

# *Non-Enforcement of Minimum Wage Laws and the Shifting Protective Subject of Labour Law in Australia: A New Province for Law and Order?*

Frances Flanagan\* and Stephen Clibborn†

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## *Abstract*

This article explains the trajectory of minimum wage laws in Australia, from their initial characterisation as ‘sacrosanct’ following the *Harvester* judgment to their current status as routinely violated, in terms of changes in the protective function of labour law in Australia. Through a comparative historical analysis, we argue that state actors have consistently used minimum wage laws to make moral interventions in labour relationships to protect the viability of particular employment relations actors, although the focus of those interventions has shifted from employees towards employers. Reconnecting the ‘how’ of wage minima enforcement with the ‘who’ and ‘why’ of labour law protection also contributes to explaining long-term continuities in the functional exclusion of particular employee groups from protection, namely non-citizens and workers in non-unionised industries, despite the prima facie universalism of current wage laws.

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\* Lecturer, Law School, University of Technology Sydney, New South Wales, Australia. Email: [frances.flanagan@uts.edu.au](mailto:frances.flanagan@uts.edu.au); ORCID iD: <https://orcid.org/0000-0002-3401-1918>.

† Associate Professor, Discipline of Work and Organisational Studies, Business School, University of Sydney, New South Wales, Australia. Email: [stephen.clibborn@sydney.edu.au](mailto:stephen.clibborn@sydney.edu.au); ORCID iD: <https://orcid.org/0000-0003-0828-9446>. The author acknowledges funding from the Australian Research Council: DE200100243. The authors thank Professor Bradon Ellem and the anonymous referees, whose comments improved this article.

## I Introduction

The widespread non-enforcement of statutory wage minima is one example of the multitude of ways in which Australian labour law appears poorly attuned to the realities of work today. It joins a constellation of phenomena including algorithmic management,<sup>1</sup> a shrinking class of workers entitled to leave arrangements,<sup>2</sup> systemic low pay in so-called ‘essential’ employment sectors,<sup>3</sup> limited opportunities for worker voice and precarious work arrangements<sup>4</sup> that pose ongoing pressures on workers’ physical wellbeing and psychological health, and community cohesion. Faced with similar crises in the United Kingdom and Europe, legal scholars have endeavoured to reconceptualise laws and systems to better address current realities.<sup>5</sup> The question of how Australian labour laws constitutionalise — that is, how they protect and prioritise particular lives, values and rules over others<sup>6</sup> — is a timely one given recent judicial confirmation<sup>7</sup> of a ‘deferential’ rather than ‘protective purpose’ approach to employment contract interpretation in Australia.<sup>8</sup> It is of international significance, too, given the distinctive and precocious adoption of legally enforceable wage minima as a central element of Australasian systems of employment regulation.<sup>9</sup>

Despite the *prima facie* universal entitlement to protection for all employees working in Australia, employer non-compliance with minimum wage obligations is

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<sup>1</sup> Alex Veen, Tom Barratt and Caleb Goods, ‘Platform-Capital’s “Appetite” for Control: A Labour Process Analysis of Food-Delivery Work in Australia’ (2020) 34(3) *Work, Employment and Society* 388.

<sup>2</sup> Andrew Stewart, Shae McCrystal, Joellen Riley Munton, Tess Hardy and Adriana Orifici, ‘The (Omni)bus that Broke Down: Changes to Casual Employment and the Remnants of the Coalition’s Industrial Relations Agenda’ (2021) 34(3) *Australian Journal of Labour Law* 132.

<sup>3</sup> Talara Lee, Laura Good, Briony Lipton and Rae Cooper, ‘Women, Work and Industrial Relations in Australia in 2021’ (2022) 64(3) *Journal of Industrial Relations* 347.

<sup>4</sup> Chris F Wright and Stephen Clibborn, ‘A Guest-Worker State? The Declining Power and Agency of Migrant Labour in Australia’ (2020) 31(1) *The Economic and Labour Relations Review* 34.

<sup>5</sup> Ruth Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford University Press, 2014) (*The Labour Constitution*); Alan Eustace, ‘The Electrical Contractors Case: Irish Supreme Court Illuminates Collective Bargaining and Delegated Legislation’ (2022) 85(4) *Modern Law Review* 1029; Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl, *The Autonomy of Labour Law* (Hart Publishing, 2015); Ruth Dukes and Wolfgang Streeck, ‘Labour Constitutions and Occupational Communities: Social Norms and Legal Norms at Work’ (2020) 47(4) *Journal of Law and Society* 612.

<sup>6</sup> Dukes, *The Labour Constitution* (n 5) 62.

<sup>7</sup> *WorkPac Pty Ltd v Rossato* (2021) 271 CLR 456. This decision confirms the distinctiveness of Australian jurisprudence concerning contractual autonomy in comparison to the United Kingdom: see Alan Bogg, ‘The Common Law Constitution at Work: *R (on the Application of UNISON) v Lord Chancellor*’ (2018) 81(3) *Modern Law Review* 509. See also the High Court’s decisions in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 96 ALJR 89; *ZG Operations Australia Pty Ltd v Jamsek* (2022) 96 ALJR 144.

<sup>8</sup> The decision in *WorkPac Pty Ltd v Rossato* (n 7) confirmed the argument advanced in Pauline Bomball, ‘Contractual Autonomy, Public Policy and the Protective Domain of Labour Law’ (2020) 44(2) *Melbourne University Law Review* 502, 505, 507.

<sup>9</sup> Peter Waring and John Burgess, ‘Continuity and Change in the Australian Minimum Wage Setting System: The Legacy of the Commission’ (2011) 53(5) *Journal of Industrial Relations* 681, 682–3.

extensive and has become particularly acute in recent decades.<sup>10</sup> While large-scale studies have not yet reliably quantified wage underpayment,<sup>11</sup> they suggest, together with smaller-scale quantitative and qualitative research,<sup>12</sup> that underpayment of wages is widespread in low-wage industries where temporary migrant workers make up a significant proportion of the workforce. This non-enforcement of minimum wage laws has potentially significant social, economic and legal consequences in Australia, a jurisdiction with a highly ‘target[ed]’ welfare system,<sup>13</sup> including consequences for income inequality, business’ level playing field, and the integrity of wage setting institutions.

The burgeoning scholarship on minimum wage law non-compliance has taken a largely de-territorialised and ahistorical approach to understanding its causes and solutions.<sup>14</sup> The ‘enforcement gap’ — between minimum legal wages and wages

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<sup>10</sup> Miles Goodwin and Glenda Maconachie, ‘Unpaid Entitlement Recovery in the Federal Industrial Relations System: Strategy and Outcomes 1952–95’ (2007) 49(4) *Journal of Industrial Relations* 523; Stephen Clibborn and Chris F Wright, ‘Employer Theft of Temporary Migrant Workers’ Wages in Australia: Why Has the State Failed to Act?’ (2018) 29(2) *Economic and Labour Relations Review* 207.

<sup>11</sup> Methodological limitations with existing large-scale studies include: limited sample selection and estimated applicable minimum wages (Laurie Berg and Basina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey* (Report, 21 November 2017); Migrant Workers Centre, *Lives in Limbo: The Experiences of Migrant Workers Navigating Australia’s Unsettling Migration System* (Report, 30 November 2021)); reliance on participant estimates of wage comparisons (Hall and Partners, *Experiences of Temporary Residents: Report Conducted for the Department of Immigration and Border Protection* (Report, 19 August 2016)); and data gathered from the small proportion of underpayment incidents that become court cases (Anna Boucher, ‘Measuring Migrant Worker Rights Violations in Practice: The Example of Temporary Skilled Visas in Australia’ (2019) 61(2) *Journal of Industrial Relations* 277).

<sup>12</sup> See, eg, Chris Nyland, Helen Forbes-Mewett, Simon Marginson, Gaby Ramia, Erlenawati Sawir and Sharon Smith, ‘International Student-Workers in Australia: A New Vulnerable Workforce’ (2009) 22(1) *Journal of Education and Work* 1; Elsa Underhill and Malcolm Rimmer, ‘Layered Vulnerability: Temporary Migrants in Australian Horticulture’ (2016) 58(5) *Journal of Industrial Relations* 608; Stephen Clibborn, ‘Multiple Frames of Reference: Why International Student Workers in Australia Tolerate Underpayment’ (2021) 42(2) *Economic and Industrial Democracy* 336 (‘Multiple Frames of Reference’); Joanna Howe, Stephen Clibborn, Alexander Reilly, Diane van den Broek and Chris F Wright, *Towards a Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry* (Report, January 2019). These findings are consistent with data from Fair Work Ombudsman, *Inquiry into the Wages and Conditions of People Working under the 417 Working Holiday Visa Program* (Report, October 2016); and the findings of Senate inquiries, including: Senate Standing Committee on Education and Employment, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (Report, March 2016); Senate Select Committee on Temporary Migration, *Report of the Select Committee on Temporary Migration* (Report, September 2021); Senate Economic References Committee, *Systemic, Sustained and Shameful: Unlawful Underpayment of Employees’ Remuneration* (Report, March 2022).

<sup>13</sup> Francis Castles, ‘The Wage Earners’ Welfare State Revisited: Refurbishing the Established Model of Australian Social Protection, 1983–93’ (1994) 29(2) *Australian Journal of Social Issues* 120, 133.

<sup>14</sup> Exceptions include Laura Bennett, *Making Labour Law in Australia: Industrial Relations, Politics and Law* (Law Book Co, 1994); Miles Goodwin and Glenda Maconachie, ‘Minimum Labour Standards Enforcement in Australia: Caught in the Crossfire?’ (2011) 22(2) *Economic and Labour Relations Review* 55; Tess Hardy and John Howe, ‘Partners in Enforcement? The New Balance between Government and Trade Union Enforcement of Employment Standards in Australia’ (2009) 23(3) *Australian Journal of Labour Law* 306; Breen Creighton, ‘Enforcement in the Federal Industrial Relations System: An Australian Paradox’ (1991) 4(3) *Australian Journal of Labour Law* 197 (‘Enforcement in the Federal Industrial Relations System’); Margaret Lee, ‘Regulating Enforcement of Workers’ Entitlements in Australia: The New Dimension of Individualisation’ (2006) 17(1) *Labour & Industry* 41.

actually paid — is commonly framed as an international technical challenge, underwritten by regulatory deficiencies that are common to many jurisdictions, including individualised complaints systems, inadequately resourced inspectorates, flawed wage recovery mechanisms and deterrence challenges. Participatory approaches to enforcement have been widely observed to be beneficial in closing the gap.<sup>15</sup>

By contrast, in this article we seek to reconnect the ‘how’ of minimum wage enforcement to the ‘who’ and ‘why’ of labour law protection. The fact that expectations of minimum wage enforceability have varied over time in Australia is perhaps most starkly exemplified by Justice Higgins’ characterisation of the living wage principle as ‘sacrosanct’, a standard that was both ‘beyond the reach of bargaining’ and applied with an expectation of strict observance by the parties.<sup>16</sup> The sacrosanct nature of wage minima admitted no discretion to overlook underpayment on the basis of an employers’ financial context: ‘[I]f a man cannot maintain his enterprise without cutting down the wages which are proper to be paid to his employees’, Higgins stated, ‘it would be better that he abandon the enterprise’.<sup>17</sup> By contrast, approaches to minimum wage law compliance today, with their emphasis on the imperative for state actors to enforce the law selectively and strategically, are premised on an acknowledgement that strict and universal compliance is not possible. Existing scholarship has only minimally reflected on this stark divergence in approach to minimum wage law enforceability in Australia and has not attempted to explain it. In situating minimum wages in terms of the broader history of who, how and why labour law ‘protects’ in Australia, we offer new context for understanding today’s apparent crisis of enforceability. We adopt this historically grounded approach, focussed on two critical periods, to interrogate how particular configurations of law, discourse and practice shape the practical application of minimum wage laws.

Our analysis situates patterns of enforcement within two distinct paradigms of protective purpose that connect the wellbeing of individual employees and households to wider social prosperity. The first conceives of worker security and household reproduction as synonymous with social prosperity; the second frames it as a set of interests that are in opposition to the economy. In both paradigms, we show that the content and enforcement of Australian wage minima were powerfully shaped by patterns of contestation by employers, although the focus of such contestation has shifted from rejection of the legitimacy of minimum wages per se to a concern with ‘complexity’. We further argue that state actors have always used minimum wage laws to make moral interventions in labour relationships to protect the viability of particular employment relations actors, although the focus of those interventions has substantively shifted from employees towards employers. Finally, we explain that wage minima have always excluded some employees, particularly non-citizens and non-unionised workforces, but now do so on a changed basis, from explicit non-recognition of rights to functional non-enforcement of rights.

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<sup>15</sup> Leah Vosko, *Closing the Enforcement Gap: Improving Employment Standards Protections for People in Precarious Jobs* (Toronto University Press, 2020).

<sup>16</sup> *The Barrier Branch of the Amalgamated Miners’ Association of Broken Hill v The Broken Hill Proprietary Co Ltd* (1909) 3 CAR 1, 32 (‘Broken Hill Case’).

<sup>17</sup> *Ibid.*

Understanding the nature of wage minima enforcement as a dimension of the shifted protective subject of Australian labour law illustrates the limitations of conceptions of labour law as having a fundamental purpose which is essentially the same across time and place, and universally concerned with responding to the vulnerabilities of employees.<sup>18</sup> We argue that enforcement paradigms are expressive of labour law paradigms which in turn express and shape historically specific conceptions of both vulnerability and the sources of social value.

