate on the whole range of issues of potential concern to voters whereas a third-party campaigner can concentrate its resources on a single issue of concern to it'.⁹¹ His Honour then went on to say:

To ensure that the political party is able to communicate on the range of issues of potential concern to voters without being overwhelmed by the targeted campaigns of any number of third-party campaigners acting alone or in concert, the cap on the third-party campaigner must be substantially lower than the cap on the political party.⁹²

When it comes to money in politics, the sirens of liberty should be resisted. In this neoliberal age, it is easy to drape on the flag of freedom and demonise State regulation. Indeed, doing so might yield short-term gains. The challenges in *Unions NSW (No 1)* and *Unions NSW (No 2)*, after all, were successful.

The longer-term prognosis for the union movement can, however, only be bleak in a world where the use of money in politics is unrestricted. However much money unions amass, there is no conceivable way they can match the funds available to commercial corporations.

It should be remembered that Clive Palmer is only a single mining magnate, only the 21st richest person in the country – and that with an estimated wealth of \$1.8 billion, his \$60 million-odd spending shows how big money in elections is small change for the mega-rich. It should also be remembered that when the mining billionaires combined to oppose the Resources Super Profits Tax, they contributed to the ousting of a Prime Minister.

You can't beat owners of capital when it comes to money – that is why they are the capitalists.



90 *Libman v Quebec (A-G)* [1997] 3 SCR 569, 601.

91 *Unions NSW v New South Wales* (2019) 93 ALJR 166, 186 [89].

92 *Unions NSW v New South Wales* (2019) 93 ALJR 166, 186 [90].

THE ROAD TO REPRESENTATION: TRADE UNIONS, DEMOCRACY AND GENDER

1 *The Changing Face of Unions*

Over my long career in unions I have seen unions change dramatically in many ways from who joins, to what we do, and who are the union leaders. Undeniably some of the change is reactive to the environment we are in and the changing face of work – what people do, and how technology has affected our workplaces. As profound as the change to work itself has been so has the change in who is in unions, who leads unions and what we seek to achieve. Back 100 years ago in the predecessor unions to the Australian Services Union ('ASU'), there were no women members and no women leaders. 100 years on a lot has changed.

This paper does not address the other serious issues affecting unions. The focus here is about the representation of women workers in unions in leadership at all levels.

There are definitely more women in senior positions than when I started in the union movement. Women are now leading the ACTU, leading national unions, leading state branches and generally getting involved. The disappointing thing today though is that the perception of unions and our work doesn't match the reality.

Now for the first time in Australia's history the majority of union members are women. The three largest unions in Australia have a majority of members who are women – the big unions are full of nurses, teachers, shop assistants and even when you look at the top four unions, which includes the ASU, the majority of union members are women. In 1986, 35% of unionists were women, in 2009 the percentage of women union members had risen to 46%, today over 50% are women.

The image most people would have of a unionist is a bloke in high vis wearing safety boots with his fist in the air. That is no longer who the majority of unionised workers are in Australia. A unionist is more likely to be a professional woman worker who has a career in nursing or teaching or in administration or a low paid woman in a retail store.

Despite the reality of Australian unionism, the most recognised name of a union is the Construction, Forestry, Maritime, Mining and Energy Union ('CFMMEU') according to focus groups we've done. My own experience when I tell people I work for a union is to be asked if it's the CFMMEU. I don't look like a CFMMEU worker but I still get asked if I work with that union.

That perception does cause problems particularly when one of the fastest growing unions is the nurses union which is dominated by women – but who knows that? In my experience people are surprised when you tell them that fact. In the ASU, the fastest growing group of membership is the Social Community and Disability Services sector workers which are 70% women who tend to be middle aged, many of whom have degrees and qualifications. For unions that aren't 'blue-collar', the perception of who is today's union and unionist causes us a problem and it has probably caused us a problem for a long, long time, not just externally but internally as well.

If I look back to the history of the Clerks Union, part of the ASU which was formerly called the Federated Clerks Union, I found us running a range of interesting activities for women – such as a Miss Clerk beauty pageant in the 1960s. But what I also found is that, many of the deunionisation strategies we saw years and years ago against the unionised Clerks/Admin workers eventually have been meted out to blue-collar blokes. Tactics we are seeing now like staff contracts to avoid agreements and Awards and non-union agreements were the centre of many a dispute for women admin workers years ago.

When it happened to the Clerks it was often dismissed as some inadequacy of the union itself rather than a concerted campaign that would reach everyone eventually. The perception was that women may not be 'real' unionists anyway so what else did we expect would happen. Interestingly, when the same has happened in blue-collar bloke land, it has become a catalyst for a rallying cry.

It is not just the female Clerks where this has happened. Look at the history of the industrial rights of Social and Community Services workers who were denied an Award until 1983 when they finally won industrial coverage and an Award as a result of the High Court decision in *R v Coldham; Ex Parte Australian Social Welfare Union*⁹³. Before then, 'caring' workers were not considered 'industrial' so were not capable of Federal Award Coverage.

It is no wonder that the perception that unions are for 'blokes' continues when such stark examples of how women's work was perceived and still is perceived as we see the rerun of recognition of the worth of work in aged care and childcare, both areas dominated by women.

93 (1983) 153 CLR 297.

We have been slow to recognise this perception but with more women in unions and leadership this has changed but only relatively recently. When you look at the history of women's leadership in our peak union bodies, for example, the first woman full time officer of the ACTU was Jennie George who became Assistant Secretary in 1991 and President in 1996. Now we have women in the positions of ACTU Secretary and President for the first time ever.

This might be a controversial thing to observe but do women end up in charge when the shit completely hits the fan? Or is it when the going gets tough – the women get going? Or is it the more acceptable thing to say that with more women members it was a natural progression? Maybe the explanation for the increasing leadership of women in unions is a combination of all three observations. In my view, though, it does take more than tough times to get women involved in unions and in leadership.

2 *No Representation Without Intervention*

My own experience is that you can't expect women to get involved without continued effort and structural change to force this to happen. In the ASU we have seen real change in the representation of women in leadership by tackling it head on.

In the ASU we did this by a concerted effort to change our union rules to drive change.

In 1993, the ASU set up a National Women's Consultation Committee to look at a number of changes to our rules and operation which included affirmative action strategies. When the new ASU was formed it was an amalgamation of three unions: the Federated Clerks Union, the Australian Services Union and the Municipal Employees Union.

In 1993 there was only one woman ASU Branch Secretary but there were some national executive positions designated for women. In 1998 we included a new objective in the ASU national rules to acknowledge that the core business of the union was 'to promote the participation of women in the union and to encourage their representation in its elected officers'.⁹⁴

Branches reflected this in their rules and adopted rules to designate positions for women from their industries in a greater proportion than how they were represented in the membership as they recognised there were women in the sector but they had only recruited the men in specific occupations not the women. Women were needed in leadership to help grow the female membership of the union. The ASU took the view that there was more chance of achieving equality for these women and encouraging membership by promoting elected positions in greater proportion than their current membership of the union.

This brought on a legal challenge in the Information Technology and Energy industry in our Victorian Authorities and Services Branch where membership was 88% male and 12% female and yet women were designated one of three positions on the branch Executive for this industry. The legal challenge culminated in a Federal Court case in 2004⁹⁵ in which the ASU was forced to argue that the reserved positions for women on the branch Executive and Conference was a special measure pursuant to s 7D of the *Sex Discrimination Act 1984* (Cth) to achieve substantial equality between men and women. The ASU was successful in establishing the rule was a special measure, we fended off the challenge and defended our approach.

Even today there are a range of ASU branch rules designating positions for women. The challenge itself brought it home to me that while we may believe in affirmative action and the place of women, we are the minority. The reality is there are many forces against us.

These rules and the mindset has had a substantial effect on elected positions we have. Currently the ASU has 27 elected branch and national full time positions, 14 are held by women and there is only one branch without a female full time elected official. To me, it is not surprising that the first woman ACTU Secretary came from the ASU and the first President from the Australian Education Union, because the first is a union that promoted affirmative action in leadership and the second is a union where the majority of union members are women.

If we look at the union movement more broadly in 2019 at a national level there are now seven Federal Union Secretaries who are female and two female Trades Hall Secretaries (down from three recently). In the three largest states, the female union Branch Secretaries see eight women in Victoria, seven women in NSW and two women in Queensland.

At the ACTU Executive level there has been an attempt to fix the gender balance by implementing an affirmative action rule which was first set in 1993 for the Executive and then for Council in 1995. There is a 50:50 gender split so that means most unions have two ACTU Executive reps, one man and one woman to achieve balance. I would not be on the ACTU Executive without this rule. Nor would I have been an ACTU Vice President without the rule of equal representation. As I commented before, for the first time ever we have a female President and Secretary.

Securing leadership jobs is not the only thing that we need to address, as the effectiveness of reflecting the gender of union members has to be achieved at all levels of unions – on management committees, among delegates and in the staff we hire – not just the women's officers, but organisers and specialist officers need to be women. The research of Professor Rae Cooper from the University of Sydney shows we have a long way to go on that score.⁹⁶

We cannot ignore the need to have women at all levels of the union organisation as delegates, local committees, workplace committees, branch executives and staff – we need a pipeline of women being involved, and this is hard to do. We consistently have to work on this pipeline to achieve it.

Not unlike the Australian Labor Party ('ALP') really, which has significant parliamentary representation of women at almost 50%. But in the administrative machine – not so much, primarily because the rules don't require it. It affects the way the ALP works for sure, it affects the way unions work too.

94 Rule 4aj, Rules of the Australian Municipal, Administrative Clerical & Services Union.

95 *Jacomb v Australian Municipal Administrative Clerical & Services Union* (2004) 140 FCR 149.

96 Rae Cooper, 'The Gender Gap in Union Leadership in Australia: A Qualitative Study', 54(2) *Journal of Industrial Relations* 131.

3 The Domino Effect

Not only does having more women in leadership and other positions in unions change the face of unions but it also changes what we do, what we focus on and what we achieve. You know you have made significant change in a union when you no longer need a women's committee to come up with ideas for improving the working lives of women – the issues for women become 'mainstream' and the issues for the whole union include women's issues which everyone says are 'union issues' without a second thought.

I am convinced without women in leadership positions and growing the number of women members in unions we would not have paid parental leave, part-time work, flexible working conditions, domestic violence leave and the continued push to cut the gender pay gap. The inadequacy of women's superannuation wouldn't be on the radar either.