## II The Current Australian Minimum Wage Statutory and Policy Framework

Australia's minimum pay standards, applicable to employees, are contained in national minimum wage orders and modern awards, under a system governed by the *Fair Work Act 2009* (Cth) ('*Fair Work Act*').<sup>19</sup> When setting and varying the national minimum wage and industry- and job-specific modern award pay rates, the Fair Work Commission ('FWC') is obliged to consider the *Fair Work Act*'s 'minimum wages objective' and 'modern awards objective' respectively. The current Australian employment relations framework only partially justifies the existence of wage minima with reference to worker protection. The minimum wages objective requires the FWC to establish and maintain a safety net of fair minimum wages, taking into account: (a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; (b) promoting social inclusion through increased workforce participation; (c) relative living standards and needs of the low paid; (d) the principle of equal remuneration for work of equal or comparable value; and (e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.<sup>20</sup> The *Fair Work Act*'s modern awards objective requires the FWC to take into account a number of additional factors in providing a fair and relevant minimum safety net of terms and conditions, including the need to promote flexible modern work practices and the efficient and productive performance of work; the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.<sup>21</sup> In setting wage minima, the Act endeavours, inter alia, to 'promote the social inclusion' of workers

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<sup>18</sup> Guy Davidov, *A Purposive Approach to Labour Law* (Oxford University Press, 2016) 27.

<sup>19</sup> While notionally a national system, modern awards and national minimum wage orders apply only to national system employees, as defined in *Fair Work Act 2009* (Cth) s 13 ('*Fair Work Act*'). This is estimated to be about 85% of all employees: Productivity Commission, *Workplace Relations Framework: Inquiry Report* (Report, 21 December 2015) 78. Employees who are not national system employees are covered by state industrial systems.

<sup>20</sup> *Fair Work Act* (n 19) s 284(1). On 6 December 2022, the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) ('*Secure Jobs, Better Pay Act*') received royal assent. It added s 284(1)(aa) to the minimum wages objective, including 'the need to achieve gender equality'.

<sup>21</sup> *Fair Work Act* (n 19) s 134(1). The *Secure Jobs, Better Pay Act* (n 20) amended s 134 to add to the modern award objective, inter alia: (aa) 'the need to improve access to secure work across the economy'; and (ab) 'the need to achieve gender equality in the workplace'.

through ‘increased workforce participation’, and generally intervene in the interest of a narrow class of workers, ‘the low paid’.<sup>22</sup>

The *Fair Work Act* provides for civil penalties in the event an employer breaches a national minimum wage order or a pay provision in a modern award. A court may order that an individual pay up to \$16,500 per contravention and a corporation up to \$82,500 per contravention.<sup>23</sup> Amendments to the *Fair Work Act* that commenced in 2017<sup>24</sup> introduced a new, special category of higher maximum civil penalties available in the case of ‘serious contraventions’, for which penalties are up to \$165,000 per contravention for individuals and \$825,000 per contravention for corporations.<sup>25</sup> In 2020 the federal government introduced to Parliament, and later withdrew, further increases to maximum fines together with criminal sanctions for the most serious cases of employer contraventions.<sup>26</sup> The Albanese Labor Government has a policy to ‘make wage theft a crime at a national level’.<sup>27</sup>

The Commonwealth labour enforcement agency, the Fair Work Ombudsman (‘FWO’), is tasked with enforcing minimum wages created under the *Fair Work Act*. Individual workers, whether represented by a lawyer or union, or unrepresented, may still recover unpaid wage debts, but the FWO is assumed to carry the main compliance responsibility. Since the *Wage Theft Act 2020* (Vic) was enacted, Wage Inspectorate Victoria has also exercised power to investigate and prosecute breaches of that Act relating to underpayment of wages.<sup>28</sup> The FWO commenced operation in 2009, based on its predecessor, the Workplace Ombudsman, that was created in 2007. Prior to these, the Industrial Relations Bureau (1977–83), the Arbitration Inspectorate (1927–97), the Office of Workplace Services (1997–2007) and, in the colonial period, inspectors appointed pursuant to Factories and Shops legislation, acted as enforcement agencies.<sup>29</sup> The FWO’s statutory functions include promoting ‘harmonious, productive and cooperative workplace relations’ and compliance with the national minimum wage and modern award pay minima.<sup>30</sup> It is to perform these functions including by providing education, assistance and advice to employees and employers. The FWO is also to monitor compliance; inquire into, and investigate

<sup>22</sup> *Fair Work Act* (n 19) s 284(1).

<sup>23</sup> *Ibid* ss 539, 546.

<sup>24</sup> *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth).

<sup>25</sup> *Fair Work Act* (n 19) s 557A. The penalties for both contravention and serious contravention are calculated and indexed by reference to penalty units in *Crimes Act 1914* (Cth) s 4AA.

<sup>26</sup> *Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Bill 2020* (Cth); Stewart et al (n 2).

<sup>27</sup> ‘Secure Australian Jobs’, *Labor* (Web Page, 8 August 2023) <<https://www.alp.org.au/policies/secure-australian-jobs>>.

<sup>28</sup> The *Criminal Code and Other Legislation (Wage Theft) Amendment Act 2020* (Qld) also introduced criminal sanctions related to some breaches of the *Fair Work Act* (n 19), with the Queensland Police Service to fulfil the prosecution role.

<sup>29</sup> Bennett (n 14) 145–64; Richard Mitchell, ‘Australian Industrial Relations and Labour Law Policy: A Post-War Review’ (1980) 52(1) *The Australian Quarterly* 40; Goodwin and Maconachie (n 14) 61. State government agencies served a comparable purpose, prior to the nationalisation of Australia’s workplace relation system for privately employed workers with the 2006 commencement of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) amendments to the *Workplace Relations Act 1996* (Cth) (‘*Workplace Relations Act*’).

<sup>30</sup> *Fair Work Act* (n 19) ss 682(1)(a)(i)–(ii).

breaches; and commence court proceedings and take other steps to enforce wage laws.<sup>31</sup>

### III Literature Review and Theoretical Approach

Extant literature has tended to focus on characteristics of particular populations and the influences of institutions and business structures in explaining why minimum wage laws are not enforced. It is well established that various populations of vulnerable workers, particularly temporary and new migrants, are most commonly affected. This is associated with factors such as a lack of information about their rights,<sup>32</sup> reluctance or fear associated with seeking to enforce rights<sup>33</sup> or maintaining reference to home country or migrant peer working conditions.<sup>34</sup> Institutional influences such as exclusive migration policies,<sup>35</sup> the decline of union presence<sup>36</sup> and under-funded enforcement agencies have all been identified as contributing to persistent and growing employer non-compliance. Studies have also identified the roles of certain business structures, with employer non-compliance more likely in fractured, or ‘fissured’, work structures such as franchises and subcontracting arrangements<sup>37</sup> and in small businesses which have less access to relevant expertise and lower prevalence of unions and bargaining coverage.<sup>38</sup> In this context, there has been much attention in legal scholarship to identifying barriers to individuals ‘accessing justice’<sup>39</sup> and to the methods and effectiveness of state enforcement.<sup>40</sup>

<sup>31</sup> Ibid ss 682(1)(b)–(f).

<sup>32</sup> Gideon Yaniv, ‘Complaining About Noncompliance with Minimum Wage Laws’ (1994) 14(3) *International Review of Law and Economics* 351; Charlotte Alexander and Arthi Prasad, ‘Bottom-Up Workplace Law Enforcement: An Empirical Analysis’ (2014) 89(3) *Indiana Law Journal* 1069.

<sup>33</sup> Elizabeth Fussell, ‘The Deportation Threat Dynamic and Victimization of Latino Migrants: Wage Theft and Robbery’ (2011) 52(4) *The Sociological Quarterly* 593; Joanna Howe, ‘A Legally Constructed Underclass of Workers? The Deportability and Limited Work Rights of International Students in Australia and the United Kingdom’ (2019) 48(3) *Industrial Law Journal* 416; Justin Pen, ‘Justice for Temporary Migrant Workers: Lessons from the “7-Eleven Cases”’ (2018) 43(1) *Alternative Law Journal* 24.

<sup>34</sup> Michael Piore, *Birds of Passage: Migrant Labor and Industrial Societies* (Cambridge University Press, 1979); Roger Waldinger and Michael Lichter, *How the Other Half Works: Immigration and the Social Organization of Labor* (University of California Press, 2003); Clibborn, ‘Multiple Frames of Reference’ (n 12).

<sup>35</sup> Wright and Clibborn (n 4).

<sup>36</sup> Hardy and Howe (n 14).

<sup>37</sup> David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press, 2014).

<sup>38</sup> William Brown, Simon Deakin, David Nash and Sarah Oxenbridge, ‘The Employment Contract: From Collective Procedures to Individual Rights’ (2000) 38(4) *British Journal of Industrial Relations* 611; Jérôme Gautié and John Schmitt, *Low-Wage Work in the Wealthy World* (Russell Sage Foundation, 2010).

<sup>39</sup> David Weil and Amanda Pyles, ‘Why Complain? Complaints, Compliance, and the Problem of Enforcement in the US Workplace’ (2006) 27(1) *Comparative Labor Law & Policy Journal* 59; Yaniv (n 32); Stephen Lee, ‘Policing Wage Theft in the Day Labor Market’ (2014) 4(2) *University of California Irvine Law Review* 655; Bassina Farbenblum and Laurie Berg, *Migrant Workers’ Access to Justice for Wage Theft: A Global Study of Promising Initiatives* (Report, 7 December 2021).

<sup>40</sup> Daniel Galvin, ‘Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance’ (2016) 14(2) *Perspectives on Politics* 324; Tess Hardy, ‘Digging into Deterrence: An Examination of Deterrence-Based Theories and Evidence in Employment Standards Enforcement’ (2021) 37(2–3) *International Journal of Comparative Labour Law and Industrial Relations* 133.

Historical studies of minimum wage enforcement have tended to concentrate on variations in the operations of statutory labour inspectorates, in a manner detached from consideration of changes to the overall protective purpose of labour law. Labour inspectorates in Australia dated from the 1830s, when inspectors were appointed to monitor factories, investigate breaches and undertake prosecutions.<sup>41</sup> Colonial-era inspectors were forced to primarily adopt voluntary approaches to labour law compliance due to widespread employee reluctance to give evidence of breaches of Factory and Shops legislation for fear of dismissal, limited penalties for non-complying employers, and the inability of inspectors to compel employers to pay wage arrears.<sup>42</sup> In the 20<sup>th</sup> century, after nearly 50 years of near-exclusive registered union-led enforcement between 1906–52 (aside from a single temporary inspector operating between 1934 and 1940),<sup>43</sup> the Industrial Relations Bureau similarly adopted voluntary compliance measures, albeit in service to a very different industrial relations system to the 19<sup>th</sup> century. The Industrial Relations Bureau's challenges have been analysed using largely present-centred concepts: resource constraints,<sup>44</sup> compliance 'barriers',<sup>45</sup> and the notion of a continuum between 'deterrence' and 'compliance' models of enforcement.<sup>46</sup> In chronicling the limitations of different enforcement regimes (including co-regulatory models that involve unions), existing scholarship has emphasised the unchanging elements of the challenge of enforcing wage minima. Less explored has been the question of how mechanisms of enforcement are expressions of, and contributors toward, historically distinctive paradigms of labour law, in which the explicit and implicit subjects of protection and recognition have altered over time.

A variety of rationales have been advanced for minimum wages in Australia: the needs of workers, employer capacity to pay, wage indexation to economic indicia relating to factors other than the needs of workers, collectivism and industrial action, and wages as a 'safety net'.<sup>47</sup> While these have been chronicled in considerable detail,<sup>48</sup> their analyses have remained largely detached from accounts of enforcement and the processes of cultural legitimation that bound together mechanisms of legal protection and statutory purpose. One exception may be found in Creighton's observation, made in relation to industrial action rather than wage underpayment, of the stark disjuncture in the conciliation and arbitration system between its strident proscription of industrial action and the widespread tolerance of it in practice. As Creighton noted, the provisions of the *Conciliation and Arbitration*

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<sup>41</sup> Michael Quinlan and Peter Sheldon, 'The Enforcement of Minimum Labour Standards in an Era of Neo-Liberal Globalisation' (2011) 22(2) *The Economic and Labour Relations Review* 13.

<sup>42</sup> Goodwin and Maconachie (n 14) 61. See also Reg Hamilton and Matt Nichol, 'Minimum Wage Regulation in Australia in the Wake of the Pandemic: The Future of the Five Wage Concepts' (2021) 31(4) *Labour and Industry* 407.

<sup>43</sup> Goodwin and Maconachie (n 14) 63.

<sup>44</sup> *Ibid.*

<sup>45</sup> Hamilton and Nichol (n 42) 407.

<sup>46</sup> Goodwin and Maconachie (n 14) 57.

<sup>47</sup> Hamilton and Nichol (n 42); Joshua Healy, Andreas Pekarek and Ray Fells, 'The Belated Return of an Australian Living Wage: Reworking "A Fair Go" for the 21st Century' in Tony Dobbins and Peter Prowse (eds), *The Living Wage: Advancing a Global Movement* (Routledge, 2022) 162.

<sup>48</sup> Hamilton and Nichol (n 42); Keith Hancock, 'The Needs of the Low Paid' (1998) 40(1) *Journal of Industrial Relations* 42; Joe Isaac and Stuart Macintyre, *The New Province for Law and Order: 100 Years of Australian Conciliation and Arbitration* (Cambridge University Press, 2004).