We saw this starkly when the ALP was last in government. Look at the Equal Pay provisions of the *Fair Work Act (Cth)* 2009 and its predecessor Legislation – there had been 16 Federal Equal Pay cases and none had been successful. That changed between 2007 and 2012 for the female dominated Social & Community Services Sector where a combination of a female Deputy Prime Minister, female union leadership and members changed the law,⁹⁷ ran a successful case,⁹⁸ secured the funding for equal pay increases⁹⁹ and increased wages for women in the sector by between 23%-47% over eight years and they got a safety net increase as well. Some women have had their pay increased by \$400 per week over that time.

That's real change and it came from a committed effort by women. That's the difference women's representation can make and not just in this case. Does anyone think that we would have paid parental leave had Sharan Burrow and Jenny Macklin not been driving this agenda? I don't.

4 Still a Long Road to Travel

For women, the representation of our gender in union structures is important, the same could also be said for the representation of our First Nations People, Culturally and Linguistically Diverse people and people with disabilities. Things change when people who know what it is to be affected have a strong voice at all levels, lead others and can effect change.

For women we have come a long way – but the gains are fragile and we have a long way to travel yet.



⁹⁷ *Fair Work Act 2009 (Cth)*, s 302.

⁹⁸ *Australian Municipal, Administrative, Clerical and Services Union and Others Equal Remuneration Case* [2012] FWAFB 5184.

⁹⁹ *Australian Government, Social and Community Services Pay Equity Special Account Act No.150 2012 (Cth)*.

THE ENVIRONMENT, TRADE UNIONS AND DEMOCRACY

Tony Maher

I'll start off with two trite observations on the environment, trade unions and democracy.

The first is the observation by Winston Churchill back in 1947 that 'democracy is the worst form of government except for all those other forms that have been tried from time to time'.

Democracy is a painful process, as the recent federal election has again reminded us, but there is nothing else that proves that all people are equal citizens entitled to determine their own future. They might make determinations that are wrong, but we accept the will of the people. The only caveat to that is that the majority will of the people must respect the rights of individuals and minorities.

The second observation is the slogan popularised by my good friend Sharan Burrow, former ACTU President and now leader of the global union movement - the International Trade Union Confederation: 'No Jobs on a Dead Planet'. So I'm starting off from what is too often the conclusion - that in the long term there is no trade off between jobs and the environment. How could one disagree?

But no jobs on a dead planet leaves unresolved the issue of whether the jobs on a living planet will be decent jobs. I'll be touching on that today.

I'll also be talking about the difficult issue of climate, Just Transition and the export coal industry - and why the campaigners targeting the export coal industry have succeeded only in perpetuating the climate wars that have forced Australia into more than a decade of inadequate action on climate change in this country.

My union - the CFMMEU - is trying to progress a model of Just Transition for the domestic coal power sector which is clearly in decline. But right now rhetoric without substance around Just Transition is being applied to every industry with an emissions problem and that strategy is threatening to debase the term and render it meaningless.

First, let's have an examination of democratic processes. I get called a 'union boss' which implies I am someone imposed from above on hapless union members. Like a company CEO! But one never hears of NGO bosses or green group bosses!

Unions vary in their electoral systems, but at their heart all unions conduct elections and every member gets a vote.

My part of the CFMMEU - the Mining and Energy Division - has its President and Secretary directly elected by the membership. The Central Council of the Division consists of national officials, plus the President and several working miners and power workers elected from each District. We have always had working miners on our top decision-making body.

And down at the site level we also have strong democratic structures - we have site ('Lodge') Presidents, Secretaries and so on who are elected by the membership on that site. This means that at all levels - site, district and national - people are directly elected and directly accountable to the membership.

For a policy to be binding on members it must be voted on by members in a national plebiscite.

It's a strong system. We have strong voter turnouts, everyone knows that they can have a say, and the people they elect know that they have a constituency that will hold them to account.

Compare it to the corporate world, where shareholders get to vote on who is on the Board, but they don't get to vote on who is the Chief Executive or the Chairman, the two most important positions. The composition of the Board and the top positions is largely determined by existing management. Managements sometimes do get turfed out, but it is only the largest shareholders that get to do it. The small shareholders are only ever along for the ride - they get no effective say.

That unions have elected leaderships means that those leaders have considerable credibility and authority with the membership. It also means they are difficult to remove, except by the membership.

But when it comes to environment issues, how strong are the democratic processes? Who determines the priorities; who sets the agenda? Who determines the leadership, and to whom are the leaders accountable?

There are some major green groups that have substantial memberships and elections, but there are plenty that don't.

I'll pick two examples - one more radical, one more moderate. Because this critique isn't about the policies, it's about whether there are democratic policies or rules underlying the decision-making. It's about whether democratic processes are part of the fundamental values of the organisation and the policies they adopt.

Let's start off with Greenpeace Australia. Or Greenpeace Australia Pacific Limited, a company limited by guarantee, as its constitution informs us.

It turns out that you are not a member of Greenpeace unless you have been nominated and seconded by current members of the General Assembly, that the Board of the company has absolute discretion to reject any membership application, and after that the application must be voted on by the General Assembly. And the size of the General Assembly is determined by the Board.

This highly restrictive process means that there are in fact very few members. The last time I heard it was only a hundred or so. It might be bigger now, but it is certainly *not* those tens of thousands of people who are encouraged to join the Greenpeace Network, get involved and frequently make regular donations. Those people will never be notified of the Annual meeting and they will never receive a ballot paper.

They may get asked for feedback from time to time, but they will never decide the leadership or direction of the organisation.

Can you imagine if we tried to govern a trade union like that? Even listed companies don't get to choose who their shareholders are.

Let's take another major green group – say one that believes in working more with business – let's look at World Wildlife Fund Australia ('WWF').

WWF has many tens of thousands of supporters and donors. But its Constitution reveals that its members are known as Governors and that the maximum number of Governors is limited to 100. Governors must be nominated and seconded by existing Governors and know them personally, and the application will be accepted or rejected by the Board of Directors.

Now I repeat that I am not here criticising the work of these organisations. They both do good and important work. But I am pointing out that they are not representative organisations that are accountable to a broad membership of any kind.

If this democratic deficit is applicable among some of the largest and most well-known green groups, you can imagine how it is for many smaller ones. When it comes to smaller NGOs it is my impression that they are dominated by committed activists who basically run the show and are accountable only to themselves.

This might make for ruthless efficiency and clarity in campaigning, but it isn't improving democracy in this country. The formal structure is more like a Leninist cell – a tight group of trained and like-minded activists operating covertly to a highly-defined agenda.

This is a partial explanation of why unions and NGOs – particularly green NGOs – sometimes view each other as coming from different planets. Union leaders have a membership to whom they are accountable and whose interests they must represent; we wonder who green groups actually represent. From the green side, they are pursuing a cause and that is the moral basis to their standing; they may lay claim to representing community views but often they have no formal representative mechanism that proves that.

This brings me to the main part of my presentation. It's about the interaction of an environmental campaign with democratic processes and also with social justice and decent work.

It's about the anti-coal campaign, and in particular its focus on the export coal industry.

It's a heady brew! And I'm not even going to name the mine which is on everybody's lips, because in my view it was never about that mine; that was just a convenient lens through which some chose to project the campaign.

The CFMMEU has now been campaigning for Just Transition for the domestic coal power industry for about four years. That industry is clearly in decline, so it's not a matter of discussing with our members how they need to lose their jobs because of climate policy. The context is that the major power station owners – public and private – have said they will close and not rebuild those power stations.

In fact most or all coal power stations in Australia will close in the next 20 years. That's the view of just about every investor, lender and power plant operator in the country.

We are responding to clear trends in the economics and technology of power generation. As unions we are not in the business of saying to members that they should lose their jobs for environmental reasons. What we *do* do is negotiate and campaign for the best outcome for our members who are being adversely affected.

So... we've been pushing for Just Transition for coal power workers. And it's not easy because Australia has *no* track record in this area. Our track record in structural adjustment is that affected workers and communities take the biggest hit. Look at the forestry industry, look at the textile, clothing and footwear industry, look at the car industry. It's always the workers that take the biggest hit in terms of lost jobs and crappy new jobs if they get anything at all.

The Hazelwood power station closed in the Latrobe Valley in March 2017. I personally moved heaven and earth to get a pooled redundancy and redeployment program in place among the remaining power station operators in the region. The idea was to keep the younger Hazelwood workers employed in the region, and enable older workers across all the power stations to access early retirement.

But that scheme has failed to deliver. Less than 90 workers out of a target of 150 were redeployed. And that was out of 750 terminations. The Latrobe Valley Authority says that 80 per cent of those made redundant have found some kind of work at some time. But only a minority have found permanent work at a similar skill level.

The Andrews Labor Government in Victoria is working hard to invest in that region and diversify it so it has a brighter future. They're spending hundreds of millions to do so. But that retrenched workforce has not seen anything like Just Transition.

We pushed the federal Australian Labour Party ('ALP') to adopt a statutory authority for Just Transition and they eventually did so in November last year. The election result means we have no progress there. The Liberal National Party ('LNP') government might carry on about coal, but they have shown not a skerrick of interest in a Just Transition program for coal power workers, let alone any much larger group in any other industry.

So... despite the lack of progress on Just Transition in coal power, and despite the lack of any history of successful Just Transition in this country, everyone campaigning on climate issues has taken the concept, tacked it on to their program along with some new job creation in renewables and declared the social justice component taken care of.

Well, it hasn't been, and the federal election result showed that in pretty spectacular fashion.

Some reckoned it was going to be 'the climate election' but it wasn't. In a few seats close to the CBDs of Sydney, Melbourne and maybe Brisbane it was a significant issue, but some of the analysis we have already seen is that the climate vote dwindled as one moved further away from the CBD in the major cities.

And in coal mining areas in Central Queensland and in the Hunter Valley in NSW, the voting swung to the right – hard to the right. Big votes for One Nation and Clive Palmer's group – and the vote didn't come back to the ALP after that but went to the LNP.

The failure to win any of those seats in central Queensland wasn't the only reason the ALP failed to win government. But it was a major contributor.

These voters were connected to the export coal industry – which is much, much larger than the domestic coal power sector.

Export earnings of \$60 billion in recent years – Australia's second largest earner after iron ore. Over 50,000 jobs and quarter of a million people dependent on it. Much larger than domestic coal power with perhaps 8,000 jobs in the power stations and associated coal mines.