*Act 1904* (Cth) ('the *1904 Act*') which made it an offence for any person or organisation 'on account of any industrial dispute, [to] do anything in the nature of a lockout or strike' were 'almost entirely unused in practice' and repealed in 1930.<sup>49</sup> Instead, the primary tools used for enforcement were bans clauses and de-registration of unions.<sup>50</sup> Taking a longer historical perspective, Schofield-Georgeson recently argued that there has been a general historical trajectory from 'collective, informal and egalitarian' approaches to enforcement in early 20<sup>th</sup> century Australia to 'individualised, technical, punitive and rarely enforced laws' at the century's end, using quantitative methods that necessarily foreclose the possibility of detailed analysis of the dynamics of any particular period.<sup>51</sup>

Rather than view non-compliance with wage minima as a longstanding policy puzzle with relatively unchanging determinants, this article instead endeavours to analyse enforcement as an expression of changes in the purpose of labour law in Australia over time, using debates concerning minimum wage laws as a focal point for a historical analysis. We adopt a labour law 'in context' approach, which seeks to describe the ways particular laws reflect and constitute social relations in specific jurisdictions and historical settings.<sup>52</sup> This approach does not presuppose a fundamental purpose to labour law, as Guy Davidov proposes in his characterisation of labour law as an attempt to address the variety of vulnerabilities, subordination and dependency that are created for employees by the employment relationship.<sup>53</sup> We instead build on Ruth Dukes' argument in her response to Davidov, which emphasises the importance of descriptive analysis of the purpose of labour law in defined contexts, that seeks to represent the terms of labour law on its own terms in each period.<sup>54</sup>

Following Dukes', as well as Deakin and Wilkinson's approach to analysing the standard employment relationship, our analysis engages with the process through which the idea of the minimum wage acquired legitimacy at particular moments in Australian society. Wage minima, like the standard employment relationship, should not, we argue, be analysed as relatively unchanging 'core' components of labour

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<sup>49</sup> Breen Creighton, 'One Hundred Years of the Conciliation and Arbitration Power' (2000) 24(3) *Melbourne University Law Review* 840, 851.

<sup>50</sup> Ibid. See also Creighton, 'Enforcement in the Federal Industrial Relations System' (n 14); Shae McCrystal, *The Right to Strike in Australia* (Federation Press, 2010).

<sup>51</sup> Eugene Schofield-Georgeson, 'The Emergence of Coercive Federal Australian Labour Law, 1901–2020' (2022) 64(1) *Journal of Industrial Relations* 52, 52.

<sup>52</sup> Ruth Dukes, 'Identifying the Purposes of Labor Law: Discussion of Guy Davidov's *A Purposive Approach to Labour Law*' (2017) 16(1) *Jerusalem Review of Legal Studies* 52 ('Identifying the Purposes of Labor Law'). See also Simon Deakin and Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (Oxford University Press, 2005) 35. This approach is consistent with the 'Cambridge School' of intellectual history, which insists on the importance of placing key texts within their intellectual and linguistic contexts and excavating their 'stakes' and significance as interventions in particular political and intellectual contexts: see Quentin Skinner, *Visions of Politics: Volume 1* (Cambridge University Press, 2002) vii; Simon Deakin, 'Juridical Ontology: The Evolution of Legal Form' (2015) 40(1) *Historical Social Research* 170.

<sup>53</sup> Guy Davidov, *A Purposive Approach to Labour Law* (Oxford University Press, 2016) 27.

<sup>54</sup> Dukes, 'Identifying the Purposes of Labor Law' (n 52) 66.

law,<sup>55</sup> but as historically situated concepts which presuppose particular structures of the household and of the enterprise and shape them in turn.<sup>56</sup>

To analyse the underlying and changing social, cultural and economic foundations of Australia's minimum wage laws, we selected two periods of Australian labour law for comparison as broadly representative of the sacrosanct approach to minimum wage enforcement, on the one hand (1907–21), and an approach where a degree of non-compliance is tolerated (2009 to the present) on the other. In each case, we asked four questions that illuminate the context in which assertions of minimum wage non-enforceability were advanced: Whose lives were understood to be the subject of protection? What was the rationale for wage minima? How did employers respond to wage minima? How were minimum wage laws enforced?

The first period we analyse spans 1907 to 1921, from the decision in *Ex parte HV McKay* ('*Harvester*'),<sup>57</sup> which gave rise to the first Australia-wide enforceable minimum wage, to the retirement of HB Higgins as President of the Commonwealth Court of Conciliation and Arbitration. While the majority of workers in this period were covered by state arbitration and wages boards, concerted attention to the federal arbitral system can be justified by the extent of its informal influence over state systems during this period.<sup>58</sup> The *Harvester* decision constituted a moment in which an idea that existed in multiple iterations theoretically and legally<sup>59</sup> was embodied in a principle that, although not formally encoded in the *1904 Act*, became integrated into the national wage-setting framework, as well as into international law.<sup>60</sup> The *Harvester* wage anticipated Otto Kahn-Freund's conceptualisation of labour law as 'a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship'.<sup>61</sup> This imbalance, Kahn-Freund argued, could not be addressed through the mere conferral of rights or

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<sup>55</sup> Davidov (n 53) 85.

<sup>56</sup> Deakin and Williamson (n 52) 309.

<sup>57</sup> *Ex parte HV McKay* (1907) 2 CAR 1 ('*Harvester*'). The *Harvester* decision, given by Higgins J, President of the Commonwealth Court of Conciliation and Arbitration, determined the test to be applied to ascertain fair and reasonable conditions as to the remuneration of labour, under the *Excise Tariff Act 1906* (Cth). While the *Excise Tariff Act* was later ruled unconstitutional, the *Harvester* decision set the tone for wage fixation under the *Conciliation and Arbitration Act 1904* (Cth) ('*1904 Act*').

<sup>58</sup> MB Hammond, 'Judicial Interpretation of the Minimum Wage in Australia' (1913) 3(2) *American Economic Review* 259, 280.

<sup>59</sup> Including in the 1891 Papal Encyclical, wages boards, a Queensland Parliamentary Bill of 1890, and NSW tribunal findings from 1905: Isaac and Macintyre (n 48). The *Harvester* decision (n 57) was subsequently overturned.

<sup>60</sup> Article 427 of the *Peace Treaty of Versailles 1919* called on the parties to promote 'the payment to the employed of a wage adequate to maintain a reasonable standard of life as this is understood in their time and country' in recognition of the 'supreme international importance' of 'the well-being, physical, moral and intellectual, of industrial wage-earners'. The International Labour Organization became squarely concerned with achieving compliance with art 427: Hancock (n 48) 43. For discussion of the statutory precursors to the arbitration system more generally, see Mitchell (n 29) 74–103.

<sup>61</sup> Paul Davies and Mark Freedland (eds), *Kahn-Freund's Labour and the Law* (Sweet & Maxwell, 3<sup>rd</sup> ed, 1983) 18.

regulation of factory conditions, but rather required ‘the spontaneous *creation of social power* on the worker’s side to balance that of management’.<sup>62</sup>

In setting a wage floor anchored in worker need as part of a system that required collective worker organisation for its application and enforcement, Justice Higgins’ living wage embodied both elements of Kahn-Freund’s concept of labour law: it sought to counteract the inequality of bargaining power inherent to employment relationships with reference to the requirements for the maintenance of workers’ lives, and did so through rights that were not ‘bare’ but had to be enforced through the social power inherent to union activity. An ethos of sanctity and strict enforceability permeated Higgins’ articulation of the living wage, and survived the declaration of the unconstitutional status of the *Excise Tariff Act 1906* (Cth).<sup>63</sup> In 1909 he confirmed that the living wage was ‘a thing sacrosanct, beyond the reach of bargaining’, to be paid regardless of the employer’s financial position or profitability.<sup>64</sup> If it could not, Higgins determined, ‘it would be better that he [the employer] abandon the enterprise’.<sup>65</sup> A strict application of the living wage resulted in sections of BHP suspending mining operations for two years in order to avoid having to pay the prescribed rate.<sup>66</sup> Wage-setting rationales such as ‘sound economic doctrine’ and ‘balancing the favourable and adverse effects of higher wages’ were added to the living wage rationale in the 1930s.<sup>67</sup> However, the living wage principle continued to inform Commonwealth and state tribunals in setting the basic wage (and thus minimum rates for all wage-earners) into the mid-1950s, as well as being understood as ‘part of the social fabric’ of the nation.<sup>68</sup> The primary sources drawn upon for this article include key judicial decisions in the period, relevant contemporary parliamentary debates, publications by Higgins, court transcripts and newspapers, a select number of awards and agreements that were made between 1907 and 1921, together with scholarly analyses of federal and state wage-setting and enforcement systems published in the period.<sup>69</sup>

The second period, from 2009 to 2022 was chosen because it spans the current ‘Fair Work’ regulatory regime until the end of the nine-year period of Coalition federal government at the May 2022 general election.<sup>70</sup> Naturally, many formal parts of that regulatory system, and policy settings shaping the current regime, pre-date the commencement of the *Fair Work Act*. These include the decline of regulatory support for union involvement in minimum wage setting and

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<sup>62</sup> *Ibid* (emphasis added).

<sup>63</sup> *Harvester* (n 57); *R v Barger* (1908) 6 CLR 41.

<sup>64</sup> *Broken Hill Case* (n 16) 32.

<sup>65</sup> *Ibid*.

<sup>66</sup> Graeme Osborne, ‘Town and Company: The Broken Hill Industrial Dispute of 1908–09’ [1973] (24) *Labour History* 26, 46.

<sup>67</sup> Keith Hancock and Sue Richardson, ‘Economic and Social Effects’ in Joe Isaac and Stuart Macintyre (eds), *The New Province for Law and Order: 100 Years of Australian Conciliation and Arbitration* (Cambridge University Press, 2004) 139, 153.

<sup>68</sup> Stuart Macintyre and Richard Mitchell, *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration 1890–1914* (Oxford University Press, 1989) 13; Robert Hawke, ‘The Commonwealth Arbitration Court: Legal Tribunal or Economic Legislature?’ (1956) 3(3) *University of Western Australia Law Review* 422, 458.

<sup>69</sup> Goodwin and Maconachie (n 14) 63.

<sup>70</sup> While our formal analysis ends at the May 2022 federal general election, we include some observation of policy initiatives in the early time of the Albanese Labor Government.

enforcement, replaced with the expectation of a Commonwealth enforcement agency as primary enforcer of minimum wage laws,<sup>71</sup> the rise of temporary migration in Australia since the mid-1990s<sup>72</sup> and the shift to a ‘command and control’ approach to setting and enforcing minimum wages since 2006.<sup>73</sup> This period also coincides with an observed significant rise in employer non-compliance with minimum wage laws in Australia.<sup>74</sup> Sources for this case study include submissions to and reports of government inquiries, media reports of public debates, media releases and publications by unions, employers and state actors, decisions and publications of the FWC and the Federal Court of Australia, and speeches by government ministers related to key legislation and policies.

## IV Findings

### A Early 20<sup>th</sup> Century

#### 1 *The Lives Protected by the Harvester Living Wage*

A crucial context for understanding Justice Higgins’ insistence on the *Harvester* wage’s sacrosanct status was the question of whose lives it was designed to protect. The *Harvester* living wage provided for the ‘normal needs of the average employee, regarded as a human being living in a civilised community’, and applied to employers ‘whether the profits are small or great’.<sup>75</sup> Despite the ostensibly inclusive terminology of ‘employee’ in this 1907 formulation, the identity of *Harvester*’s protective subjective was male, adult and white.<sup>76</sup>

Non-whites were excluded from standard labour protections in multiple ways. The *Immigration Restriction Act 1901* (Cth) (*Immigration Restriction Act*) barred non-whites from entry to Australia. For Indigenous people, the labour protections of the arbitration system were layered upon the older colonial regimes of protection which positioned them as wards, subject to comprehensive levels of state surveillance and control.<sup>77</sup> State actors controlled Indigenous peoples’ ability to enter and leave employment relationships and negotiate wages.<sup>78</sup> Employers were

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<sup>71</sup> Hardy and Howe (n 14).

<sup>72</sup> Wright and Clibborn (n 4).

<sup>73</sup> Sean Cooney, John Howe and Jill Murray, ‘Time and Money under WorkChoices: Understanding the New Workplace Relations Act as a Scheme of Regulation’ (2006) 29(1) *UNSW Law Journal* 215, 215.

<sup>74</sup> Clibborn and Wright (n 10).

<sup>75</sup> *Harvester* (n 57) 3.

<sup>76</sup> Gillian Whitehouse, ‘Justice and Equity: Women and Indigenous Workers’ in Joe Isaac and Stuart Macintyre (eds), *The New Province for Law and Order: 100 Years of Australian Conciliation and Arbitration* (Cambridge University Press, 2004) 207.

<sup>77</sup> Samuel Furphy and Amanda Nettelbeck, *Aboriginal Protection and Its Intermediaries in Britain’s Antipodean Colonies* (Routledge, 2020) 4. As these authors explain, ‘protectors took on a variety of roles, as quasi-missionaries, frontier magistrates, police officers, prison inspectors, court advocates, land brokers, providers of rations, medicine, or humanitarian assistance, or some combination of the above’: at 9.