Most green groups thought they could target the export coal sector and that the concerns of those communities would be covered by some Just Transition and renewable energy jobs.

Exactly why the export coal sector would be targeted when Australia has had so little consensus and success on its own domestic emissions trajectory has always surprised me. Why are so many Australians campaigning to reduce emissions in Japan, China and India when we are doing such a poor job in our own backyard in Australia? It's the jobs of those countries to reduce their emissions, not ours. And the idea that any of those countries would pay serious attention to a campaign seeking to deny them coal rather than just buying it elsewhere is also a fantasy.

Those countries will be making their own decisions on their own emissions and it is their duty and responsibility to do so. And we should be ready to deal with the consequences of that, which will sooner or later affect thermal coal exports. But it hasn't yet and it is simply impossible to tell workers in an export industry that is growing and making loads of profits that they should vote for anyone – in a political party – saying their jobs are finished.

The Bob Brown convoy to central Queensland, that ultimate vanity project of inner-city progressives lecturing regional people on what's good for them, was not what lost the votes of those significant communities in coal mining areas. It was just the final nail in the coffin – the polling we were seeing was already terrible by then.

Did those voters fall for a scare campaign and for lies? Somewhat. Did they believe the LNP that somehow one new mine or one new power station was going to change the course of their industry? Maybe a little.

But there was also rationality to their decision. They were being told that the large industry that employs them and pays them over \$100,000 a year – and often over \$140,000 if they are on a good union collective agreement – needed to be phased out.

They were being promised Just Transition as compensation. But there was no evidence that we have ever had Just Transition in Australia, nor that we ever will. Most of these workers have been restructured in the past – they know that workers cop it in the neck.

They were being promised jobs in renewables. But these workers know that the skill sets are largely different, that there aren't many jobs in renewables operations anyway, and that even in jobs-intensive renewables construction there have been a lot of dodgy practices.

You notice that those boasting about the jobs potential in renewables never mention the wage levels. One coal mining job does not equal one renewables job. The renewables jobs are worse paid, and often temporary or casual and insecure. We see plenty of backpackers being exploited in renewables construction projects!

When you drill down about what Just Transition means for some climate campaigners, it turns out it doesn't mean much more than some retraining and job search assistance.

For this union, it means that affected workers should not face a greater burden than the rest of the community. The pain and the benefits should be shared equally. That means if a worker is facing losing a decent job with good pay, they should be getting a new job that is a decent job with good pay. Guaranteed. If their pension or superannuation is being affected, it should be topped up so they don't lose out. Guaranteed.

This may seem improbable in Australia, but it is only a matter of priorities. In Germany, they phased out their uneconomic black coal industry from 90,000 jobs to near zero with not a single forced redundancy. In the same country, they reached a consensus deal earlier this year to phase out brown coal and all coal power – but again with a guarantee of no forced redundancies.

The coal power workers and communities of Germany will be looked after, not junked. The various parties in Germany are prioritising social justice in their climate policy, and they are winning consensus and progress.

But in Australia Just Transition is perceived already as meaningless. We get told that 'no forced redundancies is unaffordable'. But our plan for the coal power workforce would have cost only a few billion over 20 years. And most of that was on industry diversification rather than worker guarantees. While all the estimates of the cost of moving to 100% renewables are hundreds of billions.

A few billion versus hundreds of billions? Where's the unaffordability?

In refusing to guarantee genuine Just Transition in Australia we seem to be saying that workers and their communities are a distant second priority. But the cost of that refusal is the lack of consensus and indeed the polarisation of views on climate and energy policy.

Australian climate and energy policy has now been a wasteland for well over a decade. We aren't going to meet the existing 2030 emissions reduction targets let alone anything stronger. We have a large part of the Liberal and National Parties elevating coal into the realm of the culture wars. At the same time we have a large proportion of green groups targeting export coal, the primary effect of which would be to reduce emissions in other countries, and which as a side effect is alienating significant swathes of voters that need to vote differently if we are ever going to get better climate and energy policy in this country.

I suggest that the underlying principle or value that will get us out of this mess is about respecting working people – their right to a prosperous future and their right not to be restructured into oblivion. Genuine climate action is not a technocratic, technological or market exercise. It is a people exercise, and by that I mean an exercise that brings everyone along rather than casting entire industries and workforces as evil.

Democratic principles and practices are the foundation on which we build respect for the livelihoods and aspirations of ordinary people.

By and large unions embody that. Governments that seek to regulate unions out of existence are undermining fundamental workplace rights that are essential, not only because they are inalienable human rights, but because they are a means by which we achieve the major economic and industry restructuring for a cleaner world in a manner that respects and looks after working people.

When we can get that right, genuine Just Transition will be seen as a necessity, not just a nice add-on to climate, energy and other environmental policy.

Ensuring that a climate transition is successful must involve the most efficient mitigation methods implemented as soon as possible. But as well as making deep cuts to our emissions, a transition also has to ensure that whatever policies are adopted achieve a just outcome, especially for the disadvantaged. Increases in taxes, lifestyle restrictions, or the closing of whole fossil fuel industries need to be managed in a way that does not place unfair burdens on those who are least able to bear them.

The role of unions in this process will be vital. Unions have the potential to significantly advance the likelihood of a just transition (or hold it back) and we need to be clear about what their options are. Yet, the role of unions will not always be straightforward. While their potential for increasing the likelihood of a just transition is great, their choices will involve short-term disadvantage for some of their members and significant readjustments for some unions as a whole. Identifying what positive role they can play as well as what ‘flashpoints’ there are is key to understanding their role. This will be particularly true in Australia where the fossil fuel industry is so significant.

1 A Just Transition

Before beginning, we need to understand why having a just transition – not merely mitigation – is so important. The core idea is that we ought to put justice at the heart of Australia’s transition planning because the effects of any climate transition on well-being will be significant and widespread. Given the problem’s urgency, debate concerning transition strategies and steps is likely to occupy the nation’s public policy agenda. Yet, whatever these measures – from ending fossil fuel subsidies to upgrading public transportation networks – it is clear that large costs and benefits will result. No matter what technologies we choose or policy mechanisms we adopt to achieve a climate transition, each will produce benefits and burdens, which will have to be paid for and shared amongst individuals or groups within society. Sharing benefits and burdens within (and between) societies is a question of distributive justice. In this sense, justice is inescapable.

Such considerations are, of course, not unique to climate transitions. Various industries and professions regularly face closures, mass redundancies and disruption due to international relocation, frequently with devastating effects to the economic, material and psychological well-being of large numbers of people. Given the degree of transformation required for a robust climate transition, impacts are likely to be more widespread than those of, say, the ceasing of logging activities in old growth forests. Because of changes to people’s lifestyles as well as costly new infrastructure, a climate transition will potentially involve a more profound and

broader societal adjustment. But it also offers a more profound opportunity as well: shifting high carbon societies to low (or zero) emitting ones which are *more equal* is an optimal outcome overall. While I can’t defend the claim here, the goal of a just transition ought also to be making society a more equal place. Through better transport, cleaner energy or changing the ownership structure of resources, a *just* climate transition should also make society better off as well as avoiding the worst of climate change.

These considerations bolster the need to focus on ensuring that the transition does pay attention to issues of distributive justice.

A more instrumental reason for focussing on a just transition is that without it we risk alienating people who might feel they are taking on too many of the costs or not getting enough of the benefits. It is at least possible that perceptions of unfairness could lead to a backlash and Australia’s own Trump/Brexit type reaction to a transition. Workers who feel they are not getting a fair deal might not support a transition and make a transition less likely to succeed.

All of these motivations for a just transition ought to mean that considerations of justice must be the focal point of a transition strategy, not a cursory ‘co-benefit’ or as a mere afterthought.

Incorporating robust principles of justice into a climate transition has the potential to make people substantially better off by not only allowing us to avoid the worst of climate change, but offering the possibility of social transformation.

While acknowledging that reducing inequality is not all that ought to matter when assessing the justice of a transition, it is important to note that these inequalities are important because minimising them leads to an overall increase in important freedoms. For example, through greater investment in public transport and neighbourhoods, people could have their freedom increased *overall* because those changes would allow them to choose different jobs, neighbourhoods or ways to spend their time. Here we need to note two other important justice-related goals. Reducing the above inequalities could also add to the *control* that people have in respect of key goods such as energy generation. Providing the opportunity for distributed energy (such as rooftop solar), for instance, might entail additional value as it allows control over individual energy needs, including governments or companies.

One might worry that bringing some of these broader justice-based goals into our climate transition decision-making framework will over-complicate an already difficult task. Further, trying to accommodate into the planning process an array of complex disagreements over which justice-based

goals a society ought to pursue, may even hamper progress. For example, requiring that a climate transition address health or education goals might invite the critique that such a goal is excessively ambitious, too controversial and not pragmatically feasible. This is an important point.

But, as philosopher Simon Caney points out, much will depend on what kind of values or goals are at stake. What he calls a ‘maximal’ approach to justice will have very specific and perhaps controversial commitments; for example, it might entail a radical political program.¹⁰⁰ No doubt some maximal ideas of distributive justice are like this and would drastically complicate the climate transition process. In contrast, we can find elements of distributive justice that are more minimal and less controversial, where disagreement would not be so great.

There is a further response to the objection that picking a more substantive set of goals will just invite controversy and stymie mitigation efforts. This is that it may in fact be the case that *not* considering justice-based goals as fundamental will make things worse. Failure to address people’s concerns about who gets the benefits and who bears the costs of a wide-ranging and expensive climate transition seems likely to make such a transition unworkable.

The transformation of the stationary energy sector is a case in point. As some Australian states transition to a greater reliance on renewable energy, debate concerning the impacts on power prices (particularly for low-socioeconomic status households) has intensified. Also controversial are questions of whether energy companies are profiting excessively and whether a switch to renewables will allow reliable and secure electricity supply. Add in the issue of whether there should be more ‘distributed’ energy (in part allowing for greater independence), and we have a complex set of justice-related goals that are (rightly) being considered as part of the switch to renewables. Failure to take these kinds of considerations into account will plausibly make the acceptance of an ambitious climate transition, and thus the associated potential benefits, less likely.

A further point we need to consider in relation to a just transition concerns its scope. There are two related points here. The first is that a climate transition ought to at least focus on removing the risks of harm to others. One way in which we do that is by cutting our domestic emissions. But the other way in which we do that is by phasing out our exports of fossil fuels. Australia is not only a heavy domestic emissions producer, we also export a huge quantity of coal and gas, contributing significantly to global emissions. The amount of emissions produced from Australia’s exports of fossil fuels is double our domestic emissions. Arguably, we are partly causally responsible for those further emissions, though they do not currently count in our domestic emissions budget.

Given that our emissions have contributed to harming others, should we direct some of our efforts and resources toward the climate transitions of other countries? Or should we focus on making our own reductions as significant as possible? If Australia were to further reduce its domestic emissions this would lessen the burden on other countries to cut their emissions. This might allow other countries to make a smoother climate transition. But a more important reason to think that Australia ought to focus on assisting other countries to transition pertains to the distribution of benefits. Transitioning in Australia will reduce our emissions, but it will also deliver benefits – cleaner environment and so on – to Australia and not to those countries who have been harmed.

2 The Role of Unions

In the most general terms, unions have two major roles in ensuring a just transition. The first and most obvious is as direct advocates for those affected, particularly those whose jobs will be lost. By working to give those affected a voice, meaningful options and so on, unions can try to ensure affected workers are treated fairly. Unions typically perform these vital functions for any sector facing disruption and climate disruption is no different. Indeed, much of the discussion from unions themselves focuses on these kinds of direct outcomes for affected workers. Unions typically demand that those who lose their jobs, coal workers for instance, have access to new jobs which are as well paid or have generous severance packages.

But I’d like to note two more general functions that unions can – and should – play. The first is to advocate for all workers – not just those whose industries must close, such as coal mining. What happens to directly affected workers is a significant element of a just transition, but still only a part; there more than are *twelve million* employed people, of which coal workers make up around 45,000. Given many of these other jobs will also be affected by climate change and a transition, the role of unions should extend to include advocating for all those affected, whether directly or indirectly.

The second point to note about the scope of unions’ role is the potential to act as ‘norm changers’. In addition to advocating for those directly affected, unions have the potential to have a positive impact on the public debate concerning climate change. Those who oppose significant action on climate change often do so on grounds of being too costly or likely to risk energy or economic security. Because of the links that unions have with their members they can act as a counterweight to these kinds of arguments. But, more importantly, unions ought to be able to assist in promoting a progressive agenda on climate change, that, for instance, includes a discussion of the benefits and opportunities for social change offered by climate action.

The ‘maximal’ view mentioned above – highlighting the possibilities offered by a climate transition to make society a more equal place and so on – is the kind of view that ought to be championed by unions. Unions’ valuable role derives from being able to articulate the benefits that could flow from a transition, which, as we have seen, is important if we are to avoid a backlash against climate transition.

100 Simon Caney, ‘Just emissions’ (2013) 40(4) *Philosophy and Public Affairs* 255.

3 Flashpoints

Unions advocating for the benefits of a transition has the potential to have a positive effect on how a transition is perceived and hence its likelihood of success. However, such advocacy may conflict with the perceived short-term interests of some unions. Unions representing coal or gas workers may stand in opposition to, or seek to delay action on, for instance, phasing out coal mines or hinder efforts by resisting opposition to the development of new mines. The possibility of new coal mines for export – or even new gas development – represents a threat to the interests of workers not just in Australia but everywhere, given the huge volume of emissions Australia exports produce.

A further potential flashpoint could arise for how affected workers are compensated. Unions such as the CFMMEU who represent workers in coal mines might seek to negotiate severance or assistance packages for those affected. While this has to be one of the key roles that unions play, it is important to note certain limits. For instance, coal companies might sell their assets to fund assistance packages. Yet, if the interests of all workers are to be protected this source of funding cannot be used. For example, in 2017 Rio Tinto sold its Coal & Allied Industries Limited to Yancoal, and in 2018 completed the sale of its final Australian coal assets, with the divestment raising a total of \$5.39 billion.¹⁰¹

On the face of it, this seems like to the right thing to do as Rio is no longer, as far as coal goes, contributing to the risk of climate harms. Yet if a fossil fuel company sells its fossil fuel assets to another company who will continue to exploit those assets, the risk of climate change is not diminished for the simple reason that the contribution will simply continue via another company.

Retiring assets in a safe and sustainable way on the other hand, does not contribute substantially to climate harms. For this reason, unions ought to advocate for fossil fuel companies to retire their assets in a safe and sustainable way and not sell them and seek compensation from other sources.

I have argued that justice considerations ought to play a central role in shaping a climate transition. Justice goals not only determine how quickly we ought to transition, they can also be used to guide how the benefits and burdens of a climate transition should be distributed. The role of unions in this process as advocates and norm changers is significant. Yet if we are to achieve a transition that is just for all workers, then unions ought to focus on broader justice goals and not simply the interests of some sectors.



¹⁰¹ Stephanie Chalmers, 'Rio Tinto completes its exit from coal with sale of Queensland mine' *ABC News* (online, 28 March 2018) <<https://www.abc.net.au/news/2018-03-28/rio-tinto-sells-last-coal-mine-kestrel/9597352>>.

‘IS THERE AN APP FOR THAT?’ UNIONS AND THE GIG ECONOMY

Anthony Forsyth

One of the greatest challenges for trade unions around the world is the gig economy. It raises important questions about the nature of freedom of association – a foundational concept of the International Labour Organisation – in the modern era.

In Australia, the gig economy involves a business model that has shamelessly inverted our traditional assumptions about employment regulation. Workers for these platforms are designated as independent contractors, unless they prove otherwise through legal challenges.¹⁰²

‘Flexibility’ is held up as the holy grail,¹⁰³ to explain gig workers being prepared to sacrifice minimum wages, unfair dismissal rights and other employment protections associated with employee status.

For example, Deliveroo maintains: ‘that the basis of its engagement with self-employed riders is inconsistent with employment, whether full-time, part-time or casual. None of these employment relationships provide the flexibility inherent to the way in which self-employed riders work with Deliveroo.’¹⁰⁴

The contracting model has been adopted not only to absolve platforms from responsibility for minimum labour standards,¹⁰⁵ but also to keep unions at bay. Most gig operators flatly refuse to engage with unions. Instead they offer insipid forms of worker voice, which they control.

For example, Uber Australia says it provides information and feedback channels for ‘driver and delivery-partners’ through newsletters, podcasts, roundtables and focus groups. In the United Kingdom, it has piloted ‘Uber Engage’: a network of local advisory groups with driver representatives.¹⁰⁶

In the USA, the representation of Uber drivers has become a highly contentious issue. At first glance, something looking more like a union – the Independent Drivers Guild (‘IDG’) – was set up by the International Association of Machinists and Aerospace Workers in New York City in 2016.

The IDG has done some important work, including helping to obtain minimum wage increases for drivers from New York’s

Taxi & Limousine Commission,¹⁰⁷ and advocating on issues of concern to drivers such as safety, mental health and opposition to the city’s traffic congestion tax.¹⁰⁸

However, the Guild is partly funded by Uber. As Dubal has observed: ‘... Uber pays an undisclosed sum to the Machinists [Union] – which uses the money to fund the ... IDG. The IDG has not been elected by workers ... After [its] formation, the worker association agreed (for a period of five years) not to contest the status of drivers and not to go on strike.’¹⁰⁹

Clearly, this raises significant concerns about the autonomy and independence of the IDG. It has faced criticism, in particular, for giving up on contesting driver categorisation as contractors, and for combating more strongly competitors of Uber like Lyft.¹¹⁰

There is, of course, a long history in employment relations of ‘company unions’ – bodies that cannot effectively represent workers because they are compliant and beholden to management.¹¹¹

Both Uber and Lyft are masters of this approach, as can be seen in the worker representation debate that has been taking place in California in 2019.

The CEOs of Uber and Lyft wrote a joint opinion article in the *San Francisco Chronicle* on 12 June 2019, calling for the updating of ‘century-old employment laws’ so that ‘[w]e can make independent work better’. They indicated that the platforms would offer drivers more benefits if their independent contractor status is preserved, and:

We can also give workers more of a say in the decisions affecting their lives and livelihoods... We can start by forming a new driver association, in partnership with state lawmakers and labor groups, to represent drivers’ interests and administer the sorts of benefits that meet their highly individual needs.¹¹²

102 See eg ‘Deliveroo worker pursuing sham contract case’, (19 July 2019) *Workplace Express*.

103 See eg Uber, Submission to the Department of Premier and Cabinet, *Inquiry into the Victorian On-Demand Workforce* (2019), 5, 7-12.

104 Deliveroo, Submission to the Department of Premier and Cabinet, *Inquiry into the Victorian On-Demand Workforce* (February 2019), 1. Compare, however, Alex Veen, Tom Barratt and Caleb Goods, ‘Platform-Capital’s “App-etite” for Control: A Labour Process Analysis of Food-Delivery Work in Australia’, forthcoming in *Work, Employment and Society*.

105 Possibly the worst example in the Australian context has been Foodora, which ceased operations here in August 2018 leaving around 5000 riders with \$8 million in unpaid entitlements including wages and superannuation, as well as over \$2 million owing to the Australian Taxation Office: see David Chau, ‘Foodora owes \$8 million to former delivery workers, who will only receive 29 cents in the dollar’, *ABC News* (10 May 2019); ‘Failed food delivery platform coughs up \$2.3m for former riders’, *Workplace Express* (10 May 2019). See also Alison Griswold, ‘Food-delivery giant Deliveroo is pulling out of Germany’, *Quartz* (12 August 2019).

106 Uber, above n 103, 11-12.

107 Shirin Ghaffary, ‘New York City has set the nation’s first minimum pay rate for Uber and Lyft drivers’, *Vox* (4 December 2018).

108 ‘Current Campaigns’, *Independent Drivers Guild* (Web Page, 2019) <<https://drivingguild.org/current-campaigns/>>; ‘News’ *Independent Drivers Guild* (Web Page, 2019) <<https://drivingguild.org/news/>>.

109 Veena Dubal, ‘Gig Worker Organizing for Solidarity Unions’, *Law and Political Economy Blog* (Blog Post, 19 June 2019). See also Steve Greenhouse, *Beaten Down, Worked Up: The Past, Present, and Future of American Labor* (Alfred A Knopf, New York, 2019), 229-231.

110 Noam Schreiber, ‘Uber has a union of sorts, but faces doubts on its autonomy’, *The New York Times* (12 May 2017).

111 See eg John Pencavel, ‘Company Unions, Wages and Work Hours’ (2003) 12 *Advances in Industrial and Labor Relations* 7.