<sup>78</sup> In Queensland, for instance, the Chief Protector and local protectors had the role of negotiating the employment contracts of all Aboriginal workers ‘under the Act’, leaving no reasonable means by

required to have permits to employ Indigenous people.<sup>79</sup> Indigenous people were commonly explicitly excluded from statutory definitions of ‘employee’ and differential minimum wages existed that were based on race.<sup>80</sup> In 1944, the Industrial Court explained that ‘it would be inadvisable and even cruel to pay [Indigenous workers] for the work they can do at the same wage standards found appropriate for civilised ‘whites’.<sup>81</sup> This position was not overturned until 1966.<sup>82</sup>

Men and women were protected by the *Harvester* wage on different bases. While men’s physical, moral and mental life was secured by a legally enforced minimum wage that protected them *within* the employment relationship, women’s lives were understood as being kept safe by laws that protected them *from* employment. In keeping with Victorian ideals which equated ‘true womanhood’ with maternal, moral and spiritual qualities, the locus of self-development for women was emphatically domestic, a realm entirely apart from the masculine sphere of industry, politics and commerce.<sup>83</sup> The setting of a female basic wage at 54% of the male wage, by design inadequate to support a family,<sup>84</sup> entrenched cultural norms of motherhood and dependency on a male breadwinner.<sup>85</sup> The concern to protect white adult men within employment relationships in federal legislation was consistent with special measures in state wages boards that ensured that minimum wage regulation would not displace ‘old and naturally slow’ men from employment.<sup>86</sup> State motherhood endowments, payable to women independently of their relationships with men, reinforced this social domestic ordering.<sup>87</sup> The living wage was also conceived as an intergenerational measure to protect the lives of young and unborn children, within a racialised conception of the nation.<sup>88</sup> Higgins justified the wage as an instrument for ensuring the health of children, since ‘their constitutions and the future of the race must not suffer by privation’.<sup>89</sup> Imagined intergenerational prosperity was further secured, in this vision, through the gender-differentiated wage which would ensure that ‘thrifty’ working class households were

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which Aboriginal workers could improve their conditions or even quit without the protectors’ consent: *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) ss 12, 13, 15; Loretta de Plevitz, ‘Falling Through the Safety Net: Minimum Entitlements Legislation for Aboriginal Workers in the Queensland Pastoral Industry 1919–1968’ (1997) 13 *Australian Journal of Law and Society* 1, 4.

<sup>79</sup> Whitehouse (n 76) 210.

<sup>80</sup> *Re Industrial Peace Act of 1912* (1916) 1 Queensland Industrial Gazette 354, 355.

<sup>81</sup> *Australian Workers Union v Abbey* (1944) 53 CAR 212, 215.

<sup>82</sup> Commonwealth Conciliation and Arbitration Commission, *The Cattle Station Industry (Northern Territory) Award 1951* (1966) 71 CAR 319, 656, 666–9.

<sup>83</sup> Kerreen Reiger, *The Disenchantment of the Home: Modernizing the Australian Family 1880–1940* (Oxford University Press, 1985) 20.

<sup>84</sup> Edna Ryan and Anne Conlon, *Gentle Invaders: Australian Women at Work 1788–1974* (Thomas Nelson, 1975); *Rural Workers Union v Australian Dried Fruits Association (Mildura)* (1912) 6 CAR 61 (Higgins J) (*‘Rural Workers Union’*).

<sup>85</sup> Ryan and Conlon (n 84); *Rural Workers Union* (n 84).

<sup>86</sup> MB Hammond, ‘Wages Boards in Australia IV: Social and Economic Results of Wages Boards’ (1915) 29(3) *Quarterly Journal of Economics* 563, 583.

<sup>87</sup> Marilyn Lake, ‘Feminists Creating Citizens’ in Wayne Hudson and Geoffrey Bolton (eds), *Creating Australia: Changing Australian History* (Allen & Unwin, 1997) 97.

<sup>88</sup> Alison Bashford, *Imperial Hygiene* (Palgrave Macmillan, 2004) 137–63.

<sup>89</sup> Henry Bournes Higgins, ‘A New Province for Law and Order: II’ (1919) 32(3) *Harvard Law Review* 189, 204.

not forced to bring in money through the ‘pathetic’ practice of women having to leave the home to work or accept out-work such as laundry in order to survive.<sup>90</sup>

Finally, while the living wage was formulated as a universal principle with theoretical relevance to all workers in Australia, as a practical matter it only applied to employees protected by awards at the federal level, by virtue of the High Court’s finding that ‘common rule’ awards operating across an occupation or industry were not supported by s 51(xxxv) of the *Constitution*.<sup>91</sup> This exclusion of non-employed workers, however, was not fully replicated in the state systems.<sup>92</sup> Federal awards were few in number: just 239 were created between 1907 and 1921.<sup>93</sup> The federal system also categorically excluded agricultural, viticultural, horticultural and dairying workers and domestic servants, who were excluded from the definition of ‘industry’ under s 4 of the *1904 Act*.

## 2 *The Rationale for Harvester Living Wage Protection*

The *Harvester* living wage was burdened by multiple ‘protective’ objectives. Justice Higgins argued it was a measure to protect working-class minds and bodies, separate gendered spheres of production and reproduction, and public peace and uninterrupted industry, within an overall social order that was profoundly racialised. These rationales were consistent with Prime Minister Alfred Deakin’s emphasis on the imperative to protect the weak and cement an ethos of social justice.<sup>94</sup>

Higgins elaborated on the purposes of the living wage in successive decisions and publications, but succinctly summarised the core justifications in 1909:

[U]nless great multitudes of people are to be irretrievably injured *in themselves and in their families*, unless *society is to be perpetually in industrial unrest*, it is necessary to keep this living wage sacrosanct, beyond the reach of bargaining.<sup>95</sup>

Three protective targets may be discerned in this formulation: (a) the material and interior life of the worker; (b) the household; and (c) society. The *Harvester* living wage thus had both a wider conceptual reach than present wage minima, and included the ambition to simultaneously protect the ‘inner’ life of individuals and the ‘outer’ life of society via the income of the working household, which stood as symbolic of both. The breadth of the *Harvester* wage’s protective ambition reflected

<sup>90</sup> *Broken Hill Case* (n 16) 26 (Higgins J).

<sup>91</sup> *Australian Boot Trade Employees Federation v Whybrow & Co* (1910) 11 CLR 311 (*‘Whybrow’*). It should be noted, too, that until 1983, s 51(xxxv) of the *Constitution* was also interpreted to preclude federal award coverage of workers not employed in an ‘industry’; this limit was found to exclude from federal coverage many workers including clerical officers employed by state governments, firefighters and university teachers: Michael Kirby and Breen Creighton, ‘The Law of Conciliation and Arbitration’ in Joe Isaac and Stuart Macintyre (eds), *The New Province for Law and Order: 100 Years of Australian Conciliation and Arbitration* (Cambridge University Press, 2004) 98.

<sup>92</sup> The *Industrial Disputes Act 1908* (NSW) (*Industrial Disputes Act*), for example, did not exclude from its ambit persons working under a contract for labour only: at s 4.

<sup>93</sup> Goodwin and Maconachie (n 14) 63.

<sup>94</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 30 July 1903. For a discussion of the multiple public interest rationales advanced for the conciliation and arbitration system, see Richard Naughton, *The Shaping of Labour Law Legislation: Underlying Elements of Australia’s Workplace Relations System* (LexisNexis Butterworths, 2017) 55–122.

<sup>95</sup> *Broken Hill Case* (n 16) 32 (emphasis added).

an organic conception of society, a worldview which insisted on the necessary interdependence of social formations at different scales. If households were not secure and could not reliably reproduce themselves, according to this view, neither could civil society, industry or the nation.<sup>96</sup> The rationale and scope of the *Harvester* wage differed, too, from minimum wage limits set by state wages boards, which were indexed to rates paid by ‘reputable employers of average capacity’ rather than standards required for ‘civilised life’.<sup>97</sup>

Higgins’ sense of the inextricable connection between workers’ capacity for physical renewal and other vital processes was mirrored in the rationale he advanced for the living wage as a mechanism for securing the mental wellbeing of men and women. This idea reflected a social liberal conceptualisation of humanity as *homo duplex*, possessed of both physical and mental/spiritual life which could only be fully developed in and through society.<sup>98</sup> Accordingly, the ‘life’ protected by the *Harvester* wage had an interior dimension, and was a measure understood as crucial to developing and nurturing workers’ dignity, integrity and sense of citizenship as well as their physical wellbeing. These ‘mental health and development’ aims were primary, rather than secondary objectives of labour regulation; as one contemporary scholar put it, ‘the whole machinery of arbitration operates to foster the development of personality’.<sup>99</sup> Achieving the desired internal narratives of self-improvement and improved civic capability required ‘relief from materialistic anxiety’, since, as Higgins put it, once there was reasonable certainty that ‘essential material needs will be met by honest work, you release infinite stores of human energy for higher efforts, for nobler ideals’.<sup>100</sup> Absent provision for ‘improving’ resources, such as journal subscriptions, union dues, charity, church fees and sickness benefits, working class men faced inner ‘deterioration and degradation’<sup>101</sup> from the twin threats of industrial conflict and the temptations of the ‘single life’.<sup>102</sup>

For Higgins, protecting the inner lives of white male and female workers through minimum wage floors underpinned the urgent project of securing a peaceful, orderly and ‘civilised’ society. Industrial militancy could only be staunched by addressing the ‘causes of the discontent’<sup>103</sup> by ensuring that working-class men had

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<sup>96</sup> Marian Sawer, *The Ethical State? Social Liberalism in Australia* (Melbourne University Press, 2003) (*The Ethical State?*); Michael Roe, *Nine Australian Progressives: Vitalism in Bourgeois Social Thought 1890–1960* (University of Queensland Press, 1984); Marilyn Lake, *Progressive New World: How Settler Colonialism and Transpacific Exchange Shaped American Reform* (Harvard University Press, 2019); Mark Hearn, ‘Securing the Man: Narratives of Gender and Nation in the Verdicts of Henry Bournes Higgins’ (2006) 37(127) *Australian Historical Studies* 1.

<sup>97</sup> Hammond (n 58) 263.

<sup>98</sup> Peter Haeusler, ‘Progressivism and the Janus Face of “Efficient Citizenship”’: Meredith Atkinson and Australian Democracy’ (1996) 42(1) *Australian Journal of Politics and History* 24, 26.

<sup>99</sup> Clarence Northcott, quoted in Marian Sawer, ‘The Ethical State: Social Liberalism and the Critique of Contract’ (2000) 31(114) *Australian Historical Studies* 67, 85 (‘The Ethical State’).

<sup>100</sup> Henry Bournes Higgins, ‘A New Province for Law and Order: Industrial Peace through Minimum Wage and Arbitration’ (1915) 29(1) *Harvard Law Review* 13, 39.

<sup>101</sup> Henry Bournes Higgins, ‘A New Province for Law and Order: III’ (1920) 34(2) *Harvard Law Review* 105, 136.

<sup>102</sup> *Royal Commission on the Basic Wage* (Report and Evidence, 1920) 28.

<sup>103</sup> *Federated Gas Employees Industrial Union v Metropolitan Gas Co* (1921) 15 CAR 838, 873 (Powers J).

‘the essentials of food, shelter, clothing’ in line with community standards.<sup>104</sup> Industrial disorder would come to be described as a social ill equivalent in weight to the suffering caused by the Great War, according to Higgins.<sup>105</sup> A living wage and arbitration were understood as instruments for pacifying industrial conflict and providing opportunities for enhanced civic responsibility through the experience of negotiation and compromise that attached to active union involvement. The gendered division of labour was also understood as socially unifying. From their ‘appropriate’ station in the home, women could ‘soothe’ passions, discouraging men from industrial action and appealing to them to ‘Try the Courts first’.<sup>106</sup> The *Harvester* living wage was thus applied to a well-defined protective subject — the unskilled white male — on the basis of a theory which equated his wellbeing to the health of his household, workplace and wider society.

The wellbeing of employee households was thus understood as a synecdoche of societal and economic stability and productivity, rather than a category of interest that stood in opposition to the latter and required ‘balancing’ against it. Individual enterprises were not understood as requiring protection within this conception of minimum wage regulation. As a contemporary observer put it: ‘[T]o hold that an industry in general, is incapable of an increase of wages is, however, quite a different matter from saying that a particular establishment cannot stand an increase of wages.’<sup>107</sup> Rather, the ‘affordability’ of minimum wages was framed in terms of their impact on *industries* as a whole.<sup>108</sup> No exceptions were made based on employer size; rather, the categories of enterprise understood to be most vulnerable to economic non-viability as a consequence of the minimum wage were ‘the least resourceful in any trade’.<sup>109</sup>

### 3 *Employer Opposition as a Context for the Formulation of Minimum Wage Laws*

Justice Higgins’ repeated insistence that the wage was sacrosanct and applied regardless of levels of employer profit was an indication of the scale and extent of systematic employer resistance to the institutionalised subordination of contractual autonomy represented by the living wage. The *Harvester* standard, like the other government-led interventions in public health, social welfare, education and urban planning at the time, represented a fundamental challenge to the social ordering premised on *laissez-faire* liberalism.<sup>110</sup> As Higgins explained in 1916, the nation state, in his view, was

a community of human beings organised on the basis of mutual service. Its essence is that its members surrender their title to act exactly as they please and *subordinate themselves to laws designed to promote the general happiness and welfare*. Law defines the rights and duties of individuals to one another and to the community as a whole. It substitutes right and justice and

<sup>104</sup> Higgins, ‘A New Province for Law and Order: II’ (n 89) 148.

<sup>105</sup> *Ibid* 13.

<sup>106</sup> Hearn (n 96) 21.

<sup>107</sup> Hammond (n 58) 281.

<sup>108</sup> *Broken Hill Case* (n 16) 32 (Higgins J).

<sup>109</sup> Hammond (n 86) 603.

<sup>110</sup> For an analysis of the far-reaching impact of the circle of social liberals who exercised a formative role in Australian nation-building (including Higgins), see Sawyer, ‘The Ethical State’ (n 99) 78.



the principle of service, for competition and brute force as the basis of social life.<sup>111</sup>

This view was predicated on an explicit rejection of employer prerogative, individualism, contract and competition, which were social mechanisms that Higgins viewed as arcane relics of a discredited, 19<sup>th</sup> century social order.<sup>112</sup> A sense of fundamental ideological division in world views was apparent in early Conciliation and Arbitration Court hearings, with Higgins evincing contempt for employer arguments that presented economic theories of supply and demand as if they were ‘more inexorable and inevitable’ than ‘the law of gravitation’.<sup>113</sup> Notwithstanding successful constitutional challenges in the 1930s, the ambitions of the architects of the arbitration framework to provide a comprehensive remedial system for employees in the event of underpayment were upheld by the High Court for over two decades. In 1914, for instance, the High Court confirmed that common law contract remedies were unavailable to parties covered by the arbitration framework, since the system was a ‘new scheme of public policy’ in which the right and remedy are ‘inseparable’.<sup>114</sup>

The asserted sanctity of the living wage should thus be understood as related to the nature and extent of employer opposition to it and the apparatus of arbitration of which it was a part. At the employer association level, opposition was intense, fundamental and sustained. The slogan ‘freedom of contract’ was ‘emblazoned on the scroll of every Employers Association’ prior to the passage of the *1904 Act*.<sup>115</sup> Subsequently, employers called for a return to a ‘clear, open, economic ring’ in relation to employment governance,<sup>116</sup> and prosecuted political campaigns against state interference and all forms of joint regulation with unions.<sup>117</sup> Employer associations also pressed legal challenges to arbitration (backed by a reserve fund of £5,000 established by the Central Council of Employers), the *Harvester* decision and subsequent decisions.<sup>118</sup> Employers discredited arbitration on the basis that it represented an illegitimate interference with their felt entitlement as businessmen and property owners, ‘taking business entirely out of the hands of the man who owns it’ and ‘put[ting] it under the control of a trio of men, one of whom is a lawyer and the others of whom are content to receive salaries of £700 for their complete occupation’.<sup>119</sup> While insisting on the sacrosanct nature of the living wage, Higgins reminded employers that the system enabled them to retain the freedom to choose their employees, new machines, and methods and to make the most of the advantages of locality and their superior knowledge.<sup>120</sup> Higgins acknowledged that award wages

<sup>111</sup> Sawyer, *The Ethical State?* (n 96) 85 (emphasis added).

<sup>112</sup> *Ibid* 83.

<sup>113</sup> *Federated Engine Drivers and Firemen’s Association of Australasia v The Broken Hill Proprietary Co Ltd* (1911) 5 CAR 9.

<sup>114</sup> *Josephson v Walker* (1914) 18 CLR 691, 702–3.

<sup>115</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 12 August 1903 (William Sawers).

<sup>116</sup> David Plowman, ‘Forced March: The Employers and Arbitration’ in Stuart Macintyre and Richard Mitchell, *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration 1890–1914* (Oxford University Press, 1989) 251.

<sup>117</sup> Macintyre and Mitchell (n 68) 16.

<sup>118</sup> *Whybrow* (n 91); Plowman (n 116) 138–47.

<sup>119</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 12 August 1903 (Bruce Smith).

<sup>120</sup> Higgins, ‘A New Province for Law and Order: II’ (n 89) 21.

could be complicated to calculate correctly, and sympathised with employers who potentially faced the ‘ruinous’ prospect of an accumulation of stale claims for non-deliberate underpayments over years. Such challenges were adequately addressed, Higgins argued, by measures which capped the time period available to employees to obtain arrears at six years.<sup>121</sup> Further, Higgins argued that the living wage constituted an *advantage* to employers, not merely in terms of reducing industrial conflict but also as an instrument for securing the supply of willing labour in the context of rural labour shortages,<sup>122</sup> and in preventing the growth of ‘parasitic enterprises’.<sup>123</sup> Some individual employers agreed, such as Harris Weinstock, a 1909 manufacturing employer who observed, in response to Victorian wages board minima, that the measure transformed Victorian manufacturing, ensuring that every employer ‘starts out on an even basis’ and was required to ‘exercise his managerial ability along other lines than that of “squeezing” labour’.<sup>124</sup>

#### 4 *Enforcement of Minimum Wage Laws*

Minimum wages were enforced under the arbitration system using collective, rather than individual mechanisms, that, through their reliance on and stimulation of constant union participation, served to reinforce the decentering of contract law as the conceptual foundation for industrial relations. Until 1928, federal powers of enforcement were limited to the registrar of the court and the union representing the member affected by the breach.<sup>125</sup> These mechanisms replaced the 19<sup>th</sup> century *laissez faire* system which relied on a combination of employee-initiated litigation for breach of contract, prosecutions by inadequately resourced labour inspectorates pursuant to Factory and Shops legislation,<sup>126</sup> and cultural pressures of ‘moral suasion’ and philanthropic disapproval generated by the public revelation of ‘evils’ inflicted against women and children in Royal Commissions and public hearings.<sup>127</sup> These measures were, by the mid-1880s, widely viewed as unsatisfactory in comparison to laws that entrenched a general minimum entitlement for employees.<sup>128</sup> State systems did often include criminal penalties, including imprisonment for periods not exceeding three months for award breaches that were ‘wilful acts’,<sup>129</sup> however it was widely recognised that unions, together with public sentiment supporting wage minima, were crucial to effective enforcement. As one observer put it,

even a large force of inspectors could not learn of all the supposed violations if they were not brought to their attention by some responsible agency or organization. This the trade union undertakes to do ... it is doubtful if a full

<sup>121</sup> *Josephson v Walker* (n 114).

<sup>122</sup> *Rural Workers Union* (n 84) 78 (Higgins J).

<sup>123</sup> *Broken Hill Case* (n 16) 32 (Higgins J).

<sup>124</sup> *Hammond* (n 86) 624.

<sup>125</sup> *Bennett* (n 14) 136. As Bennett observes, no inspectors were actually appointed until 1934.

<sup>126</sup> *Quinlan and Sheldon* (n 41) 13.

<sup>127</sup> *Royal Commission on Employees in Shops: Report on the Operation of the Victorian Factory Act 1874* (Report, 1884) 5.

<sup>128</sup> Stuart Macintyre, *Winners and Losers: The Pursuit of Social Justice in Australian History* (Routledge, 1985) 47–9.

<sup>129</sup> See, eg, *Industrial Disputes Act* (n 92) s 43.

compliance with a wages board determination is anywhere secured without an organisation of the workers to see to its enforcement.<sup>130</sup>

The new system hinged on compulsory entitlement and recognition for registered trade unions and employer associations with the capacity to activate processes of conciliation and arbitration themselves.<sup>131</sup> Unions' pre-eminent role in award enforcement was a facet of their fundamental role in the system: as entities with unilateral access to conciliation and arbitration who could effectively force employers to the bargaining table.<sup>132</sup> Powers of entry and inspection were integral to the meaningful exercise of rights and responsibilities by these actors. The *1904 Act* granted wide powers in this respect, allowing every person authorised in writing by the President or Registrar the ability to enter any building or premises in respect of which any industry was carried on, any award had been made or 'any offence against the Act' suspected, and inspect and view the work, material, machinery or appliances for the purposes named in the authority.<sup>133</sup> Following any instance of non-compliance, regardless of the seriousness of the act and whether it was deliberate or accidental, unions had the capacity to bring a 'dispute' (which could be a 'paper dispute' involving no physical manifestation of industrial action), which enlivened the Court's jurisdiction to resolve the matter. Such resolution would usually be by conciliation and occasionally by arbitration, followed by a rapid return to work.<sup>134</sup> Even though industrial action undertaken pursuant to this process was technically unlawful (potentially involving the commission of industrial torts, breach of contract and/or the breach of express terms of the legislation and/or awards), legal sanctions were very rarely brought in relation to these activities in practice.<sup>135</sup> Enforcement of the tribunal's determination was inherently 'strict', in the sense that either party, if they were dissatisfied with the way an award was being applied, could trigger a dispute to the tribunal that would then be quickly resolved. Unions' ability to access workplaces to represent employees and inspect books without the need to demonstrate a suspected breach of conditions meant that they exercised a preventative influence in relation to employer non-compliance that is difficult to represent empirically, although contemporary historical sources confirm the significance of this informal role.<sup>136</sup> According to an observer of the wages board system writing in 1915, 'the influence of the trades unions in securing information concerning violations of the law and reporting these violations to the factory inspectors has been one of the most important aides in securing stricter compliance

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<sup>130</sup> Hammond (n 86) 607–8.

<sup>131</sup> Creighton (n 49) 844. The encouragement of representative bodies for employers and employees was a stated object of the *1904 Act* (n 57), s 2(vi) of which made it a priority to 'encourage the organisation of representative bodies of employers and employees'.

<sup>132</sup> Mark Bray and Andrew Stewart, 'From the Arbitration System to the Fair Work Act: The Changing Approach in Australia to Voice and Representation at Work' (2013) 34(1) *Adelaide Law Review* 21, 25.

<sup>133</sup> *1904 Act* (n 57) s 41.

<sup>134</sup> Creighton (n 49) 855.

<sup>135</sup> *Ibid.*

<sup>136</sup> Under the *Workplace Relations Act* (n 29), union rights of entry, inspection and interview could only be exercised for the purposes of investigating specific breaches of terms of the Act or an instrument: Ingrid Landau, Sean Cooney, Tess Hardy and John Howe, *Trade Unions and the Enforcement of Minimum Employment Standards in Australia* (Report, 2014) 15.

with the law.<sup>137</sup> This writer's observation of three exceptional situations where he perceived that the law was routinely not enforced — Chinese furniture manufacturing, workplaces in remote regions such as Tasmania where there was a 'lack of public concern for workers sweating' and in instances where a worker's categorisation as an apprentice or improver was contested — invites the inference that unionised workplaces in urban areas were less likely to be afflicted by systematic patterns of non-compliance in relation to adult workers.<sup>138</sup>

## B *Early 21<sup>st</sup> Century*

### 1 *The Lives Protected by Contemporary Wage Minima*

Today's wage minima are only partially justified in terms of worker protection.<sup>139</sup> The national minimum wage and modern award wages are intended to provide a 'safety net of fair minimum wages'<sup>140</sup> in support of collective bargaining rather than a 'living wage', within the *Fair Work Act*'s general objective of creating a 'balanced framework for cooperative and productive workplace relations'.<sup>141</sup> Wage minima apply broadly, with all national system employees being covered by the national minimum wage or a modern award. The 'safety net' concept was first introduced in the objects provisions of the 1993 amendments to the *Industrial Relations Act 1988* (Cth) to express the function of the award system.<sup>142</sup>

In setting the current safety net, the FWC must take into account a wide range of matters.<sup>143</sup> While one of those matters comprising the minimum wages objective — 'the relative living standards and needs of the low paid' — may be understood as partial recognition of the living wage principle, s 284(1) of the *Fair Work Act* profoundly departs from the Higgins' formulation in its implication that the 'performance and competitiveness of the national economy' is an objective at odds with, rather than integrally congruent with, strong social protections for workers. The FWC is required to consider matters that relate to particular characteristics of the national economy: 'productivity, business competitiveness and viability, inflation and employment growth' (s 284(1)(a)) and 'employment growth, inflation and the sustainability, performance and competitiveness of the national economy' (s 134(1)(h)). The Act also enshrines the imperative to promote particular practices

<sup>137</sup> Hammond (n 86) 619.

<sup>138</sup> The dynamics of non-payment of wage minima to Chinese furniture manufacturing workers between 1880 and 1930 are discussed in Peter Gibson, 'Australia's Bankrupt Chinese Furniture Manufacturers, 1880–1930' (2018) 58(1) *Australian Economic History Review* 87.

<sup>139</sup> Federal minimum wage laws have only ever applied to employees, excluding other types of workers such as independent contractors. An exception to this is found in cl F.5.8 in sch F of the Textile, Clothing, Footwear and Associated Industries Award 2020 which provides that award minima apply to certain self-employed outworkers. Further, the Albanese Labor Government has committed to 'extend[ing] the powers of the Fair Work Commission to include "employee-like" forms of work, allowing it to make orders for minimum standards for new forms of work, such as gig work': see Australian Government, 'Jobs and Skills Summit: Outcomes' (1–2 September 2022) 6.

<sup>140</sup> *Fair Work Act* (n 19) s 284.

<sup>141</sup> *Ibid* s 3.

<sup>142</sup> Section 7 of the *Industrial Relations Reform Act 1993* (Cth) introduced new objects to pt VI of the *Industrial Relations Act 1988* (Cth), including a reference to a safety net in s 88A(b).

<sup>143</sup> See the minimum wage objective in *Fair Work Act* (n 19) s 284(1) and the modern awards objective in s 134(1).

such as ‘the need to promote flexible modern work practices and the efficient and productive performance of work’ (s 134(1)(d)) and to consider ‘the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden’ (s 134(1)(f)). These clauses invert the positive nexus drawn by Higgins between employment regulation and business productivity and efficiency, constructing them instead as inherently opposed objectives. They also invite inquiry into the impact of wage minima at a level that is smaller than the Higgins’ scale of an entire industry and is instead concerned with the conduct and viability of ‘business’, a term that does not exclude approaches that emphasise smaller aggregations of individual enterprises.<sup>144</sup>

There is no requirement for the FWC to consider the needs of workers in general, much less their households, in an unqualified way in setting wage minima. Workers who do not fall within the circumscribed categories of ‘the low paid’, junior employees, trainees and/or employees with a disability do not receive mandated consideration in terms of their general needs and interests. The *Fair Work Act* requires the FWC to consider narrower dimensions of worker need and to do so in prescribed ways. The need for ‘social inclusion’ is to be addressed through ‘workforce participation’. The performance of work during unsocial and non-standard hours is framed as a disutility requiring ‘additional remuneration’ as compensation rather than, as previously, matters where employees stood in a position of vulnerability to employers, in need of protection from potentially ‘unreasonable or unjust demands’.<sup>145</sup> The character and determinants of ‘business competitiveness and viability’, are open-ended considerations under the terms of s 284(1)(a), with no prescription as to the bases the FWC can consider for what enables a business to be competitive and viable. The FWC draws extensively on expert evidence and research reports to calculate adjustments to the National Minimum Wage, which accord a significant role to economic quantitative and material indicators, such as productivity, digital activity, hours worked, labour turnover, inflation, the consumer price index, underemployment, household spending, financial wellbeing, pay gap statistics, and apprentice and trainee outcomes.<sup>146</sup>

Some race-based exclusions from minimum wage law protection potentially remain in practice — despite the 1958 repeal of the *Immigration Restriction Act*, the illegality of discrimination against migrants based on their race since the *Racial Discrimination Act 1975* (Cth)<sup>147</sup> and the absence of legislated exclusions from state-mandated minimum wages based on race. Despite the FWO’s declarations that the

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<sup>144</sup> In the *Four Yearly Review of Modern Awards, Penalty Rates* [2017] FWCFB 1001, the Full Bench of the FWC noted that impacts of award reductions need not apply ‘uniformly’ across all businesses in the hospitality and retail sector and ‘would depend on the circumstances applying to individual businesses’: at 32.