112 Dara Khosrowshahi, Logan Green and John Zimmer, ‘Open Forum: Uber, Lyft ready to do our part for drivers’, *San Francisco Chronicle* (12 June 2019). See also Shannon Bond, ‘Uber and Lyft set aside rivalry in driver status fight’, *Financial Times* (12 June 2019).

Given what was stated earlier about the opposition of most platforms to collective representation, it may be asked: why are these two rideshare companies now talking about setting up driver collectives?

The answer is that the regulatory door is closing in on them. There is a bill before the California legislature called 'AB5',¹¹³ which would make it easier for platform workers to be categorised as employees.

AB5 would enshrine in statute the April 2018 ruling in a case called *Dynamex*,¹¹⁴ where the Supreme Court of California found that on-demand couriers were employees covered by that state's minimum wage orders. In place of previous judicial approaches to distinguishing between employees and contractors under Californian Law, the Court articulated a new 'ABC test' which deems a worker to be an employee unless:

- the worker is free from the control and direction of the hiring entity, both under the contract via which work is performed and in the practical operation of the working relationship;
- the worker performs work outside the scope of the hiring entity's usual business operations; and
- the worker is normally engaged in an independent trade, occupation or business of the same kind as the work being performed.¹¹⁵

AB5 therefore poses a significant threat to the operating model of Uber, Lyft and many other platforms operating in California. As a result, they have engaged in furious lobbying to prevent AB5 becoming law.¹¹⁶ The rideshare companies have been especially vocal and active, using many of the tactics pioneered over a long period by the union-busting industry in the US.¹¹⁷

For example, drivers have been marshalled to protest against this legislative threat to the 'flexibility' they are said to treasure. Some drivers were offered up to \$100 to cover their costs of attending an anti-AB5 rally in Sacramento. The "I'm Independent Coalition", funded by the California Chamber of Commerce, covered these costs.¹¹⁸

The rideshare companies also asked drivers to sign a petition against AB5. There is evidence to suggest that some drivers were confused when this appeared as an 'in-app message', thinking they had to accept it in order to keep using the app and therefore continue to perform driving work. Drivers with limited English language skills also claimed they feared retaliation from Uber and Lyft if they spoke in favour of AB5, and were worried the companies were keeping track of who had signed the petition.¹¹⁹

Divisions have arisen within mainstream unions. The *New York Times* reported in late June that Californian officials of the Service Employees International Union ('SEIU') had met with Uber and Lyft about establishing a drivers' organisation, again premised on retaining contractor status. National SEIU leaders rejected that approach because 'the union supported full employee status [for rideshare drivers], including the California bill that would enshrine it'.¹²⁰

Creating 'deep rancor within the labor ranks and set[ting] unions against one another'¹²¹ looks like a classic 'divide and conquer' strategy. With 100,000 ride-share drivers in California, the platforms are investing heavily in preventing the passage of AB5.¹²² Creating a captive worker association is a key part of the plan.

While some aspects of the way the gig economy operates present an uncomfortable fit with trade unionism as we have traditionally understood it, examples from around the world show that there is a demand from many platform workers for collective representation.¹²³

We can see this in the efforts being made by established unions to organise and represent the interests of these workers, including the Independent Workers Union of Great Britain;¹²⁴ Unions New South Wales;¹²⁵ and the Transport Workers Union of Australia and Victorian Trades Hall Council (Young Workers Centre and Gig Workers Victoria).¹²⁶

Where unions have not been as proactive, there are examples internationally of workers organising spontaneously to fill the gap – such as the online forum, Ride Share Drivers United, which has helped organised several global rideshare driver protests and 'strikes';¹²⁷ and the various food delivery rider collectives (like Deliveroo Strike Raiders) that have emerged in Italy.¹²⁸ The latter have evolved from workers simply gathering in central meeting places in northern Italian cities to discuss their gripes. They now have a seat at the table in local and national policy debates about gig work regulation.¹²⁹

113 'AB-5 Worker Status: Employees and Independent Contractors', *California Legislative Information* (Web Page, 19 September 2019) <https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB5>. See also Lorena Gonzalez, 'Commentary: Why workers need state protections', *The San Diego Union-Tribune* (21 August 2019).

114 *Dynamex Operations West, Inc v Superior Court of Los Angeles* (Supreme Court of California, Docket No S222732, 30 April 2018) <<https://scocal.stanford.edu/opinion/dynamex-operations-west-inc-v-superior-court-34584>>.

115 Timothy Kim, 'The Dynamex Decision: The California Supreme Court Restricts Use of Independent Contractors', *Labour & Employment Law Blog* (Blog Post, 1 May 2018) <<https://www.laboremploymentlawblog.com/2018/05/articles/class-actions/dynamex-decision-independent-contractors/>>. On the approach to worker categorisation under Australian common law, see Andrew Stewart and Shae McCrystal, 'Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?' (2019) 32(1) *Australian Journal of Labour Law* 4, 6-8.

116 Carolyn Said and Dustin Gardner, 'Gig-work bill passes Senate committee as crowds rally for and against it', *San Francisco Chronicle* (10 July 2019).

117 John Logan, 'The Union Avoidance Industry in the United States' (2006) 44(4) *British Journal of Industrial Relations* 651.

118 Johana Bhuiyan, 'Uber and Lyft drivers were paid up to \$100 to demonstrate against bill', *The San Diego Union-Tribune* (15 July 2019).

119 Shirin Ghaffary, 'Some Uber and Lyft driver say they were misled into petitioning against their own worker rights', *Vox* (27 June 2019).

120 Noam Schreiber, 'Debate Over Uber and Lyft Drivers' Rights in California Has Split Labor', *The New York Times* (29 June 2019).

121 *Ibid.*

122 *Ibid.*

123 See generally Kurt Vandaele, 'Will trade unions survive in the platform economy? Emerging patterns of platform workers' collective voice and representation in Europe' (Working Paper 2018.05, *European Trade Union Institute*, 2018); Jeremias Prassl, *Collective Voice in the Platform Economy: Challenges, Opportunities, Solutions* (Report to the European Trade Union Confederation, September 2018).

124 Joe Atkinson and Hitesh Dhorajiwala, 'IWGB v RooFoods: Status, Rights and Substitution' (2019) 48(2) *Industrial Law Journal* 278.

125 Kate Minter, 'Negotiating Labour Standards in the Gig Economy: Airtasker and Unions New South Wales' (2017) 28(3) *Economic and Labour Relations Review* 438.

126 Sarah Bright and Amy Fitzgerald, 'Snapshot: On-Demand Food Delivery Riders' *On Demand Workers Australia* (Web Page, 2018) <https://d3n8a8prof7vnm.cloudfront.net/victorianunions/pages/1411/attachments/original/1517351126/ODFDR_Snapshot.pdf?1517351126>.

127 'Uber drivers signal further strikes after Melbourne 'log-off'', *Workplace Express* (12 April 2017); Australian Associated Press, 'Uber drivers log off in Australia-wide protest against low fares', *The Guardian* (6 August 2018); Simon Thomsen, 'Uber drivers are holding another nationwide strike in Australia today', *Business Insider* (22 August 2018); Patrick Hatch, 'Uber drivers feel "pay cut" pinch as rivals grow', *The Age* (30 July 2018).

128 Arianna Tassinari and Vincenzo Maccarone, 'Striking the Startups', *Jacobin* (January 2017); Lorenzo Zamponi, 'Bargaining with the Algorithm', *Jacobin* (June 2018).

129 *Ibid.*; Arianna Tassinari and Vincenzo Maccarone, 'The mobilisation of gig economy couriers in Italy: Some lessons for the trade union movement' (2017) 23(3) *Transfer* 353; James Politi, 'Di Maio takes aim at Italy's gig economy', *Financial Times* (19 June 2018).

In Australia, debate about the regulation of platforms has not been quite as colourful as it has been in California recently.

The case law has not been especially helpful. On three occasions, the Fair Work Commission has decided that Uber drivers are independent contractors rather than employees, and therefore could not pursue unfair dismissal claims after being cut off Uber's app.¹³⁰ The Fair Work Ombudsman also concluded that Uber drivers are contractors after a two-year investigation.¹³¹

Unions have not been as active in contesting the gig economy's contractor model through litigation,¹³² as they have in pushing for legal reforms to counter the misclassification of these workers. However, given the Coalition Government's unexpected re-election in May 2019, there is no prospect of legislative change at the federal level.¹³³ Something may emerge from a Victorian Government Inquiry into the In-Demand Economy, due to report by late 2019.¹³⁴

Other test cases, for example in the food delivery sector, may result in different outcomes to those in the Uber cases. Even if the contractor categorisation holds, though, Australian unions have a vital role to play in organising and representing the interests of gig workers. There are several legal mechanisms they could utilise in those efforts, such as:

- running unfair contract cases under the *Independent Contractors Act 2006*, an under-utilised statute that has provisions allowing applications to be made to federal courts for review of harsh or unfair contracts;¹³⁵
- engaging in collective bargaining with platform operators over rates, rest periods, safety standards, managerial control through algorithms and the like – although the competition law risks would have to be resolved;¹³⁶
- assisting drivers in the gig economy to access their rights to information about applicable rates and costs, and dispute resolution processes through the Victorian Small Business Commission, under a proposed expansion of that state's owner-drivers legislation.¹³⁷

Whatever form it takes, the collective voice of platform workers must meet the essential preconditions for genuine freedom of association – it must be strong, independent from management, and grounded in legal rights and protections.



130 *Kaseris v Rasier Pacific V.O.F.* [2017] FWC 6610; *Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579; *Suliman v Rasier Pacific Pty Ltd* [2019] FWC 4807.

131 Fair Work Ombudsman, 'Uber Australia investigation finalised', *Media Release* (7 June 2019).

132 However for one successful example, see *Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836.

133 For discussion of possible policy options, see Stewart and McCrystal, above n 115.

134 See 'Inquiry into the Victorian On-Demand Workforce', *Department of Premier and Cabinet* (Web Page, 2019) <<https://engage.vic.gov.au/inquiry-on-demand-workforce>>.

135 *Independent Contractors Act 2006*, Part 3; see Andrew Stewart, Anthony Forsyth, Mark Irving, Richard Johnstone and Shae McCrystal, *Creighton and Stewart's Labour Law* (The Federation Press, 6th ed, 2016) 697-699.