<sup>145</sup> *Fair Work Act* (n 19) s 134(1)(da). Cf *Judgement re Five Day Working Week* (1945) 54 CAR 34.

<sup>146</sup> Fair Work Commission, *Research Reference List: Annual Wage Review 2021–22* (Report, 6 June 2022).

<sup>147</sup> However, as Tham et al argued, it is unclear whether this extends to protection against discrimination based on migrant status: Joo-Cheong Tham, Iain Campbell and Martina Boese, ‘Why is Labour Protection for Temporary Migrant Workers So Fraught? A Perspective from Australia’ in Joanna Howe and Rosemary Owens (eds), *Temporary Labour Migration in the Global Era: Regulatory Challenges* (Hart Publishing, 2016) 173, 181.

*Fair Work Act* applies to all employees regardless of visa status,<sup>148</sup> temporary migrants who worked in breach of their visa conditions, or remained in Australia after their visa expired, could be excluded by common law doctrine.<sup>149</sup> The reports of several government inquiries recommended that the Commonwealth Parliament remedy this situation by confirming in legislation that minimum wage laws apply equally to all employees regardless of migration status.<sup>150</sup> However, while one such private member's Bill was introduced to Parliament in 2016,<sup>151</sup> this exclusion of some migrant workers from minimum wage protection was not remedied until the *Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023* (Cth) was passed in June 2023.<sup>152</sup> Many temporary migrant workers are also practically excluded from the benefit of minimum wages through the operation of migration policies that reduce their labour market power by creating dependence on employers — restricting their ability to exit or to report non-compliant employers.<sup>153</sup> For instance, working holiday makers seeking to extend their visas to a second year by working for 88 days in a primary industry such as horticulture, require documentation from employers such as pay slips, and are commonly underpaid,<sup>154</sup> and workers on Temporary Skill Shortage visas (previously 457 visas) rely on their employers' continuing sponsorship for both ongoing employment and the right to remain in the country.<sup>155</sup> Further, Indigenous workers have been identified as particularly vulnerable to underpayment of minimum wages due to factors such as understanding of rights, access to services and discrimination.<sup>156</sup>

While state-mandated minimum wages are no longer differentiated on the basis of gender and are calculated on an individual, rather than 'household' basis, practical gender-based disparities persist. As modern awards prescribe minimum wages, intended as a safety net for collective bargaining, rather than setting 'paid rates', actual wages depend on enterprise-level bargaining above the safety net. Australia's labour market has become horizontally segregated on gender lines, with wages paid in female-dominated industries being lower than those paid in male-dominated industries.<sup>157</sup> Further, women have been identified as at greater risk of

<sup>148</sup> Fair Work Ombudsman, 'Gold Coast Restaurant Operators Penalised \$225,500' (Media Release, 7 December 2021).

<sup>149</sup> Stephen Clibborn, 'Why Undocumented Workers Should have Workplace Rights' (2015) 26(3) *The Economic and Labour Relations Review* 465.

<sup>150</sup> Productivity Commission (n 19) Recommendation 29.4; Senate Standing Committee on Education and Employment (n 12) Recommendation 23; Attorney-General's Department (Cth), 'Report of the Migrant Workers Taskforce' (7 March 2016) Recommendation 3.

<sup>151</sup> Fair Work Amendment (Protecting Australian Workers) Bill 2016 (Cth).

<sup>152</sup> The *Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023* (Cth) inserted in the *Fair Work Act* (n 19) s 40B, which states, 'For the purposes of this Act, any effect of the *Migration Act 1958*, or an instrument made under that Act, on the validity of a contract of employment, or the validity of a contract for services, is to be disregarded.' Note also *Industrial Relations Act 1979* (WA) s 84AA — inserted by the *Industrial Relations Legislation Amendment Act 2021* (WA) — which allows the Industrial Magistrate's Court to deal with an illegal employment contract as if it was valid, in relation to a contravention of a Western Australian State award.

<sup>153</sup> Wright and Clibborn (n 4).

<sup>154</sup> Howe et al (n 12).

<sup>155</sup> Boucher (n 11).

<sup>156</sup> Senate Economic References Committee (n 12) 32.

<sup>157</sup> Meraiah Foley and Rae Cooper, 'Workplace Gender Equality in the Post-Pandemic Era: Where To Next?' (2021) 63(4) *Journal of Industrial Relations* 463, 465.

unlawful underpayment due to a range of factors including their over-representation in casual and other insecure work.<sup>158</sup>

## 2 *The Rationale for Contemporary Wage Minima*

The rationale for the minimum wage under the Fair Work system advanced by the Rudd Government in 2007 was to provide part of a guaranteed ‘safety net of decent, relevant and enforceable minimum wages and conditions for working Australians’,<sup>159</sup> and the *Fair Work Act* aimed ‘to achieve productivity and fairness through enterprise-level collective bargaining underpinned by the guaranteed safety net’.<sup>160</sup> That is, it was not a living wage, but a mandated minimum standard underpinning a system of enterprise bargaining to be undertaken in good faith. In contrast to the overtly moralising language and objectives of the *Harvester* wage, which aimed at protecting and improving the character of the male working-class breadwinner, the ‘safety net’ concept is instead passive and asocial. It relies on an idea of labour law which ‘catches’ a subset of workers in particularly needy circumstances, rather than contributing to the rebalancing of power between employers and employees that arises from the employment relationship itself. As noted above, the current minimum wage safety net requires the FWC to simultaneously consider human needs on a qualified basis (such as ‘social inclusion’), and economic indicia (‘the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth’).<sup>161</sup> The imperative to simultaneously consider social and economic matters is not recent, dating back to the addition of employer ‘capacity to pay’ to basic wage calculations in the 1930s. The current composition of matters in s 284(1)(a) of the *Fair Work Act* also stands in continuity with the equivalent section of the *Workplace Relations Act 1996* (Cth), which required the Australian Industrial Relations Commission in performing its functions (including setting the minimum wage) to take into account ‘the public interest’ and have regard to

the state of the national economy and the likely effects on the national economy of any order that the Commission is considering, or is proposing to make, with special reference to likely effects on the level of employment and on inflation.<sup>162</sup>

In applying the statutory objectives, the FWC has noted that they ‘are very broadly expressed and do not necessarily exhaust the matters which the [Expert] Panel might properly consider to be relevant’.<sup>163</sup> Applying them involves an ‘evaluative exercise’, negotiating some overlap and tension between them and

<sup>158</sup> Senate Standing Committee on Education and Employment (n 12).

<sup>159</sup> Kevin Rudd and Julia Gillard, *Forward with Fairness: Labor’s Plan for Fairer and More Productive Workplaces* (Australian Labor Party, 2007) 6.

<sup>160</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2008, 11190 (Julia Gillard, Acting Prime Minister).

<sup>161</sup> *Fair Work Act* (n 19) s 284(1)(a).

<sup>162</sup> *Workplace Relations Act* (n 29) s 103(1)(b). That Act set as one of its principal objects the provision of ‘an economically sustainable safety net of minimum wages and conditions’ (s 3(c)) thus explicitly qualifying the protective scope of the safety net on an economic basis. For a comprehensive analysis of the public interest concept in Australian labour law history, see Naughton (n 94).

<sup>163</sup> *Annual Wage Review 2021–22* [2022] FWCB 3500 [22].

attaching ‘no particular primacy’ to any. The FWC rejected ‘a mechanistic or decision-rule approach to wage fixation’ as the weighting given to each statutory objective is dependent on particular social and economic contexts.<sup>164</sup> It has resisted attempts by the Australian Council of Trade Unions to revisit ‘living wage’ considerations of workers’ needs, in favour of maintaining a ‘balancing act’ focused on proof that the economy has unutilised capacity to pay.<sup>165</sup> Further, because the FWC’s annual wage reviews do not take account of widespread employer non-compliance in certain industries, they are disconnected from the reality in those industries. As Healy and colleagues argue, this approach risks sapping the FWC’s credibility in wage setting.<sup>166</sup>

Despite the multiple social and economic objects for minimum wage laws in the current Act, some elected federal state actors have placed strong emphasis on economic considerations, and in particular on the narrow objective of employment creation. In his second reading of the Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Bill 2020 (‘2020 IR Bill’), then Attorney-General, Christian Porter, stated that the Bill’s aim was ‘to help Australia’s recovery from COVID-19 by supporting productivity, jobs and economic growth’ with ‘one simple goal, that being to create jobs’.<sup>167</sup> Reforms introduced to this end focused on increasing the quantity of jobs, in support of business needs, rather than the quality of jobs in support of minimum wages for workers.<sup>168</sup> The 2020 IR Bill sought to address the problem of employer non-compliance with minimum wage laws by including increased maximum fines and criminal sanctions for the most egregious instances of ‘wage theft’. However, despite bipartisan support for those parts of the Bill, the Government withdrew them.<sup>169</sup> In contrast, the Albanese Labor Government has maintained a policy to increase wages. Its main intervention in 2022 was reform of the Fair Work collective bargaining system in the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth). The Act did not include the new government’s promised criminal sanctions for ‘wage theft’, which were delayed to an anticipated additional tranche of amendments to the *Fair Work Act* in 2023. Instead, it introduced minor reforms aimed at addressing employer non-compliance such as making unlawful the advertising of jobs at below-minimum wages.<sup>170</sup> The new government also submitted to the FWC’s 2021–22 Annual Wage Review, in the context of 5.1% inflation, that the FWC should ensure ‘that the real wages of Australia’s low-paid workers do not go backwards’.<sup>171</sup>

Despite the technical framing of wage minima considerations under the *Fair Work Act*, a sense of moral distinction between ‘good’ and ‘bad’ employers, and a notion that it is proper for minimum wage laws to protect and foster the former and sanction the latter has become apparent in recent commentary by Commonwealth

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<sup>164</sup> Ibid [5]–[8].

<sup>165</sup> Healy et al (n 47) 164.

<sup>166</sup> Ibid 175.

<sup>167</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 9 December 2020, 11016.

<sup>168</sup> Stephen Clibborn, ‘Australian Industrial Relations in 2020: COVID-19, Crisis and Opportunity’ (2021) 63(3) *Journal of Industrial Relations* 291 (‘Australian Industrial Relations in 2020’).

<sup>169</sup> Stewart et al (n 2).

<sup>170</sup> *Secure Jobs, Better Pay Act* (n 20) pt 25.

<sup>171</sup> Australian Government, *New Australian Government Submission to the Fair Work Commission Annual Wage Review 2022* (3 June 2022) 2.



and state actors reflecting on enforcement matters. The federal Attorney-General's Department drew this distinction in its 2019 discussion paper seeking submissions on 'strengthening penalties for non-compliance':

[T]he overwhelming majority of employers who are trying to do the right thing are competing against those that underpay or exploit workers. The Government considers it unacceptable that there is a persistence of underpayment and exploitation behaviours by a small number of employers.<sup>172</sup>

In the State of Victoria, where criminal sanctions were introduced to address employer non-compliance, exclusions apply to employers who make 'honest mistakes' or 'exercise due diligence in paying wages and employee entitlements'.<sup>173</sup>

At the time of writing, it remains too early to assess whether the new federal Labor government will take a different approach. Its one published policy for addressing employer non-compliance with minimum wage laws appears to maintain the focus on punishing 'bad' employers for 'wage theft' with criminal sanctions.<sup>174</sup> There are also indications of continued distinguishing of 'good' small business owners in the defence of horticulture farmers by the Minister for Employment and Workplace Relations, Tony Burke, who claimed that

some of the worst examples of wage theft were coming from that exact sector, not because of the farmers themselves but because of the labour hire companies that were going through rorting the systems. The farmers thought they were paying for decent wages ...<sup>175</sup>

However, in a potentially significant departure from previous government discourse, when announcing plans to introduce legislative reforms in 2023, Burke publicly recognised a category of non-compliant employers as a target for enforcement, additional to deliberate wage thieves and the honestly inadvertent, being those who 'were reckless to the extent of really not making an effort to do the proper checks and they had the capacity to do so'.<sup>176</sup>

Thus, applied too strictly, minimum wage laws threaten the good reputation of business owners and wider social prosperity. The simplistic representation of employer non-compliance with minimum wage laws as binary — deliberate or accidental — ignores other potential contributing factors such as the adequacy of business efforts to comply. By assuming that minimum wage law complexity is a major contributor to employer non-compliance, this view prioritises the convenience of business over the protection of workers' income. The binary approach, together with the assumption that only a small minority of employers breaches minimum wage laws, also gives licence to governments to target their policy responses narrowly at the worst cases of deliberate non-compliance.

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<sup>172</sup> Attorney-General's Department (Cth), 'Improving Protections of Employees' Wages and Entitlements: Strengthening Penalties for Non-Compliance' (Discussion Paper, 19 September 2019) 2.

<sup>173</sup> Daniel Andrews, 'New Laws to Crack Down on Wage Theft' (Media Release, 18 March 2020).

<sup>174</sup> Australian Labor Party (n 27).

<sup>175</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 24 November 2022, 3498.

<sup>176</sup> Tony Burke, 'Address: National Press Club' (Speech, National Press Club, 1 February 2023).

### 3 *Employer Opposition as a Context for the Formulation of Minimum Wage Laws*

With few exceptions,<sup>177</sup> there is little explicit contemporary argument for ‘freedom of contract’ as a principle for opposing minimum wage regulation per se. Rather, employers oppose the removal of practical freedoms to pay below legal minimum wages that they currently enjoy. Employer opposition to wage minima now occurs through the discourse of undue legal ‘complexity’ and potential for unforeseen consequences from overly rigid enforcement. Employers argue that strict enforcement may cause grave social and economic injury, endangering the reputation of business owners through no fault of their own. Just as the interests, needs and character of the working-class household were framed by Justice Higgins as synonymous with society, within this discourse an association is drawn between the viability of an individual business and the viability and prosperity of wider society. The National Farmers’ Federation argued, unsuccessfully,<sup>178</sup> against proposed amendments to the Horticulture Award 2020 imposing a minimum wage floor under piece rate arrangements, claiming

the risk of putting a minimum hourly wage floor price on piecework rates is that growers will see productivity and the pool of suitable workers drop<sup>179</sup> [and] you’ll just be driving a whole bunch of growers and small growers out of business and out of the economy.<sup>180</sup>

This was in the context of ongoing calls by horticulture employer representatives to increase temporary migration to address claimed labour shortages, and widespread underpayment of wages for temporary migrants working in the industry.<sup>181</sup>

Business representatives have resisted proposals to increase enforcement of minimum wage laws, arguing that doing so would jeopardise business viability and, consequently, Australia’s wellbeing. They have made this argument consistently since the 2015 national media exposé of 7-Eleven businesses<sup>182</sup> brought underpayment of minimum wages into the national spotlight. For instance, the Australian Chamber of Commerce and Industry (‘ACCI’) emphasised the shared interest of business and broader society, arguing:

When Australian businesses are growing, creating more jobs and employing more people, the entire community benefits. ACCI therefore strongly urges

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<sup>177</sup> HR Nichols Society, Submission No 74 to Productivity Commission, *Inquiry into Executive Remuneration* (5 June 2009); Australian Mines & Metals Association, Submission No 19 to House of Representatives Standing Committee on Education and Employment, *Fair Work Amendment (Tackling Job Insecurity) Bill 2012* (March 2013); Frank Chung, “‘Low-Paid Work Provides Dignity’: MPs Urged to Scrap \$19.49 Minimum Wage, Unions Slam “Appalling” Push”, *news.com.au* (online, 20 August 2019) <<https://www.news.com.au>>.

<sup>178</sup> *Australian Workers Union* [2022] FWCFB 4.

<sup>179</sup> An interesting claim that imposing a minimum wage floor, but no ceiling, would discourage workers from seeking employment: Cait Kelly, ‘Australian Farm Workers Entitled to Minimum Wage in Major Industry Shake-Up’, *The Guardian* (online, 4 November 2021) <<https://www.theguardian.com/australia-news>>.

<sup>180</sup> Kath Sullivan, ‘Labor Picks Fight with Farm Piece Rates in a Move Critics Say Could Drive Producers to the Wall’, *ABC News* (online, 19 March 2021) <<https://www.abc.net.au/news>>.

<sup>181</sup> Howe et al (n 12).

<sup>182</sup> ‘VIDEO: 7-Eleven: The Price of Convenience’, *Four Corners* (ABC, 31 August 2015) <<https://www.abc.net.au/news>>.

caution against changes to our workplace compliance regime, such as the introduction of criminal sanctions for underpayment, that would make it harder to do business in Australia.<sup>183</sup>

The whole community benefits when businesses grow and employ more staff. Conversely, if employers hold back from hiring or shut up shop because they are concerned about the risk they face of imprisonment, it will adversely affect the entire community.<sup>184</sup>

Similarly, the National Farmers' Federation resisted increased enforcement, claiming that 'undue restraints on business decision-making impede growth and innovation, while complexity drives up compliance costs. These issues need to be addressed to support the future competitiveness of the agriculture sector and the Australian economy.'<sup>185</sup>

Some employers went as far as calling for an amnesty, protecting them from penalty for breaching wage laws. One restaurateur said:

The legislation is in need of serious reform ... It is outdated, convoluted and complex. It is almost impossible for even the most professional organisation to be totally compliant, but hitting employers with a big stick is not going to solve the problem ... [A]llow employers to make adjustments without fear of being publicly attacked or fined.<sup>186</sup>

The Woolworths Group, after admitting to millions of dollars in underpaid wages, supported this notion of an amnesty from penalty for employers who have breached minimum wage laws:

We would support the notion of access to a 'Safe Harbour' regime, in which companies have the opportunity to remedy inadvertent underpayments in a timely manner without the threat of punitive sanction. Any system should ultimately motivate individuals and organisations to do the right thing, and for impacted workers to be paid back.<sup>187</sup>

The Business Council of Australia even suggested that the government provide tax incentives for small businesses to encourage them to comply with wage laws:

Employers should wherever possible review and update their payroll systems to ensure they are adequate. The Government should consider measures to encourage this process, for example by providing tax incentives for smaller businesses.<sup>188</sup>

A consistent theme in industry association and employer submissions to government inquiries is the claim that the majority of cases of employer non-

<sup>183</sup> Australian Chamber of Commerce and Industry, Submission to Attorney-General's Department (Cth), *Improving Protections of Employees' Wages and Entitlements: Strengthening Penalties for Non-Compliance* (October 2019) ii.

<sup>184</sup> Australian Chamber of Commerce and Industry, 'Compliance Changes Must Not Put Business at Risk' (Media Release, 8 December 2020).

<sup>185</sup> National Farmers' Federation, Submission No 223 to Productivity Commission, *Inquiry into the Workplace Relations Framework* (13 March 2015) 6.

<sup>186</sup> Dani Valent, 'Restaurateurs Call for 'Amnesty' to Deal with Wage Compliance', *The Sydney Morning Herald* (online, 3 October 2019) <<https://www.smh.com.au>>.

<sup>187</sup> Woolworths Group, Submission No 71 to Economic References Committee, *Inquiry into the Unlawful Underpayment of Employees' Remuneration* (undated).

<sup>188</sup> Business Council of Australia, Submission No 69 to Senate Economics References Committee *Inquiry into the Unlawful Underpayment of Employees' Remuneration* (March 2020) [2.4].

compliance with wage laws involve honest businesses making unavoidable errors caused by the complexity of wage laws. They argue that a distinction must be drawn in enforcing minimum wage laws, including applying penalties, between the assumed majority of non-compliant employers who make genuine accidental errors and the minority who deliberately, egregiously and systematically underpay,<sup>189</sup> claiming, in the case of the National Farmers' Federation, that 'the overwhelming number of farmers take enormous pride in being fair employers and providing rewarding jobs to Australian and foreign workers'.<sup>190</sup> They urge that 'employers should not be at risk of being labelled a "thief" for such mistakes'.<sup>191</sup> Employer representatives make this argument about small businesses in particular because they lack 'sufficient resources to invest in systems that can prevent errors',<sup>192</sup> calling for a system that allows setting of penalties that 'address the special needs and circumstances of small and medium businesses whilst at the same time enabling the judiciary to impose sufficiently severe penalties on major institutions'.<sup>193</sup>

Industry associations sought to extend this argument — that most employers who breach minimum wage laws are innocent victims of complex wage laws — to avoid significant increases in state enforcement measures. They resisted proposals to increase enforcement efforts and penalties, including criminalising some deliberate forms of 'wage theft', claiming that 'implementing criminal penalties for wage underpayments would discourage investment, entrepreneurship and employment growth'.<sup>194</sup>

Therefore, employers argue, the implied objective of minimum wage laws is to protect and ensure respect for the autonomy of the business owner, as the ultimate source of 'jobs' and thus wider social prosperity. As the ACCI expressed it, 'nobody wins when a business closes because of the size of a fine or because the employer has been imprisoned'.<sup>195</sup>

#### 4 *Enforcement of Minimum Wage Laws*

Individual workers, whether represented or not, may recover unpaid wage debts. The framework no longer ties disputes to union recognition or their co-enforcement role. Instead, the primary burden for enforcement is on the FWO whose statutory functions include promoting harmonious, productive, cooperative workplace relations, and compliance, and which has significant discretion in allocating its resources to perform these functions through a range of support and enforcement

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<sup>189</sup> Restaurant and Catering Australia, Submission to Attorney-General's Department, *Improving Protections of Employees' Wages and Entitlements: Strengthening Penalties for Non-Compliance* (October 2019); Woolworths Group (n 187); Ai Group, Submission No 62 to Economics References Committee, *Inquiry into the Unlawful Underpayment of Employees' Remuneration* (6 March 2020).

<sup>190</sup> National Farmers' Federation, 'Piece Work Rate Decision Threatens to Drive Horticulture's Best Workers Away' (Media Release, 4 November 2021).

<sup>191</sup> Ai Group (n 189) 3.

<sup>192</sup> Business Council of Australia (n 188) 1.

<sup>193</sup> National Retail Association, Submission to Attorney-General's Department, *Improving Protections of Employees' Wages and Entitlements: Strengthening Penalties for Non-Compliance* (2019) [4.2.8].

<sup>194</sup> Ai Group (n 189) [6a].

<sup>195</sup> Australian Chamber of Commerce and Industry (n 184) (emphasis added).

actions.<sup>196</sup> However, the agency has never been adequately funded to succeed in that role.<sup>197</sup>

Unions no longer hold a formal place at the centre of Australia's industrial relations system, lacking their former capacity as parties to awards.<sup>198</sup> While the *Fair Work Act* still recognises unions' enforcement role, three decades of neoliberal reform of Australia's industrial relations system have constrained unions' capacity to effectively enforce minimum wage laws. The *Fair Work Act* restricts unions' right of entry to workplaces, limiting their ability to organise and to enforce minimum wage rights.<sup>199</sup> Union density has dropped dramatically, from 41% in 1992 to 12.5% in 2022.<sup>200</sup> Unions may only exercise rights of entry if they give at least 24 hours' notice and if entry is for the purpose of investigating a suspected contravention affecting a member of that union.<sup>201</sup> Researchers have found that many unions have an ambivalent apprehension of their enforcement role: simultaneously viewing the protection of members' minimum conditions as an integral part of their role, while also recognising that resources dedicated to enforcement take away from their ability to undertake organising, recruitment and representation activities.<sup>202</sup> Despite these challenges, unions still recover a significant amount of unpaid wages on behalf of their members<sup>203</sup> and have had some impact monitoring and enforcing labour standards for contracted-out services.<sup>204</sup> However, industries with particularly low union presence, such as hospitality and horticulture, have relatively high incidence of employer non-compliance.<sup>205</sup>

In that context, the FWO must decide how to allocate its limited resources to best effect. Although there is no statutory equivalent to s 284(1)(a) that requires the FWO to take into account business viability in enforcing wage minima, in practice, consideration of 'business capacity to pay' has powerfully informed the organisation's strategic approach. The FWO's 'strategic priorities' for 2020–21 provided:

[A] business' financial position and viability will be considered when deciding whether to commence litigation for serious non-compliance, or determining the size of any contrition payment included in any Enforceable Undertaking.<sup>206</sup>

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<sup>196</sup> *Fair Work Act* (n 19) s 682.

<sup>197</sup> Clibborn and Wright (n 10); Stephen Clibborn, Submission to the Attorney-General's Department, *Improving Protections of Employees' Wages and Entitlements: Strengthening Penalties for Non-Compliance* (25 October 2019).

<sup>198</sup> Bray and Stewart (n 132) 28.

<sup>199</sup> Hardy and Howe (n 14); Clibborn and Wright (n 10); Rae Cooper and Bradon Ellem, 'The Neoliberal State, Trade Unions and Collective Bargaining in Australia' (2008) 46(3) *British Journal of Industrial Relations* 532.

<sup>200</sup> Australian Bureau of Statistics, *Trade Union Membership, August 2022* (Catalogue No 3665.0, 14 December 2022).

<sup>201</sup> *Fair Work Act* (n 19) s 481.

<sup>202</sup> Ingrid Landau and John Howe, 'Trade Union Ambivalence Toward Enforcement of Employment Standards as an Organizing Strategy' (2016) 17(1) *Theoretical Inquiries in Law* 201.

<sup>203</sup> Unions NSW, *Wage Thieves: Enforcing Minimum Wages* (Report, December 2018).

<sup>204</sup> Sasha Holley, 'The Monitoring and Enforcement of Labour Standards When Services Are Contracted Out' (2014) 56(5) *Journal of Industrial Relations* 672.

<sup>205</sup> Senate Economic References Committee (n 12).

<sup>206</sup> Fair Work Ombudsman, 'FWO Launches 2020–21 Priorities' (Media Release, 13 July 2020).