136 For example, potential liability for price-fixing or reducing competition in a market under the *Competition and Consumer Act 2010*. A proposed Australian Competition and Consumer Commission (ACCC) class exemption for small businesses would need to have clear application to enable independent contractors to bargain together in the context of platform work (backed up by the ability to engage in boycott activity). See 'Collective Bargaining Class Exemption' ACCC (Web Page, 23 August 2019) <<https://www.accc.gov.au/public-registers/class-exemptions-register/collective-bargaining-class-exemption>>.

137 *Owner Drivers and Forestry Contractors Amendment Bill 2019*.

UNIONS, DEMOCRACY AND GLOBALISATION

Scott Connolly

I begin with an acknowledgement of the traditional owners of the land on which we meet today, the Wurundjeri people and pay my respects to their elders past and present.

What a powerful gathering this is.

Congratulations to each and every one of you, to Melbourne University and to the ILO for putting together such an expansive and impressive agenda.

For an event paying tribute to an organisation formed to achieve the permanent peace of the world based on the foundations of the freedom of working people, democracy, justice and humanity we should expect nothing less.

The fast paced, rapidly changing, global world of Trump and Brexit, corporate entities like Alphabet, companies like Facebook and almost 8 billion souls we inhabit today would have been unimaginable when the ILO was formed 100 years ago.

World War I had just transformed the world order.

Industrial advances progressed through war like never before and were increasingly being converted to commerce.

Air travel was probably thought of like we might think of space travel today – maybe possible, maybe attainable for a few of us.

Shipping and the seas made the globe work in 1919.

Accounts and transactions were recorded in hand written ledgers, not made in nano-seconds and certainly not instantly visible on the smart phone you carry constantly in the pocket or bag.

Despite the enormity of these changes the last century has seen, ensuring workers are at the centre of a world blessed by permanent peace has always been an objective of trade unions the world over.

We have always fought for workers to be at the centre of the global system.

This is certainly the case when we had a say creating the ILO.

Formed at the very beginning of the industrial global world we are leaving behind today the prospect of a global market place with working people at the centre, when being a force for good may well have been an achievable ambition.

Imagining a global market as a force that could alter the lives of almost everyone on the face of the earth for good, with workers being put first and their rights and humanity being advanced, may well have been realistic.

Faced with the war's slaughter of workers from the world over, anything was possible.

While it may still be remotely conceivable that globalisation can be harnessed to improve the lives of working people, the century since 1919 has increasingly seen a form of globalisation emerge which places the needs of business owners and multinational corporations ahead of workers.

Worse still, it has become yet another mechanism for the rights of workers and their democratic freedoms to be undermined across the globe.

It is now more critical than ever that we have a strong, globally coordinated trade union movement to fight for workers' rights and human rights by challenging and confronting the massive corporate interests that are seeking to bend our planet to their absolute advantage at everyone else's expense.

In Australia today, the overwhelming majority of multinational businesses are recording ever-expanding profits.

But the workers who generate those profits have not seen a real increase in their wages in six years.

We are moving through the longest period of record or near-record low wages growth since the end of World War II.

Four in ten workers are in insecure work, meaning they do not know if they will have a job next month or next year.

1.8 million Australians are unemployed or underemployed.

Just yesterday the ABS revised the unemployment rate for last month up to 5.2%.

In real terms this means more than 700,000 Australians are unemployed.

The global system which has created so much for the very rich is not creating wealth for the remaining 99%.

As we have seen productivity growth decouple from wages growth over the last decade it has asked more and more from workers who are receiving less in wages, having conditions eroded and cannot count on the security of their employment.

Globalisation, which promised improvements in the living standards of all people, has delivered an era of wealth we have never seen in the modern age for a handful of people who are powerful enough to turn the entire system towards their interests.

Meanwhile, the quality of life for the remainder of us is beginning to slide backwards for the first time in half a century.

As unions we are constantly in communication with working people, their families and communities and we know that people are pessimistic about the performance of the global economy and its impact on their futures.

They are worried about what continuing on the current path will mean for them and their families.

They see the rules which protect pay and safety and the quality of life of working people being chipped away and they wonder what can be done to reverse that decline.

People are worried that their kids will grow up in a world that has weaker protections for the rights of workers than the one they grew up in.

In these circumstances it is more important than ever to stand together and demand our share of what we create, and push back against businesses which, for the first time in human history, are both bigger than many nation states and are prepared to use their power to shape the globe, and our shared future, to their interests.

Far too often the influence of employers and big business on government is visible only because of its results.

Our own Morrison Government, for example, doesn't hold a press conference with the big construction firms, it just announces the re-introduction of the Australian Building and Construction Commission and Registered Organisations Commission.

Despite a public outcry over wage theft or banking excess, its priority is the Orwellian Ensuring Integrity Bill, a piece of anti-worker legislation so extreme it has no equivalent in the western world and contains powers which would normally be considered to be the signs of an authoritarian regime.

When big global business' wishes are carried out by our governments today, they are given the veneer of unbiased national or global interest by big global media businesses.

Without transparency of the hours of lobbying, largesse, tracking the donations, or approvals the idea is to present these decisions as in our collective best interest the world over.

In reality, we know governments are simply implementing policy which has been designed, or even drafted, by the global elite.

We don't just see this in construction.

When the Morrison Government voted eight times to keep the cuts to penalty rates; or decided to go to an election with company tax cuts as its sole economic policy; or when state governments privatise state assets, our world and the lives lived by workers in it are being shaped by the extraordinary power of big business.

These are policies which benefit the very rich and make life harder for the other 99%.

There can be no legitimate public interest case made for them.

They are examples of a government which is beholden to the business community appeasing its backers.

The most serious examples of this are the most recent.

When unions won a historic victory in the struggle against the abuse of casual contracts with a court case brought against the labour hire company WorkPac, the Morrison Government intervened on behalf of the employer to roll back the victory and protect the company's ability to exploit workers.

Even after public demands for a royal commission into the banking sector had become deafening, the Turnbull government waited for the banking sector itself to request the start of the Commission, and even then rushed the process to ensure minimal damage to the financial interests of some of the Liberal Party's biggest backers.

Yesterday, it was revealed they are now stalling on implementing the very recommendations of the Hayne Royal Commission they had promised to implement just prior to the election.

The conservative government in Australia, just like similar governments around the world, is being used by business to advance a form of globalisation which is hostile to workers' rights and our democracy itself.

You can see this influence most obviously perhaps in the trade deals which form the backbone of the globalised economy.

These deals, often negotiated in secret with no public oversight, are far too often also being written by multinational companies which stand to gain from the destruction of workers' rights that far too many of them enshrine.

Investor State Dispute Settlement clauses in these trade agreements give companies the right to sue national governments over laws which are not as advantageous as companies would prefer them to be.

Other provisions allow companies to sidestep protections against the exploitation of temporary visa workers.

While it's true that a global market with workers at its core could be a great force for advancing workers' rights, the current system is demonstrating the very opposite.

When employers can use governments to attack workers' rights in one country and then are also free to move to whichever country allows the most exploitation, it opens the door for a race to the bottom on rights for workers around the globe.

Confronting this, what workers need is an international body which can enforce basic standards across the globe and ensure that no country, and no worker, is left behind.

This was the promise of the ILO.

Founded on the principle that only by creating a level playing field for workers' rights around the world would it be possible to create a version of globalisation which benefitted working people.

In the ILO Constitution it states that 'the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations'.

The ILO reflects at the international level what all workers and unionists know to be true.

That if one group of workers has their rights stripped away, it is a barrier for all working people and an obstacle to the improvement of the rights of all working people.

The ILO has consistently put forward an agenda to advance the rights and interests of working people around the world, just as unions in all countries have fought for the rights of workers in individual workplaces and across industry.

The work of unions is always adapting to the new efforts made by business to cut wages, make work more insecure and reduce the costs involved in keeping workers safe.

As business has tried to exploit loopholes in the way casual work and labour hire relationships are defined, unions have worked to create better laws and more protections.

When business won an unprecedented cut to penalty rates for 700,000 people, Australian unions won a string of equally unprecedented increases to the minimum wage.

We are now within striking distance of our long-term goal, re-establishing the living wage – a minimum wage of 60% of median earnings.

We are working towards national industrial manslaughter laws, better paid parental leave, paid family and domestic violence leave, an end to racially discriminatory unemployment programs and better bargaining power for all Australian workers.

But in a world with such interconnected economies, all of this can be undermined if workers internationally do not have access to the same kinds of rights and protections.

Unions must respond to the fact that business can now too easily side step advances which are only made in one country, and we are.

The recent ILO convention on gendered violence represents the latest step by labour organisations to create a global baseline of rights for working people.

Enforcement of these conventions is the next step in creating a version of globalisation which benefits working people and generates wealth and prosperity for all people.

If globalisation is to be a success for working people, it must be successful everywhere.

That requires international cooperation and an international set of rights for working people.

This can only be achieved by the union movement and it means that the efforts of the union movement internationally are more important than ever.

We have the resources and structures in place to ensure that workers reap the benefits of globalisation, and it is our responsibility to make sure that the future of globalisation is one which places the interests of workers at its centre.

Remembering 1919, we must also remember that 1919 was followed by 1929.

And that 1929 was followed by 1939.

Something we can never forget.



TRADE AGREEMENTS, GLOBALISED REGULATION AND DEMOCRACY: DEFENDING BOTH LABOUR RIGHTS AND THE DEMOCRATIC PROCESS

Patricia Ranald

Donald Trump has tapped into resentment of neoliberal trade policies, which have not always delivered on promises of jobs and growth for all. There are always winners and losers from trade deals. But the simplistic responses of high tariffs on imports, trade wars, building walls and discriminatory immigration policies will not restore lost jobs nor improve peoples' lives.

In this paper I want to explore the progressive critique of the impact of neoliberal trade policies, their impact on labour rights and democracy, and the need for progressive alternative trade policies that can ensure that trade will actually improve peoples' lives.

Neoliberal trade theory ignores power relations and historical institutional development. But we can only understand trade institutions and government policies through a critical analysis of their social origins and histories, and the power relationships between the social forces that influence them. These include contests between powerful global corporations and business organisations, and unions and community groups which defend the interests of the less powerful. Transnational corporations pressure governments for trade rules that suit their interests, often at the expense of workers and communities.¹³⁸

In addition to trade agreements of the World Trade Organisation, which has 164 member countries, we now have a noodle bowl of preferential bilateral and regional agreements which include only some countries and are not just about reducing tariffs. They have expanded to include complex forms of regulation in many areas which seek to maximise freedom of trade and investment for global corporations, and which often restrain governments from regulating in the public interest.¹³⁹

I will briefly discuss four aspects of the impacts of these preferential agreements on labour rights, human rights and democracy and conclude with ideas for alternative policies.