The notion that minimum wages should be oriented to the protection of businesses (rather than workers) necessarily affects the FWO's decision-making in how and when to commence litigation, considering the size of the underpayment and business' capacity to pay. The approach was formalised in the FWO's Compliance and Enforcement Policy, which notes that, in deciding when to commence litigation, the FWO shall take into account the 'characteristics of the person(s) alleged to have committed the contraventions' which include their 'sophistication and financial position (including the impact on business viability, service delivery and employees if excessive costs and sanction imposed)'.<sup>207</sup> While this policy was introduced during the COVID-19 pandemic, it formalised existing practices.<sup>208</sup> It was also consistent with the Morrison Coalition Government's prioritisation of the quantity of jobs over their quality as measured by compliance with minimum legal standards. That is, a non-compliant business' survival was elevated in importance over the rights of a low-waged worker.

Over the 12 years to 2022, the FWO has initiated an average of 48 litigation cases per year. While litigation is just one part of its resource-maximising strategic enforcement approach, this underscores the fact that the FWO must make compromises when applying penalties to employers' resolution of underpayment cases outside of the courts. In the prominent case of *Made Establishment*, fronted by the celebrity chef George Calombaris, the employer agreed with the FWO to repay to its employees \$7.8 million in unpaid wages and to make a 'contrition payment' of \$200,000 to consolidated revenue. In response to public criticism that its calculation of the contrition payment was too lenient relative to the quantum of underpayment, the FWO said:

One of the other factors we take into account is the financial position of a company. ... [W]e will in future take into account the size of the underpayment as a major factor. We didn't take it into account in this case. We didn't make it as perhaps as high a priority as we think, clearly, the public and others believe we should.<sup>209</sup>

Indeed, the FWO did take a different approach, for example agreeing with the Australian Broadcasting Corporation to a contrition payment of \$600,000 in respect of the broadcaster's underpayment of \$11.9 million in wages.<sup>210</sup> Nonetheless, the FWO maintains its policy to prioritise a business's capacity to pay when making decisions regarding commencing enforcement litigation and calculating contrition payments. Consistent with this approach, courts have discounted penalties imposed on businesses that contravened minimum wage laws, due to the nature of the businesses among other circumstances, 'rarely ordering penalties in the upper range of the maximum available'.<sup>211</sup> Based on their analysis of decisions of federal courts

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<sup>207</sup> Fair Work Ombudsman, *Compliance and Enforcement Policy* (July 2020).

<sup>208</sup> David Marin-Guzman, 'Bosses Get a COVID-19 Reprieve on Underpayments', *Australian Financial Review* (online, 13 July 2020) <<https://www.afr.com>>.

<sup>209</sup> Commonwealth, *Parliamentary Debates*, Senate Education and Employment Legislation Committee: Fair Work Ombudsman Senate Estimates, 23 October 2019, 132 (Sandra Parker, Fair Work Ombudsman).

<sup>210</sup> Peter Ryan, 'ABC to Make \$600K "Contrition Payment" over Underpayment of 1,900 Casual Staff', *ABC News* (online, 19 June 2020) <<https://www.abc.net.au/news>>.

<sup>211</sup> John Howe and Sean Cooney, 'Mixed Messages: The Role of the Courts in Improving Compliance with Labor Law in Australia' (2023) 43(1) *Comparative Labor Law & Policy Journal* 105, 123.

in underpayment cases since 2011, Howe and Cooney conclude that, through their heavy discounting of penalties, ‘the courts are not doing enough to contribute to the promotion of compliance through their assessment of penalty’.<sup>212</sup>

The federal government’s primary measure in recent years to address non-compliance with minimum wage laws was to increase the maximum available penalties for deliberate non-compliance. In 2017 the *Fair Work Act* was amended to increase the maximum fine tenfold.<sup>213</sup> The government also introduced in the 2020 IR Bill, but later withdrew, additional increases to maximum fines and criminal sanctions for the most serious cases of non-compliance. However, all of these increased fines and criminal sanctions maintained the focus on the assumed minority of cases of deliberate underpayment by ‘bad’ employers and were so narrowly worded as to be practically unenforceable, particularly by the under-resourced FWO. The 2017 maximum penalties apply only for ‘serious contraventions’ when a ‘person knowingly contravened’ the minimum wage laws as ‘part of a systematic pattern of conduct’.<sup>214</sup> The criminal sanctions proposed in the 2020 IR Bill would have required a prosecutor to prove intent and that the employer ‘dishonestly engages in a systematic pattern of underpaying’.<sup>215</sup> In order to satisfy the evidentiary burden required to impose maximum fines or secure criminal convictions, a significantly greater investment of resources would be required to investigate and prosecute, than for civil wage-recovery actions. However, while the government significantly increased funding of the FWO over the six years to 2022, the level remains comparable in practical terms now to 2009.<sup>216</sup> In 2022, the Coalition government’s federal budget announced reduced funding<sup>217</sup> although, after the general election, the Labor government’s budget again increased funding, albeit in the context of allocating to the FWO additional responsibilities from the soon to be abolished Australian Building and Construction Commission.<sup>218</sup>

## V Discussion

The analysis above indicates that the framing, justification and application of minimum wage laws has been shaped by historically specific narratives about the roles of households and businesses in engendering social prosperity. The *Harvester* living wage offered expansive and unqualified protection to a narrow category of employee subject, the white male householder, by virtue of his status as an employee alone. This protection was an expression of a thesis about the organic nexus between the material and mental security and character of the male breadwinner, and the productivity, peace, ‘civility’ and racial purity of wider society. It conceptualised the interests, character and capacity of working-class households to securely reproduce

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<sup>212</sup> Ibid 124.

<sup>213</sup> *Fair Work Amendment (Protecting Vulnerable Workers) Act* (n 24).

<sup>214</sup> *Fair Work Act* (n 19) s 557A.

<sup>215</sup> The 2020 IR Bill proposed to introduce a new s 324B to the *Fair Work Act* (n 19).

<sup>216</sup> Clibborn, ‘Australian Industrial Relations in 2020’ (n 168).

<sup>217</sup> Stephen Clibborn, ‘Temporary Migrant Workers Remain Vulnerable to Workplace Exploitation’, *The Sydney Morning Herald* (online, 8 April 2022) <<https://www.smh.com.au>>.

<sup>218</sup> ‘Budget Gives FWO \$70M to Assume ABCC Functions’, *Workplace Express* (online, 25 October 2022) <<https://www.workplaceexpress.com.au>>. The Australian Building and Construction Commission was abolished in February 2023.

to the shared benefit of society within a highly racialised and gendered framework. The wage minima of the contemporary period, by contrast, are framed as a 'safety net', a set of measures which are not addressed to meeting the needs of employees as a totality, but rather to ameliorating potential harms and disutilities experienced by particular sub-groups of workers and/or particular elements of working life. Simultaneously, the regulation of wage minima entrenches particular economic values that are applied at the national and enterprise levels and sets these criteria in implicit opposition to employer-focused criteria, against which they must be 'balanced'. In practice, employer associations have heavily emphasised the business competitiveness and viability rationales for wage minima in public discourse and marginalised their (already residual) social rationales. This contemporary opposition to wage minima has been commonly framed in terms of a critique of the complexity of regulation and the risk of reputational damage to 'good' businesses from overzealous approaches to compliance. While institutional state actors such as the FWC and FWO have not endorsed such arguments, the legal frameworks they are required to apply provide little basis for contesting them either, given the readiness with which the fortunes of individual businesses may be constructed as constitutive of wider national economic productivity, business competitiveness and employment growth. Recent initiatives by state and federal actors to criminalise wage theft, in affirming divisions between 'honest' and other categories of employer, have unwittingly contributed to the marginalisation of worker entitlement-based rationales for regulation.

This historical perspective indicates that questions of how strictly enforced wage minima should be do not float free of understandings of who labour law should protect and why. In these arguments, a sense of secure business reproduction as synonymous with economic and social prosperity is a commonly repeated theme, as is the imperative that minimum wage enforcement be undertaken in a manner that protects 'good' employers who inadvertently underpay wages and punishes only 'bad' employers who do so deliberately. This association between minimum wage enforcement and employer reputation and good character has a symmetric resonance, in form if not function, with the imperatives for minimum wage sanctity articulated by Justice Higgins that were anchored in the need to ensure working class men could be supported to develop their character and civic capacities. For Higgins, in the early 20<sup>th</sup> century, it was crucial that the living wage was strictly applied because payment below the required minimum threatened to unravel the lives of individuals, households, industries, and ultimately society through industrial unrest and (white) population decline. For the FWO, it is important that minimum wage laws be applied cautiously, lest unfair criticism of employers who had accidentally underpaid wages unravel good businesses which might, in turn, threaten the engine of a prosperous economy. In each case, wage minima were understood as a tool for improving the secure reproduction of an entity that was understood to be representative of Australian society, and the underlying source of social value.

These divergent paradigms of protection flowed through into mechanisms and practices of enforcement, which differed substantially between the periods considered here. In the *Harvester* period, the imperative to protect male breadwinners was practically reinforced by the active role played by unions (entities that, themselves, had worker protection as a primary objective) in the enforcement



process. The use of industrial action as a trigger for institutionalised dispute resolution meant that enforcement of award terms was strict, swift, participative and decentralised, and was not characterised by chronic employer non-compliance (in urban and white settings) without union acquiescence. By contrast, contemporary enforcement processes that rely on the strategic prioritisation of an underfunded inspectorate have seen ‘business viability’ and capacity to pay considerations emerge as policy criteria in allocating resources.

Finally, our historical analysis highlights overlooked continuities in the categories of employees who have been functionally excluded from wage minima protection over time. These exclusions were explicit in the early 20<sup>th</sup> century, and included the statutory exclusion of non-whites, agricultural workers and domestic servants as well as the second-class treatment of female and junior workers and the practical (if temporary) exclusion of non-union employees. Despite major shifts from exclusive to inclusive nominal protection over the course of the century — none of the above categories of worker are now formally excluded from protection, and laws prohibiting racial discrimination apply — significant historical continuities are apparent in terms of practical access to protection by non-citizens, women, Indigenous peoples, agricultural workers, and employees in industries with low union density. In the context of an inspectorate that continues to be under-resourced and that necessarily reproduces and amplifies the economic rationales for wage minima, and where unions are highly constrained in their enforcement capacity, these functional exclusions seem unlikely to be addressed without concerted legislative intervention.

The two periods analysed here reveal multiple categories of persons and relationships that were and are understood as involving vulnerability. In the first period, white male unskilled workers, women, juniors and non-whites (including Aboriginal people) were also viewed as vulnerable, although only the first of these was accorded formal and full intervention through labour law to limit the extent of their subordination to employers, based on the idea that other institutions such as households would exercise stewardship over the others.<sup>219</sup> In the contemporary period, labour law sets out to intervene in a wider array of vulnerabilities, that even extend to the reputational vulnerabilities of certain employers, but provides a very different kind of institutional apparatus for enabling those vulnerabilities to be addressed in practice. This stark divergence between the periods suggests the limitations of Davidov’s thesis that the purpose of labour law concerns core and relatively unchanging norms associated with addressing vulnerabilities. Our findings indicate that, even within one jurisdiction, Australia, it is clear that there is no direct relationship between the recognition that a particular group is vulnerable and whether or how labour law is made available to address that vulnerability in practice. This thesis supports Dukes’ insistence on the value of empirically exploring the purpose of labour laws within defined historical contexts,<sup>220</sup> and extends her argument to suggest that it is not only categories of vulnerability that merit attention, but also changing senses of the actors that are understood to be the key sources and symbols of economic and social value.

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<sup>219</sup> Davidov (n 53) 34.

<sup>220</sup> Dukes, ‘Identifying the Purposes of Labor Law’ (n 52) 66.

## VI Conclusion

There have been profound shifts in the ways in which wage minima, and labour laws in general, have been conceived, justified, contested and enforced in Australia over time. These shifts have not been a major focus of enforcement scholarship, which has tended to concentrate on understanding the causes of and solutions to the vulnerabilities of particular employee groups that are associated with underpayment and changes in the structure of labour inspectorates. Our approach in this article has been to redirect attention away from the ‘margins’ of the labour market and instead conceptualise wage minima as expressions of, and contributors to, concepts of social value that sit at the ‘centre’ of labour law and its wider social justification. In trying to explain the departures from the sacrosanct quality of wage minima, we have argued that there is merit in adopting a historically grounded approach which interrogates how particular configurations of law, discourse and practice have practically reinforced each other, rather than discussing enforcement practices and challenges in ahistorical and technical terms that are detached from cultural settings. This perspective opens up questions about how labour law is currently ‘constitutionalised’, and the potential advantages that might flow from revisiting the objectives of the national minimum wage, modern awards and the *Fair Work Act* to reassert the primacy of worker protection. Such a reconfiguration might also inform a reworking of the current statutory provisions which posit the performance and competitiveness of the economy as objectives at odds with strong worker protections, rather than being secured by them.

Long-term non-enforcement of minimum wage law has the potential to undermine social cohesion, and the shared expectation that nominally universal laws can be universally applied. The historical perspective advanced here shows that the sacrosanct status of the *Harvester* wage was grounded in a systemic orientation of labour law toward worker protection as a superordinate objective and to counteract the inequality of bargaining power inherent to employment relationships.<sup>221</sup> While the racialised and patriarchal context that underwrote Justice Higgins’ reasoning cannot and should not be returned to today, it is feasible for the objects of contemporary labour legislation, and the considerations guiding minimum wage and award setting, to again explicitly privilege the protection of all employees (not merely those classified as vulnerable). Such legislative amendments could potentially engender a wider cultural shift in understandings of the role of workers in creating social prosperity. Such a reorientation is compatible with, and would potentially enhance, the extensive existing policy recommendations for enhancing labour law enforceability among vulnerable worker groups.

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<sup>221</sup> Davies and Freedland (n 62) 18.