The first is the impact on the global race to the bottom on labour rights in the absence of effective government commitments to enforceable labour rights. The second is the influence of transnational corporations like pharmaceutical companies in achieving other types of international trade rules which suit their interests, like stronger medicine monopolies that delay the availability of cheaper medicines. The third is the inclusion in trade agreements of additional legal rights for transnational investors that already have enormous market power, legal rights that enable them to sue governments for millions in unfair international tribunals over changes in domestic legislation, including, health, environmental and labour regulation. Lastly I will discuss the secrecy and lack of democratic process in trade negotiations themselves.

Firstly the impact on labour rights. The extreme neoliberal trade theory that has been especially dominant in the Australian trade establishment argues that a one-size-fits-all reduction of tariffs and non-tariff trade barriers by all countries will increase trade and investment in a globalised competitive market and will eventually raise living standards for all. Each country should specialise in exporting its most narrowly-defined 'competitive' products or services, import everything else at the lowest possible prices, have zero tariffs, no active industry policies and minimal government regulation. This theoretical model has been increasingly criticised by economists dealing with real-world outcomes.¹⁴⁰

This approach promotes global production chains that encourage governments to compete with each other to provide the lowest labour and environmental costs. This often occurs in export processing zones or export industries where the workers have no effective labour rights to join a union or engage in collective bargaining. We all remember the 2013 case of the Rana Plaza Bangladeshi garment factory building, where workers left a dangerous building when cracks appeared, but had no effective rights to refuse when they were ordered back into the building.¹⁴¹ The building then collapsed, killing 1200 people, mostly women and children. Those factories were supplying garments to retail stores in Australia.

More recently we have the allegations of forced labour in Western China contributing to production chains for exports of Chinese clothing to Australia.¹⁴² The China-Australia Free Trade Agreement gives preferential zero tariff access for Chinese imports to Australia but has no obligations on either government about labour rights. If these allegations prove to be true, there is no means for the Australian Government to raise the issue of whether such products should have preferential access, and there is no obligation on the Chinese Government to take action to end forced labour.

Unions have responded to this race to the bottom by advocating that governments entering into trade agreements should make enforceable commitments to abide by ILO conventions on labour rights, including the freedom of association and the right to organise and bargain collectively, safe hours of work and health and safety standards, no child labour, no forced labour and no discrimination in the workplace. They have also supported calls from environmental organisations that governments should make enforceable commitments to international environmental law, including agreements to reduce carbon emissions and combat climate change. Such chapters in trade agreements should be enforced through the same government-to-government dispute process as other chapters, whereby failure to implement commitments can result in trade penalties.¹⁴³

138 Robert Cox 'Global Restructuring', in Richard Stubbs and Geoffrey Underhill (eds) *Political Economy and the Changing Global Order* (Macmillan, London 1994) 45-59.

139 Joseph Stiglitz 'Don't trade away Health,' *New York Times* (online, 30 January 2015) <<https://www.nytimes.com/2015/01/31/opinion/dont-trade-away-our-health.html>>; Patricia Ranald 'The Trans-Pacific Partnership Agreement: reaching behind the border, challenging democracy' (2015) 26(2) *Economic and Labour Relations Review* 241.

140 Joseph Stiglitz and Andrew Charlton, *Fair Trade for All* (Oxford University Press, 2005); Jim Stanford *Economics for Everyone* (Pluto Press, 2nd ed, 2015) 304-11.

141 Jim Yardly, 'Report on Deadly Factory Collapse in Bangladesh Finds Widespread Blame,' *New York Times* (online, 22 May 2013) <<https://www.nytimes.com/2013/05/23/world/asia/report-on-bangladesh-building-collapse-finds-widespread-blame.html>>.

142 Sophie McNeil et al 'Cotton On and Target investigate suppliers after forced labour of Uyghurs exposed in China's Xinjiang' *ABC News* (online, 17 July 2019) <<https://www.abc.net.au/news/2019-07-15/uyghur-forced-labour-xinjiang-china/11298750>>.

143 Australian Council of Trade Unions, 'Fair Trade' (Policy & Issues Document, 2016) <<https://www.actu.org.au/our-work/policy-issues/fair-trade>>.

But WTO agreements and most other trade deals still do not include such enforceable labour rights commitments, despite the promise of them in the original post World War Two proposal for an international trade organisation. Australia's agreements with ASEAN, China, Hong Kong and Indonesia do not include them, nor does the giant Regional Comprehensive Economic Partnership ('RCEP') currently being negotiated between Australia, New Zealand, China, India, Japan, South Korea and the 10 ASEAN countries.¹⁴⁴

There are some examples of labour rights chapters. The Comprehensive and Progressive Trans-Pacific Partnership, also known as the TPP-11, without the US but with four countries in the Americas and six in Asia, which Australia ratified last year, does have labour and environment chapters. However, the International Trade Union Confederation has argued that the range of commitments is limited and they are not legally enforceable in the same way as the other chapters in the agreement.¹⁴⁵ Environment organisations have made similar criticisms of the TPP-11 environment chapter.¹⁴⁶

The EU also includes labour and environment chapters in its agreements, but they are not legally enforceable, with the EU preferring to use persuasion rather than trade penalties. European unions have called for greater legal enforceability.¹⁴⁷

Secondly, in addition to their impact on labour rights, trade agreements have expanded into many other policy areas previously regarded as the domain of more transparent democratic national parliamentary processes. And many of these have negative impacts on workers and the whole community.

The classic example is the amazing achievement of global pharmaceutical companies in influencing the US, European and Japanese governments to use bilateral and regional trade agreements to achieve ever longer patent monopolies on medicines than the 20 years that was achieved in the WTO intellectual property agreement of 1994. This has been documented by public health scholars, as well as the Productivity Commission.¹⁴⁸

These longer monopolies to charge higher prices delay the availability of cheaper medicines for even more than 20 years. Just think about this for a moment. A 2017 study by the US Government Accountability Office showed that these are the most profitable companies in the world.¹⁴⁹ Yet they are persuading governments to believe they do not have enough incentives to invest, and to use free trade agreements to extend monopolies on their products, monopolies which are the opposite of free trade and competition.

Would democratic parliaments knowingly vote in open

domestic debate for increasingly longer delays in the availability of cheaper medicines? I believe not. But they have endorsed trade deals that lock in stronger medicine monopolies in exchange for comparatively small market access increases for agricultural exports to US or other markets when presented with done deals. Trade agreements now also include these trade-offs in many other areas of regulation as diverse as health services, energy services, financial services, e-commerce, food regulation and government purchasing, all done behind closed doors. This removal of policies from national democratic processes can and has provoked resistance not only from the labour movement but a range of other social movements.¹⁵⁰

My third example of the disproportionate influence of global corporations on trade agreements is the use of trade agreements to give additional legal rights to global corporations that already have enormous market power. As explained above, all trade agreements are enforced by government-to-government dispute processes. However since the 1990s, global corporations have succeeded in persuading governments to include in bilateral and regional trade agreements what is called Investor-State Dispute Settlement (ISDS). This gives individual foreign corporations the right to bypass national courts and sue governments for millions in compensation in a non-WTO international investment tribunal if a change in law or policy can be claimed to harm their investment, even if the change is in the public interest.¹⁵¹

Legal experts like our former High Court Chief Justice French and international investment law expert George Kahale argue that ISDS tribunals are not independent, and lack the legal safeguards of national systems. The tribunals consist of investment law experts who can continue to be practising advocates, and there are no precedents or appeals.¹⁵² At the end of 2018 there were 942 known ISDS cases, many against health, environment labour rights and other public interest legislation.¹⁵³ Examples are listed below.

Public Health:

The Philip Morris Tobacco company used ISDS to claim billions of dollars from the Australian Government after the tobacco companies lost their bid for compensation in Australia's High Court for our plain packaging law and had to pay all of the Australian Government's costs. Philip Morris, a US based company, could not use ISDS in the US Australia free trade agreement because the Howard Government had not agreed to include ISDS in that agreement. Philip Morris found an obscure Hong Kong-Australia investment agreement that contained ISDS, shifted some assets to Hong Kong, claimed to be a Hong Kong company and launched a case.¹⁵⁴

144 'Australia's Free Trade Agreements', *Department of Foreign Affairs and Trade* (Web Page, August 2019) <<https://dfat.gov.au/trade/agreements/Pages/trade-agreements.aspx>>.

145 'Trans-Pacific Partnership labour chapter scorecard: fundamental issues remain unaddressed', *International Trade Union Confederation* (Economic and Social Policy Document, 2015) <https://www.ituc-csi.org/IMG/pdf/trans_pacific.pdf>.

146 'TPP text analysis: environment chapter firms to protect the environment', *Sierra Club* (Web Page, 2015) <<https://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/tpp-analysis-updated.pdf>>.

147 'ETUC Manifesto, 2019-23', *European Trade Union Confederation* (Web Page, 2019) [3] <<https://www.etuc.org/sites/default/files/publication/file/2019-06/CES-14e%20Congre%2%95%A0%C3%87s-Manifesto%20EN.pdf>>.

148 Ruth Lopert and Deborah Gleeson, 'The high price of "free" trade: US trade agreements and access to medicines 2013', 41(1) *Journal of Law, Medicine and Ethics* 199; Belinda Townsend, Deborah Gleeson and Ruth Lopert, 'Pharma's next frontier? New threats to public health in the Regional Comprehensive Economic Partnership agreement 2015', 40(1) *Australia and New Zealand Journal of Public Health* 5; 'Bilateral and Regional Trade Agreements Final Report', *Productivity Commission*, (Report, 2010) [263] <<http://www.pc.gov.au/inquiries/completed/trade-agreements/report>>.

149 'Drug industry profits, research and development spending, merger and acquisition deals', *United States Government Accountability Office* (Report, November 2017) <<https://www.gao.gov/products/GAO-18-40>>.

150 Ranald, above n 139.

151 Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy*, (Cambridge University Press 2009 Cambridge); Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen, and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press, 2017).

152 Chief Justice Robert French, 'Investor-State Dispute Settlement - a cut above the courts?' (Conference Paper, Supreme and Federal Courts Judges conference, 9 July 2014) <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj09jul14.pdf>>; George Kahale, 'Keynote Address' (Speech, Eighth Annual Juris Investment Arbitration Conference, Washington DC, 28 March 2014) <<http://www.curtis.com/siteFiles/Publications/8TH%20Annual%20Juris%20Investment%20Treaty%20Arbitration%20Conf.%20-%20March%2028%202014.pdf>>.

153 'Investment Dispute Settlement Navigator', *United Nations Committee on Trade and Development* (Web Page) <<http://investmentpolicyhub.unctad.org/ISDS>>.

154 Patricia Ranald, 'Expropriating public health policy: tobacco companies' use of international tribunals to sue governments over public health regulation' (2014) 73 *Journal of Australian Political Economy* 76.

It took almost 5 years for the ISDS tribunal to decide that Philip Morris was not a Hong Kong company and that the case was an abuse of process. It took another two years for the tribunal to decide costs, but these were redacted from the decision. It took another two years and two FOI cases to discover that the arbitration and legal costs to the Australian Government were \$24 million and that the Australian Government only recovered half of them.¹⁵⁵ Even when governments win cases, they can lose tens of millions defending them.

Environment:

The US Bilcon mining company won millions of dollars of compensation from Canada because a quarry development was refused by a provincial government for environmental reasons.¹⁵⁶ The US Westmoreland Coal Company is suing Canada over Alberta's decision to phase out coal powered energy.¹⁵⁷

Indigenous land rights:

The Canadian Bear Creek mining company won \$36 million in compensation and costs from Peru because Peru cancelled a mining contract after the company failed to obtain consent from Indigenous people about the mine.¹⁵⁸ The company was compensated despite the fact it had ignored both Peruvian and international law on informed consent from Indigenous people.

Labour rights:

French Veolia company sued Egypt for compensation for a rise in the minimum wage as part of a dispute over a local government contract. The case took seven years, and was lost by the company, but there is no public information about the costs to the Egyptian Government.¹⁵⁹

These investor rights clauses which increase corporate rights at the expense of workers, the community and the environment are included in Australian agreements already in force, like the 2010 Australia-New Zealand agreement with ASEAN, the China Australia Free Trade Agreement and the TPP-11, which was ratified last year. There are similar proposals in the RCEP currently under negotiation.¹⁶⁰

So why have governments agreed to these deals? My fourth point is about the secretive and undemocratic process which hides the content of trade agreements until after the deal is done.

The current Australian process is essentially a Cabinet process which excludes Parliament as well as the public. Cabinet makes the decision to initiate trade negotiations and receives reports on the progress of negotiations, but the text remains secret until the deal is completed. Cabinet then makes the decision to sign the completed agreement.

It is only after the agreement is signed that the text is tabled in Parliament and released to the public. But the parliamentary process is also extremely limited.

The Joint Standing Committee on Treaties reviews the agreement but it cannot make any changes to the text. It can only make recommendations which are not binding on the government. Since the government has a majority on the committee, it usually endorses the deal, with the minority of opposition and minor parties confined to making critical comments.

Parliament does not vote on the text of the agreement, only on the implementing legislation, which is mostly confined to changes in tariffs.

The WTO, the EU and even the US have more open processes, in which the text is released before signing, and/or Parliament votes on the whole agreement.¹⁶¹

The Australian process was strongly criticised by a 2015 Senate Inquiry report aptly entitled *Blind Agreement* which recommended a more open process.¹⁶²

Changes needed to this process include:

- Parliament, not Cabinet, should make the decision to enter trade negotiations.
- negotiating texts should be released and there should be regular consultation about them with unions and community groups as well as business organisations.
- the completed text should be released and independent evaluations of its economic, health, gender and environmental impacts should be published before it is signed.
- Parliament should vote on the whole text of the agreement not just the implementing legislation.

A progressive alternative trade policy is needed to combat both neoliberalism and Trump-style unilateralism. Trade can improve people's lives if it is part of an economic policy that delivers employment and higher living standards in an environmentally sustainable society that rejects discrimination and respects human rights. This need not mean a return to high tariffs, but should enable expanded trade combined with active industry policies that deliver a range of jobs in manufacturing, services, agriculture and other sectors, supported by high quality education, health and other services.

Trade rules should be negotiated openly and democratically in a system which includes all governments and provides for the specific needs of developing countries. Trade agreements should not prevent governments from regulating in the public interest. They should not strengthen monopolies, nor give additional legal rights like ISDS to global corporations which already have enormous market power. And finally, trade agreements should be based on internationally agreed and fully enforceable labour rights and environmental standards, to counter the global race to the bottom on these standards

155 Patricia Ranald, 'When even winning is losing. The surprising cost of defeating Philip Morris over plain packaging' *The Conversation* (online, 27 March 2019) <<https://theconversation.com/when-even-winning-is-losing-the-surprising-cost-of-defeating-philip-morris-over-plain-packaging-114279>>.

156 'Investment Dispute Settlement Navigator Clayton/Bilcon v. Canada 2008', *United Nations Committee on Trade and Development* (Dispute Summary, 31 December 2018) <<https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/304/clayton-bilcon-v-canada>>.

157 'Investment Dispute Settlement Navigator Westmoreland v. Canada 2018', *United Nations Committee on Trade and Development* (Dispute Summary, 31 December 2018) <<https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/936/westmoreland-v-canada>>.

158 *Bear Creek Mining Corporation v. Republic of Perú* (Award) (International Centre for Settlement of Investment Disputes, Case No. ARB/14/21, 30 November 2017) <http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3745/DS10808_En.pdf>.

159 Benoit Breville and Martine Bulard, 'The injustice industry and the TTIP' (June 2014) *Le Monde Diplomatique English Edition* <<http://www.bresserpereira.org.br/terceiros/2014/agosto/14.08.injustice-industry.pdf>>; 'Investment Dispute Settlement Navigator Veolia v. Egypt 2012', *United Nations Committee on Trade and Development* (Dispute Summary, 31 December 2018) <<https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/458/veolia-v-egypt>>.

160 Department of Foreign Affairs and Trade, above n 144.

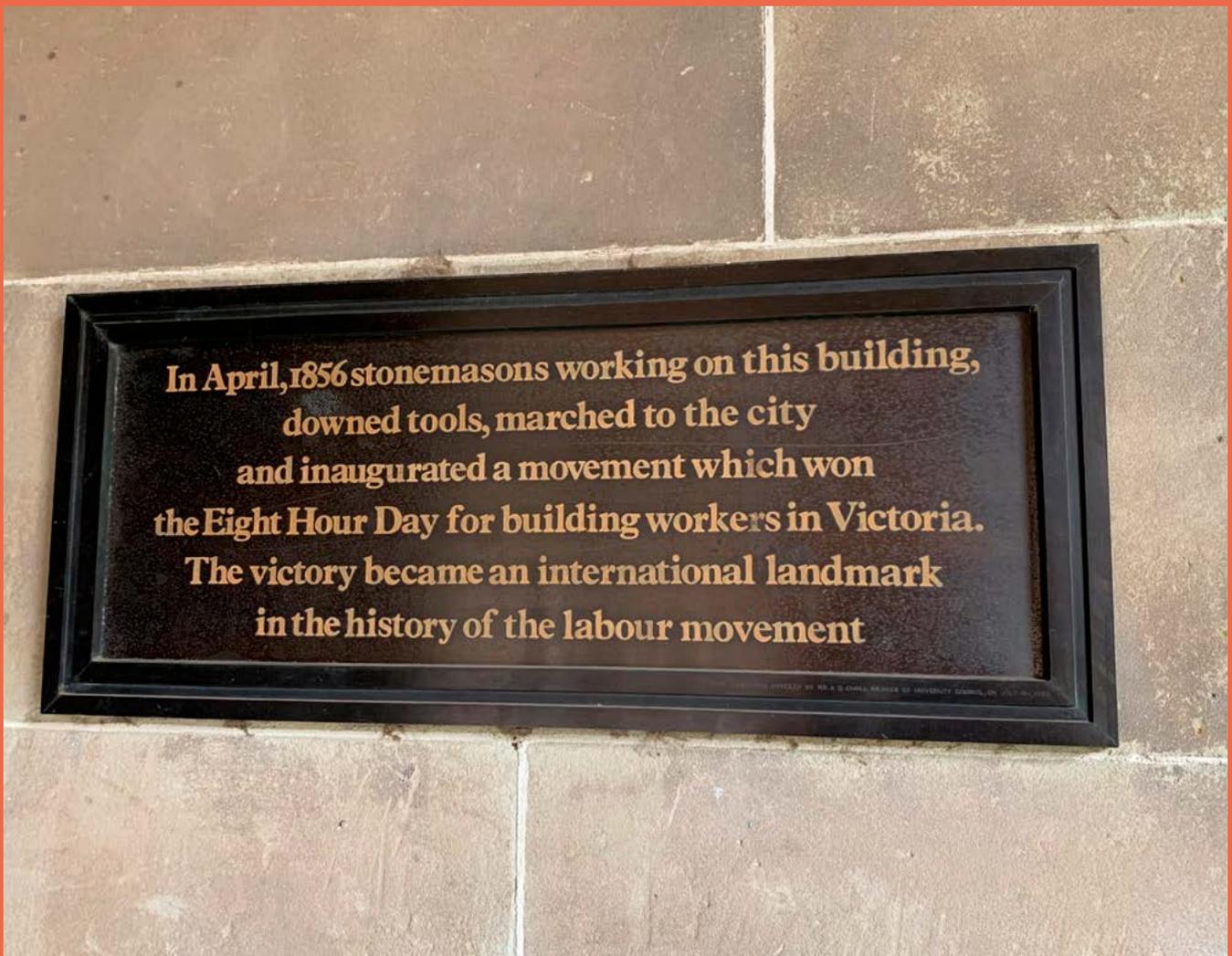
161 Patricia Ranald, 'Trade agreements need more public and parliamentary scrutiny' *Sydney Morning Herald* (online, 1 May 2015) <<https://www.smh.com.au/opinion/trade-agreements-need-more-public-and-parliamentary-scrutiny-20150501-1mxqc9.html>>.

162 Senate Foreign Affairs, Defence and Trade References Committee, *Blind Agreement: Inquiry into the Commonwealth's treaty-making process* (Report, 25 June 2015).



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